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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

SEPTEMBER TERM, 1918
JANUARY AND MAY TERMS, 1919

BY
U. G. WHITNEY
REPORTER

VOLUME 185

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1920

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By

STATE OF IOWA ■

OCT 13 1920

JUDGES OF THE SUPREME COURT.

BYRON W. PRESTON, Chief Justice, Mahaska County.

*SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

FRANK R. GAYNOR, Plymouth County.

BENJAMIN I. SALINGER, Carroll County.

TRUMAN S. STEVENS, Fremont County.

OFFICERS OF THE COURT.

H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

*Became Chief Justice Jan. 1, 1919.

JUDGES OF THE COURTS, 1919

DISTRICT COURTS

- First District*, two judges—WILLIAM S. HAMILTON, Ft. Madison; JOHN E. CRAIG, Keokuk.
- Second District*, four judges—C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, three judges—HIRAM K. EVANS, Corydon; HOMER A. FULLER, Mt. Ayr; P. C. WINTER, Creston.
- Fourth District*, three judges—GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa; W. G. SEARS, Sioux City.
- Fifth District*, three judges—J. H. APPELGATE, Guthrie Center; LORIN N. HAYS, Knoxville; H. S. DUGAN, Perry.
- Sixth District*, three judges—CHAS. A. DEWEY, Washington; D. W. HAMILTON, Sigourney; H. F. WAGNER, Sigourney.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport.
- Eighth District*, two judges—R. G. POPHAM, Marengo; RALPH OTTO, Iowa City.
- Ninth District*, five judges—LAWRENCE DE GRAFF, Des Moines; HUBERT UTTERBACK, Des Moines; THOMAS J. GUTHRIE, Des Moines; GEORGE A. WILSON, Des Moines; JOSEPH E. MEYER, Des Moines.
- Tenth District*, three judges—GEORGE W. DUNHAM, Manchester; H. B. BOIES, Waterloo; JOHN E. WILLIAMS, Waterloo.
- Eleventh District*, four judges—R. M. WRIGHT, Ft. Dodge; H. E. FRY, Boone; EDWARD M. MCCALL, Nevada; G. W. THOMPSON, Webster City.
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—WILLIAM J. SPRINGER, New Hampton; H. E. TAYLOR, Waukon.
- Fourteenth District*, three judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville; JAMES DE LAND, Storm Lake.
- Fifteenth District*, five judges—ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic; EARL PETERS, Clarinda.
- Sixteenth District*, two judges—M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, four judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton; F. F. DAWLEY, Cedar Rapids.
- Nineteenth District*, two judges—JOHN W. KINTZINGER, Dubuque; D. E. MAGUIRE, Dubuque.
- Twentieth District*, two judges—JAMES D. SMITH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; C. C. BRADLEY, Le Mars.

SUPERIOR COURTS

- Cedar Rapids*—ATHERTON B. CLARK.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—J. H. P. ROBINSON.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JAY COOK.
- Perry*—W. W. CARDELL.
- Shenandoah*—FREDERICK FISCHER.

MUNICIPAL COURTS

- Clinton*, one judge—*GEORGE CLAUSSEN; F. M. FORT.
- Des Moines*, four judges—W. G. BONNER; O. S. FRANKLIN; J. E. MERSHON; T. L. SELLERS.
- Waterloo*, two judges—†W. N. BIRDSALL; O. B. COURTRIGHT; GEORGE W. WOOD.
- *Resigned, Jan. 15, 1919.
- †Resigned, Dec. 1, 1919.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, SEPTEMBER TERM, 1918

KATE SCHULING, Appellant, v. I. S. ERVIN et al., Appellees.

BILLS AND NOTES: Signing in Representative Capacity. Prom-

1 issory note signers who are acting solely in a representative capacity, and desire to escape all personal liability, must, *as to one whose knowledge is limited to what the face of the note reveals*, see to it that the principal is disclosed by the face of the note. *Held* that a signature, "Trustees of the Second Christian Church, I. S. Ervin, R. C. Moulton, Chairman, M. L. Everett," personally bound the individual signers.

WEAVER, J., dissents.

EVIDENCE: Parol as Affecting Writing. Whether parol evidence

2 is admissible to show that the signer of a promissory note intended solely to bind some principal who is *undisclosed* on the face of the instrument, *quaere*.

PRINCIPAL AND AGENT: Dual Agency. Statements by a bor-

3 rower of money that he would sign the note only in a repre-

sentative capacity, made to his own agent to procure the loan, do not bind the payee in the note, even though such agent was payee's agent to make the loan.

PRINCIPAL AND SURETY: Estoppel by Proceeding Against Undisclosed Principal. Procuring an uncollectible judgment against an undisclosed principal in a note works no estoppel on the payee to proceed against the agents, who have, in legal effect, assumed the position of sureties on the note.

WEAVER, J., dissents.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

DECEMBER 14, 1918.

THE appellant claims to have loaned money to the appellees, as individuals. The counter contention is that these appellees signed as the agents of the Second Christian Church, and are not personally bound. The trial court adopted their view, and the plaintiff appeals.—*Reversed.*

George Harnagel, for appellant.

Stewart & Hextell and *S. F. Prouty*, for appellees.

SALINGER, J.—I. The signature to the promise to pay was in the following form:

"Trustees of the Second Christian Church.

"I. S. Ervin,

"R. C. Moulton, Chairman,

"M. L. Everett."

Before considering what is the liability, where one signs, say, John Smith, Trustee, it may well be said to be doubtful whether the individual signatures make claim to a trustee relation to anyone. Nothing indicates such a claim on part of Ervin, unless it may be inferred from mere juxtaposition—from the fact that his signature appears immediately following "Trustees of the Second Christian Church." In the line following the Ervin signature, Moul-

ton designates himself as "Chairman." The signature of Ervin is as much in juxtaposition with that of Moulton as it is with the phrase "Trustees of the Second Christian Church." Add that Moulton designates himself as "Chairman," and the two facts make at least as much of an argument for holding that, though Moulton resorted to descriptive words, Ervin desired none, as the one fact of signing as close to the first line as to the Moulton line makes for claiming that Ervin designated himself as one of the trustees of said church.

Moulton uses the descriptive word "Chairman." So doing is as much support for arguing that he intended no description other than "Chairman," as for the argument that one who finds the signature "Trustees of the Second Christian Church" in the first line, I. S. Ervin, without more, in the second line, and then signs himself, and adds "Chairman," intended to assert that he was a trustee of said church.

Everett is the last signer, and uses no words of description. "Trustees of the Second Christian Church" is the first line; I. S. Ervin, without any descriptive words, the second line; R. C. Moulton, with the descriptive word "Chairman," the third line. Why does the fact that Everett signed last of all, without words of description, with these things preceding his signature, make any evidence that he asserted himself to be one of the trustees of said church?

II. But this may all be passed as not controlling. And it may be assumed, for the sake of argument, that the signatures are, in effect, what they would be if they were in the following form:

1. **BILLS AND
NOTES:** signing in representative capacity.

"Trustees of the Second Christian Church, I. S. Ervin, R. C. Moulton, Chairman, M. L. Everett."

Will such signature avoid personal liability? It may be granted there is much judicial conflict on

the question; but it is everywhere agreed that, if the signature had been what has just been assumed, the signers will be personally bound, unless their signature is a sufficient indication of what principal the signers were acting for. Indeed, that is the effect of Section 3060-a20, Code Supplement, 1913.

It admits of grave doubt whether parol is admissible to show that the signers intended to bind some principal not disclosed on the face of the instrument. We may premit

citation of the many cases that raise this doubt, because it is probably true that such evidence will be admitted, as between the original parties. See *Megowan v. Peterson*,

2. EVIDENCE: parol as affecting writing.

173 N. Y. 1. We think that the case states the law, if limited to such proof as stops short of varying by parol whatever is affirmatively expressed in the writing, and that it may not be carried to the point of, say, showing by parol that the disclosed principal was not the principal, and that someone else was. Many other illustrations could be indulged in, but it is unnecessary. But, of course, such testimony accomplishes nothing, unless it appear that the intent of the maker was in some manner made known to the payee, before he parts with his money in reliance upon the paper. We shall speak later to whether plaintiff had actual notice that the individual signers were acting for a disclosed principal. Assume, for the present, she had no notice except what the face of the note imparted, and keeping in mind that, if the signatures had been qualified by nothing but words such as "agent," or "trustee," the signers would be personally liable (see *Stevenson v. Polk*, 71 Iowa 278, at 285, where the signature was, "J. S. Polk, Trustee," and which case approves many that precede it, and in its turn has never been seriously challenged), and we have the question whether the signature at bar disclosed more than the equivalent of signing, and adding descriptive words, such

as "Chairman" or "Trustee" or "Agent." We have elsewhere assumed, for the sake of argument, that the signature is equivalent to "One of the Trustees of the Second Christian Church, I. S. Ervin, R. C. Moulton, Chairman, M. L. Everett." Such qualifying words have more effect, perhaps, than the mere signing of one's name, and adding some such word as "Trustee." Be that as it may, if any principal is disclosed by such signature, is it "The Second Christian Church?" Does that, of itself, disclose who the principal is? Would not further inquiry be necessary, before it would be known what principal is disclosed? Could plaintiff have maintained suit on this note by merely making "The Second Christian Church" the defendant? If she had so impleaded, upon whom would she have served original notice, without aid beyond the statement that the signer was "The Second Christian Church?"

2-a

As said, it is universally agreed that these signers were bound, unless a principal was disclosed. Let us test whether there was sufficient disclosure, by the case law.

In *Schumacher v. Doland*, 154 Iowa 207, Renihan, who followed his signature by "Pastor of St. Francis Church," was held to have given a personal obligation. Why is "Pastor of St. Francis Church" less a disclosure of a principal than "Trustees of the Second Christian Church?"


In *Heffner v. Brownell*, 70 Iowa 591, the signatures were:

"Independence Mfg. Co.

"B. I. Brownell, President.

"D. B. Sanford, Secy."

It was held this did not show Brownell signed as president of the Manufacturing Company, and was, therefore, personally bound. Why does not writing B. I. Brownell, President, in the line next to Independence Manufacturing Company, prove Brownell signed as president of the com-



pany, as much as signing I. S. Ervin, without the designation "President," next to the line "Trustees of the Second Christian Church?" If signing as Brownell did does not claim he signed as president, why does signing as Ervin did make a claim he signed as one of the trustees? And so of Everett. Neither Ervin nor Everett had either the aid of a descriptive word, like "president." If signing "B. I. Brownell, President," in the line next to "Independence Manufacturing Company" does not constitute a signing as president of that company, why does the signature "R. C. Moulton, Chairman," in the second line after "Trustees of the Second Christian Church" assert he signed as one of said trustees? The *Heffner* case, in holding the signers personally, held, among other things, that "Independence Mfg. Co." was not a sufficient disclosure of a principal. Why is signing "Independence Manufacturing Company," followed by "B. I. Brownell, President, D. B. Sanford, Secretary," not as much a disclosure of who the principal of Brownell and Sanford is, as is a signature which is not the signature of a church at all, and which, as against "Independence Manufacturing Company," is "Trustees of the Second Christian Church?"

III. Cases in our reports that may be urged for the proposition that here was a sufficient disclosure of a principal have, on analysis, no application, because their examination discloses that in them there *was* a sufficient disclosure. For instance, in *Baker v. Chambliss*, 4 G. Greene 428, the promise was, "We, the undersigned, Directors of School District No. 4, Montpelier Township, promise to pay," and then signed their individual names. In the same situation is *Lyon v. Adamson*, 7 Iowa 509, 510. In *Harvey v. Irvine*, 11 Iowa 82, the note read, "We, or either of us, promise to pay * * * for value received of him in behalf of School District No. 6," and the signature was,

"James M. Irvine, President, L. B. Bullock, Secretary, Conrad Dietz, Treasurer."

In *Wheelock v. Winslow*, 15 Iowa 464, the signature was, "For the Dubuque Times Co., Ferd S. Winslow, Treasurer." In *Turner v. Potter*, 56 Iowa 251, it was, "Burlington & Southwestern Railway Co., V. K. Moore, A. Tr." Note, Moore does not sign as assistant treasurer of this railroad, or as the representative of anything. The first signature is that of the corporation itself, and the description of Moore is a statement of who affixed the signature of the corporation. In the case at bar, no signature of the church corporation appears. In *Exchange Bank v. Schultz*, 167 Iowa 136, the signature was, "Glendell Dairy Company, by Henry O. Harstad, President; J. E. Schultz." It is held that Schultz is personally bound, because the evidence does not justify reforming the note to show that he signed for the Dairy Company.

The signature in *Liebscher v. Kraus*, 74 Wis. 387, exhibits differences from the one at bar that have already been adverted to. It is, "San Pedro Mining & Milling Company, F. Kraus, President." Kraus was released; but it is again to be noted, the signature is that of the corporation. The case would be a parallel one, had the signature been, "President of the San Pedro Mining & Milling Company, C. F. Kraus," and Kraus been released.

All that *Capital Sav. B. & T. Co. v. Swan*, 100 Iowa 718, decides, is that, where the promise is signed, "Merchants Loan & Trust Company, Sioux City, Iowa, by W. E. Higman, President, F. C. Swan, Sec'y and Treas.," such signature suffices to put a purchaser of the note on inquiry as to whether the secretary intended to bind himself personally.

We are of opinion that the face of the note in suit did not disclose to the plaintiff who the claimed principal of the signers is, and that, upon the face of the instrument, the

signers Ervin, Moulton, and Everett were personally bound.

IV. The question remains whether the plaintiff was informed, other than by the face of the note, that Ervin, Moulton, and Everett were signing merely in a representative capacity. If she had such knowledge, it

8. PRINCIPAL
AND AGENT:
dual agency.

must be because Shope, who was the intermediary between the borrower and the lender, had such knowledge. Shope procured this loan for the borrower. Plaintiff testifies: "Mr. Shope loaned the money;" when the loan was made, she gave Shope her passbook, to go to the bank and draw the money, and he afterwards reported he had loaned the money, and gave her the note. Shope testifies that, at the time the note was given, he was "doing her business for her;" that he drew the note, procured its execution, and gave it to plaintiff; and that he "had been loaning money for her since about the year 1897 and 1898 down until this note was given," a period of ten years or more. But in spite of this, Shope also acted for the borrower. At best for appellees, Shope is what is known as a "double agent." And being that, his knowledge does not bind the plaintiff as to what was said in getting Shope to obtain the loan. See 2 Corpus Juris 446, 447, 448, 712; *Englemann v. Reuse*, 61 Mich. 395 (28 N. W. 149); *Henken v. Schwicker*, 174 N. Y. 298 (66 N. E. 971); *Boyd v. Boyd*, 128 Iowa 699.

Note, too, that Shope merely advised the plaintiff that the "church people wanted \$600," which is no more a disclosure of who the principal is than the note affords. Note, further, Shope added there would be four or five good men on the note, which justifies a fact finding that he thus led the plaintiff to believe that the individual names finally appearing on the note were a fulfillment of that promise.

V. As to alleged estoppel or ratification because plaintiff procured judgment against the church corporation, we are of opinion that, in the circumstances at bar, this does

4. PRINCIPAL AND
SURETY: estoppel
by proceeding
against undi-
closed princi-
pal.

not create a binding estoppel. Appellees admit the church was the borrower. This, of itself, does not negative that the individuals are liable. A borrower may give sureties. If so, proceeding against the principal does not release the sureties, unless satisfaction be had. And see *Goodale v. Middaugh*, 8 Colo. App. 223 (46 Pac. 11), and *McClure v. Livermore*, 78 Me. 390 (6 Atl. 11).

In our opinion, the cause must be reversed. It is done, and the trial court directed to give plaintiff judgment on the note sued on, against the defendants Ervin, Moulton, and Everett.—*Reversed*.

PRESTON, C. J., LADD, EVANS, GAYNOR, and STEVENS, JJ.,
concur.

WEAVER, J. (dissenting). I dissent. To make clear the reasons which impel me to withhold my concurrence, it is necessary to state the facts with some degree of fullness. The majority, in its opinion, touches upon these only in a fragmentary way, and reaches its conclusion very largely from a technical discussion of the mere form of the signatures appended to the note sued upon.

It is shown without serious dispute that, prior to the making of the note, certain persons holding to a common religious faith, and residing in Des Moines, organized and incorporated a society, not for pecuniary profit, under the name of "The Second Christian Church." This incorporated society entered upon the project of erecting a house of worship. When the building was nearing completion, it was found that the fund collected for that purpose was insufficient to cover all the expenses; and, as the contributing members were not able or not willing to increase their subscriptions, the matter of borrowing the needed money was proposed. The plaintiff was a resident of the city, and, for a period of ten years or more, had been lending money

through the agency or assistance of one Shope, who was a member of this church. The trustees of the church, acting in its behalf, mentioned to Shope the matter of borrowing the money, and he informed them that plaintiff had \$600 which she might lend on a promissory note. To this, the trustees at once responded that they would not take upon themselves any additional personal liability in the enterprise. Shope then explained to them that he meant a "trustee note;" that, upon a note of that kind, the signers would not be charged with personal liability; and that plaintiff was willing to take the church for it. With this understanding, the loan was agreed upon, and plaintiff gave her bank book to Shope, to draw and deliver the money. The loan was then adjusted between Shope, acting for plaintiff, and the trustees; Shope drawing the note, and the trustees signing it in the manner and form stated in the majority opinion. Plaintiff took the note; and for several years, the church paid, and she received, the annual interest thereon. Later, default being made, plaintiff delivered the note to Shope for collection. Suit was brought thereon against the church alone; judgment was recovered for the amount of the debt; and the judgment was made a specific lien on the church property, subject to a prior mortgage. The property has since been sold, under special execution, and a small sum realized, which appears to remain in the hands of the sheriff, or the clerk. The present action was then begun at law against the trustees, alleging the note to be the individual or personal undertaking of the trustees, and asking a personal judgment against them. Answering the claim so made, the defendants allege that they signed and delivered the note in their representative capacity, as the act and obligation of the corporation, and not otherwise; and that it was so known and understood by all the parties thereto.

Defendants, further answering, say that they were unaccustomed to making such instruments in their capacity as trustees, and subscribed the note in the form in which it now appears, believing it was sufficient to indicate that the note was the note of the corporation alone; that such were the intention and belief of all the parties at that time, and, if such is not the legal effect of the note as written and signed, it is the result of mutual mistake: and they ask that the writing may be reformed, to express the true meaning and intent of the parties thereto.

That the defendants did not know or understand or believe that the note so made was anything more than the note of the corporation which they officially represented, is established with as much certainty as is humanly possible, in matters pertaining to mental operations. That Shope, plaintiff's agent in the transaction, so understood, and that he himself formulated the note, to give it the effect of a corporate obligation, and not the personal obligation of the trustees, is equally clear.

With the foregoing statement in mind, we are now prepared to consider the questions raised by the appeal. In doing so, it must be borne in mind that this case involves no charge of fraud or deceit on the part of defendants, or either of them. The questions presented by this appeal are:

I. Does the form of the note, as executed, import upon its face a personal obligation of the trustees?

It may be conceded at the outset that there is probably no other controversy arising in ordinary business transactions concerning which there is such dire confusion and numberless inconsistencies in the adjudicated cases. The Supreme Court of the United States, referring to what it calls the "vast conflict," or "anarchy of the authorities," on this subject, says it is "not easy to lay down any general rule which would be in harmony with all of them." *Falk v. Moebbs*, 127 U. S. 597. The result of this condition

has been that many, and perhaps a majority, of the courts, after a more or less vain attempt to discover some sound general principle threading its way through the countless aggregation of precedents, have abandoned the attempt, and exercised their right to follow the rule which commends itself to their several judgments as being nearest in accord with the general policy of the law in the interpretation and enforcement of contracts. There are very few courts which have not, at times, gone to the extreme of technicality in holding agents, officers, and trustees to personal liability upon contracts, where it was as clear as noonday that none was intended,—only to rebound to the opposite extreme of liberality, until there is not an American jurisdiction in which the decisions along this line are not, to a greater or less degree, inharmonious. Nor does this court, as we shall see, furnish any exception to the truth of that statement. Much of the confusion has arisen over the extreme tenderness of the law for the rights of holders of commercial paper, and the frequent failure of some courts to discriminate between the defenses which may be urged against such paper in the hands of subsequent purchasers and indorsees, and defenses which may be available where the action is between original parties.

Now, the case at bar is between the original parties. The note was given to plaintiff, and she is still its owner and holder; and I shall not, therefore, discuss the rule which has been applied where the suit is brought by a subsequent purchaser, except to give point to the proposition that what has been recognized as a good defense to a note in the hands of an assignee or indorsee is assuredly good as against the original holder.

Cases in plenty may be found in which it has been held that, if a note be so written as to import the signer's unqualified promise to pay, the mere fact that he adds the words "agent" or "trustee" or "president" or "secretary" to

his signature, without anything more in the instrument indicating the person, company, or corporation for which he assumes to act, the note will be construed and held to be his personal contract; and, as against a subsequent purchaser in due course, he will not be allowed to plead or prove that, in giving the note, he was, in fact, acting for another. So, too, precedents may be found for holding that, even as between the original parties, such defense will not avail; but such is certainly not the law in this state at this time, nor has it the support of the authorities generally. There is nothing sacred in a promissory note, to prevent the signer, as against the payee, from pleading the truth of the transaction in which or as part of which it was made. He may show that it was given and received as a mere accommodation note; that it was without consideration; that the consideration has failed; that the note was made and delivered upon a condition precedent, which has not been performed; or that, by mistake of the parties as to the legal effect of the language used, the maker is made to appear bound to personal liability for the payment of the note, when in truth such personal liability was not intended by either party. *Hausbrandt v. Hofler*, 117 Iowa 103; *Staford v. Fetters*, 55 Iowa 484; *Lee & Jamieson v. Percival*, 85 Iowa 639; *Brook v. Latimer*, 44 Kan. 431 (24 Pac. 946, 947); *Johnson v. Ghost*, 11 Neb. 414 (8 N. W. 391); *Western W. Scraper Co. v. Stickleman*, 122 Iowa 396. Parol evidence is admissible to show that a note joint in form was intended to be joint and several. *Whitmore v. Nickerson*, 125 Mass. 496.

According to the weight of authority, as well as under the provisions of our Negotiable Instruments Act, if a plaintiff sue upon a note which the defendant has signed with the word "agent," or other word indicating a representative character, but without anything to indicate his principal or other person for whom he professes to act, the

signer is *prima facie* personally bound. The provision of the statute (Code Supplement, 1913, Section 3060-a20), that, where the note contains or the signer adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not personally liable thereon, if he acted with authority, establishes a rule under which a vast number of extremely technical and confusing precedents are no longer to be regarded as authority. For example, there are many decisions of an earlier date holding that, unless the disclosure of the principal is found in the body of the note, the agent cannot avoid personal liability by words of representation or description attached to his signature; but the statute now provides that, if the representative capacity of the signer be indicated either *in* the note or *in the signature*, it is enough, and he is not liable. This, to a very large degree, relegates that over-worked phrase, "*descriptio personae*," to the ever-growing scrap heap of useless legal learning into which the courts and the profession occasionally delve for material with which to ornament their rhetoric, or camouflage the defects in a weak argument. So, too, the further provision of the statute, that the "mere addition" of words to the signature, describing the signer as "agent," or as filling a representative capacity, "without disclosing his principal," will not relieve him from personal liability, while providing an imperative rule in all cases of this class where nothing more is shown than the addition of a word or words which do not identify the principal, does not, in terms or by implication, exclude proof between the original parties, showing that the principal was, in fact, known, and that the note was made and accepted as the obligation of the latter. This question was before the New York court in *Megowan v. Peterson*, 173 N. Y. 1, where suit was brought upon a promissory note signed simply, "Charles G. Peterson, Trustee," there being nothing in the note or signature indicat-

ing the beneficiary of the trust, if any there was. The defendant was, in fact, the trustee of an insolvent firm, under a composition settlement to wind up its business and apply its assets to the payment of its creditors; and, in the discharge of this duty, he gave the note in suit to the plaintiff, who took it, knowing and understanding that it was given solely in a representative capacity, and not as an evidence of a personal obligation. On the trial, the plaintiffs relied upon the provision of the Negotiable Instruments Act to which we have already referred, and the trial court ruled against the defendant, and excluded all extrinsic evidence. On appeal, the judgment was reversed. The court there says:

"It is contended, on behalf of the plaintiffs, that his [defendant's] representative character must be disclosed upon the face of the note. This may be so, in so far as innocent purchasers for value are concerned; but, as to the payees named in the note, we think a different rule prevails. * * * We do not understand that the statute * * * was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown."

The same rule is approved in *Wanner v. Emanuel's Church*, 174 Pa. 466 (34 Atl. 188), where it is said that:

"The fact that a note is so executed by an agent as not to disclose his principal, and, therefore, to make it *prima facie* his individual note, * * * does not, rights of parties misled by such appearance being out of the way, preclude proof that it was intended to bind, and was in reality the note of, the principal; for parol evidence is admissible, in case of doubt, to show that the corporation, and not its agent, was to be bound."

To the same effect, see Field on Corporations, Section 198.

The Minnesota court has frequently held that:

"Where a party signs a contract, affixing to his signature the term 'agent,' 'trustee,' or the like, it is *prima facie* his individual contract, the term affixed being presumptively merely descriptive of his person; but that extrinsic evidence is admissible to show that the words were understood as determining the character in which he contracted." *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293 (48 N. W. 1116); *Pratt v. Beaupre*, 13 Minn. 187 (Gil. 177); *Rowell v. Oleson*, 32 Minn. 290 (20 N. W. 227); *Peterson v. Homan*, 44 Minn. 166 (46 N. W. 303).

The same rule has been followed by practically every court in the United States, including this court,—though not always consistently. The following are illustrative examples: *Reeve v. First Nat. Bank*, 54 N. J. L. 208; *Haile v. Peirce*, 32 Md. 327; *Bean v. Pioneer Mining Co.*, 66 Cal. 451; *Mechanics' Bank v. Bank*, 5 Wheaton (U. S.) 336; *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 591 (58 N. E. 833); *Keidan v. Winegar*, 95 Mich. 430 (54 N. W. 901); *Benham v. Smith*, 53 Kan. 495 (36 Pac. 997); *Kline v. Bank*, 50 Kan. 91; *English & S. Am. M. & I. Co. v. Globe L. & T. Co.*, 70 Neb. 435 (97 N. W. 612); *Haskell v. Cornish*, 13 Cal. 45; *Janes v. Citizens Bank*, 9 Okla. 546; *Swarts v. Cohen*, 11 Ind. App. 20 (38 N. E. 536); *Bank v. Gay*, 63 Mo. 33; *Ohio & M. R. Co. v. Middleton*, 20 Ill. 629, 636. Citations to the same effect could be continued quite indefinitely. The sum and substance of the rule is well summed up in Mr. Abbott's Trial Evidence, page 46, as follows:

"If, upon the face of the instrument, there are indications suggestive of agency,—such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper,—parol evidence is competent

to show who the parties intended should be bound or benefited."

This court has held it competent for the signer of a note, as against the payee, to show that the instrument, though in form a note, was intended as a mere receipt (*Hausbrandt v. Hofler*, 117 Iowa 103); that a written indorsement importing liability as an indorser may be shown to have been intended as an indorsement without recourse (*Stafford v. Fetters*, 55 Iowa 484). It has been at least five times held by us, in comparatively recent years, that, even if, upon the face of the note, it appears that corporate officers signing it might otherwise be held liable, it was competent for them to show that they acted only in a representative capacity, without assuming personal liability, and that the writing would be reformed to give effect to the defense. *Lee & Jamieson v. Percival*, 85 Iowa 639; *Western W. Scraper Co. v. Stickleman*, 122 Iowa 396; *Capital Sav. Bank & T. Co. v. Swan*, 100 Iowa 718, 722. *Hanna v. Wright*, 116 Iowa 275, 277; *Lacy v. Dubuque Lbr. Co.*, 43 Iowa 510.

II. But, to sustain the defense in this case, it is not necessary to go to the extent of liberality shown in most of the many precedents to which we have referred; for the note here sued upon comes clearly within the scope of the section above cited from the Negotiable Instruments Act, providing that the agent, trustee, or officer is exempted from personal liability, when the identity of his principal is revealed, either in the body of the note or in the form of his signature. No person of ordinary intelligence can read the signature of this note, and doubt for a moment that these men were acting in an official or representative capacity for the "Second Christian Church," and sought to express that fact. To say that, in thus executing the note, they made use of these terms simply as a matter of personal description or designation, is nothing better than solemn pretense, which

has acquired an air of legal solemnity by repetition, until it has lost its power to excite a smile over the joke which it conceals. The absurdity of applying such a rule in this case may be aptly illustrated by supposing that these defendants had applied to plaintiff or her agent for a loan of \$600 for their own personal use and benefit, agreeing to evidence the debt by their joint and several promissory note, and they had tendered in fulfillment of their promise a note made in the very manner and form of the one which is here sued upon,—would the plaintiff have been under any obligation to accept it? It is inconceivable that any court would so hold. The tender would be promptly held insufficient, because: First, it is evident that the promise in such note is made by the signers in their representative capacity for the Second Christian Church; or, second, it is, at best, doubtful or ambiguous in this respect, leaving the intention of the parties to the instrument open to extrinsic proof. The provision of the statute (Section 3060-a20) is that, if the note "contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable." No particular style or form of signature is prescribed; and any word or phrase which "indicates" to the mind of the average reader that the person writing his name on the paper is doing so in his representative, rather than in his personal, capacity, is all that is required. It is a matter of common knowledge and observation that, in these days, no man executing a note or other written contract in its own behalf attaches to his signature, as a matter of description or designation, any word showing his business or official relations with some third party or corporation having no interest in the transaction. It is barely possible that an occasional member of certain learned professions devoted to the healing of physical and spiritual ills may persist in the use of "Dr." or "Rev." in connection with his name on hotel regis-

ters or subscriptions to charitable funds, but no man, in the ordinary course of business, signs his personal and individual contract with words which will, or reasonably may, lead the reader to understand that he does so as the agent, officer, or representative of another. Upon this very subject, we have ourselves distinctly said:

"Such words are most commonly used with signatures to indicate an official act, and there is nothing in the note in suit which makes the words in question at all necessary, or even appropriate, to indicate mere personal liability. Words of a like character are so frequently used with a signature to designate an official act, and are so rarely used in that manner for any other purpose, that, when they are attached to a signature, they are well calculated to suggest that the signature was intended to be official, and not merely to describe the signer." *Capital Sav. Bk. & T. Co. v. Swan*, 100 Iowa 718, 723.

This rule is also approved by much the greater weight of authority. Says the Indiana court:

"In the usual course of business in this country, the addition of a title or description of any kind is not customary,—indeed, it may be said that such addition or description is *never* appended,—when men sign their names to contracts by which they intend to bind themselves in their own proper persons, and not as the representatives of another. Again, it is to be observed that such additions and descriptions, as 'president,' 'secretary,' 'treasurer,' 'trustee,' 'agent,' and the like, plainly import a relation to some other person, as a principal, distinct from the person signing the instrument. * * * It is not at all usual for a person executing a note, or other contract, to add words descriptive of himself, or to refer to his relation to other persons, whether natural or artificial, who have no connection with the transaction; and when he designates his representative capacity, to assume that such designation was intended merely

as a description of himself, is to assume something which is rarely—perhaps never—in harmony with the facts. * * * There is a growing inclination to consider an instrument as it would manifestly be understood by the average business man, or, in other words, as it was most probably understood by the party receiving and the party signing it, and to exonerate the latter from liability, when * * * it appears to the court that he did not intend, and was not understood, to bind himself, but to act for the corporation for which he was the agent.” *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581 (58 N. E. 833).

To the same point, see Mr. Freeman’s note to *Greenberg v. Whitcomb Lbr. Co.*, 90 Wis. 225 (48 Am. St. 919). This court has made practical application of the same principle in *Baker v. Chambles*, 4 G. Greene 428, where we say that:

“If the name of the principal and the relation of agency be stated in the writing, and the agent is authorized * * * the principal alone is bound, unless the intention is clearly expressed to bind the agent personally.”

This rule was followed in *Harkins v. Edwards*, 1 Iowa 426; *Lyon v. Adamson*, 7 Iowa 509; *Harvey v. Irvine*, 11 Iowa 82; *Wheelock v. Winslow*, 15 Iowa 464; *Lacy v. Dubuque Lbr. Co.*, 43 Iowa 510; *Western W. Scraper Co. v. Stickleman*, 122 Iowa 396. Of these cases, *Lacy v. Dubuque Lbr. Co.*, which is wholly ignored by the majority, is an instructive example. The note in that case made no express reference to the lumber company, except in the date line at the top, which reads:

“Office of the Dubuque Lumber Company, Dubuque. September 9, 1874.”

This is followed by a promissory note, in ordinary form, “I promise to pay,” etc., and signed “M. H. Moore P. D. L. Co.” This we held to be the note of the company, saying:

“We think the note on its face shows that it is the obli-

gation of the defendant, * * * and few business men would have difficulty in understanding the initials attached to the name of the party signing it, and would interpret them as meaning, 'President of the Dubuque Lumber Company.' But if this be *not* so, and the letters are unintelligible without explanation, the law will permit such explanation to be given. 1 Greenleaf on Evidence, Section 282; Story on Agency, Section 154; Angell & Ames on Corporations, Section 294."

If, then, a name in the date line, and the letters "P. D. L. Co.," be held sufficient to indicate the representative character of the signer, and the principal for whom he acts, it seems little less than childish to say that a note subscribed by the "Trustees of the Second Christian Church," followed by their names, including the chairman of the board, gives no indication of the representative character of such signers, or of the corporation they represent; or to say that the personal obligation of the signers is so clearly expressed that oral evidence in explanation thereof will not be considered. The Massachusetts court has said that the courts will always "lay hold of any indication on the face of the paper to enable them to carry out the intention of the parties" (*Carpenter v. Farnsworth*, 106 Mass. 561, 562); but the opinion of the majority herein indicates that this court commits itself to the contrary policy, which regards the intention of the parties as a matter of very slight moment. As bearing out to its fullest extent the principle underlying *Lacy v. Lumber Co.*, and other precedents mentioned in connection therewith, I further cite Field on Corporations, Section 198; Mechem on Agency, Section 443; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; 4 Thompson on Corporations, Section 5141 et seq.; *Sayre v. Nichols*, 7 Cal. 535; *Hardy v. Pilcher*, 57 Miss. 18; *New England Elec. Co. v. Shook*, 27 Colo. App. 30 (145 Pac. 1002); *Johnson v. Smith*, 21 Conn. 626, 627. In the last mentioned case, the note was signed by the "vestrymen"

of a named Episcopal Church, and this was held to be the note of the church, for which the signing vestrymen were not personally bound.

III. Turning now to the cases cited by the majority, I freely admit that some of them—notably *Heffner v. Brownell*, 70 Iowa 591—go to the full extent of holding that an agent or corporate officer, even where the name of the corporation or principal is expressly indicated in the signature to the note, is conclusively to be held liable in a suit charging him as a maker of the instrument. I also admit that, for a time, this court seemed to follow the precedent so established; but I further contend that, until the majority opinion in this case was adopted, we had, for a period of fourteen years, definitely receded from that position, and put ourselves in line with the current of modern authority, which holds either that a note in such form is to be held, as a matter of law, the obligation of the principal, and not of the agent (*Falk v. Moebis*, 127 U. S. 597 [32 L. Ed. 266]), or that the matter is open to explanation by extrinsic evidence (*Lacy v. Lumber Co.* supra), or, at the worst, that the instrument will be reformed to admit the defense (*Western W. Scraper Co. v. Stickleman*, 122 Iowa 396). The check in the reactionary tendency of *Heffner v. Brownell* and its following was first felt in *Matthews & Co. v. Dubuque Mattress Co.*, 87 Iowa 246. There, although the majority of the court felt itself bound by the authority of the *Heffner* case, it eased its apparent repugnance to a rule so unreasonable by pointing out that, under the authority of *Lee & Jamieson v. Percival*, 85 Iowa 639, defendant had a way of escape therefrom, by asking a reformation of the writing. Justices Kinne and Granger united in a very vigorous dissent, pointing out the inherent unsoundness of the rule, and showing, by a very convincing array of the authorities, that, as between the original parties, it is always admissible to show that the parties, in making and

delivering the note, intended it to be the obligation of the principal, and not of the agent. The same division of the court took place in the subsequent cases of *Day v. Ramsdell*, 90 Iowa 731, and *Tama Water Co. v. Ramsdell*, 90 Iowa 747. Later, in *Hanna v. Wright*, 116 Iowa 275, 277, the question arose again. The plaintiff was there seeking to hold to personal liability the defendant, who had signed an order for goods as "J. H. Wright, President School Board." In support of the claim, plaintiff cited and relied upon the cases of the *Heffner v. Brownell* class; and the court, speaking by Deemer, J., refused to so rule, saying:

"Some of our cases sustain plaintiff's contention, but the court as now constituted has grave doubts of the correctness of those decisions."

Two years later, it arose once more in *Western W. Scraper Co. v. Stickleman*, 122 Iowa 396, where, in substance and form, the note sued upon is entirely similar to the one now in controversy. It is a note in ordinary form, in which it is said, "We promise to pay," and is signed:

"Polk Township	Trustees	Trustees:
"Taylor County	of said	J. M. Stickleman
"State of Iowa	Township.	Joseph Litsch."

The defendant having pleaded the understanding of the parties that no personal liability was assumed by them in giving the note, and asking that the note be reformed accordingly the trial court found for the plaintiff. On appeal, this court reversed the decree below, and, speaking unanimously, by McClain, J., said:

"We think it doubtful whether these notes on the face import individual liability of the defendants. It is true that, in several cases [citing *Mathews v. Dubuque M. Co.*, and others, by way of example], we have held that instruments similar to those now before us conclusively import personal liability of the signers, and that, in an action at law, the intention that the instrument should bind the corporation

only, and not the officers, could not be inferred from the language of the instrument itself, nor shown by parol evidence. The court as now constituted would favor the conclusion reached by the dissenting judges in the *Mathews* case; but the question need not now be further considered. See, however, *Lacy v. Dubuque Lbr. Co.*, 43 Iowa 510. This much is said to avoid any inference which might otherwise be drawn that the instruments now before us would be conclusive as to defendant's liability in an action at law."

There the subject was allowed to rest, apparently finally settled for this jurisdiction, for a period of fourteen years, until the adoption of the majority opinion in this case. Meanwhile, the courts of at least three states,—Wisconsin, Indiana and Nebraska,—have definitely refused to recognize the authority of our *Heffner v. Brownell*; and with our own condemnation of it in *Hanna v. Wright and Scraper Co. v. Stickleman*, it ought to have been permitted to rest in its grave. Neither *Schumacher v. Dolan*, 154 Iowa 207, nor *Exchange Bank v. Schultz*, 167 Iowa 136, is in any manner inconsistent with the position I have taken.

IV. To recapitulate, the following propositions of fact are all shown, without substantial dispute:

1. The man Shope was, and for years had been, the plaintiff's agent, through whom she made loans of money; and he was not in any sense of the word an agent for the defendants.

2. The Second Christian Church, by its board of trustees, applied to said agent to obtain a loan, on the distinct understanding that such loan was being asked for upon the credit of the corporation.

3. With that notice, plaintiff, through her agent, furnished the money, and the agent prepared the note in the form in which it is sued upon, and assured the trustees that, in legal force and effect, it was a "church note," or

"trustee note," and did not import any personal liability on their part.

4. The money borrowed was obtained for the use and benefit of the corporation alone, and was not in any manner or degree received or applied to the personal use, benefit, or advantage of the defendants.

5. With this knowledge and notice, plaintiff took the note, collected the interest from the church corporation, and in the end, brought suit against said corporation and obtained judgment against it for the full amount of the note remaining unpaid, and a fraction of the amount so adjudicated in her favor has been collected.

Concerning the law applicable to the proved and admitted facts, I contend:

1. That the note in the form in which it is made and signed brings it easily within the provisions of the Negotiable Instruments law, to which I have adverted, by which the person signing a note as agent or trustee is chargeable with no personal liability, if, in either the note or signature, there may be found "words indicating" that he signs for or on behalf of a principal, or "in a representative capacity."

2. That, if any doubt arise in any mind upon this point, there can be none upon the further proposition that enough does appear to bring the case within the rule admitting extrinsic evidence of the intention of the parties, as has been held in at least a dozen of our own cases, above cited, and in a myriad other precedents from other states.

3. That, in any event, if it be thought that the form of the note does not disclose the representative character of the defendants' signatures, a perfect case has been made for a reformation of the instrument.

4. That the claim of the defense is clearly established, as a matter of law.

V. There is another defense pleaded, which the majority pass with the merest touch, as not entitled to serious

consideration, but which I am constrained to believe presents an insuperable objection to a recovery by plaintiff. I refer to the plea setting up the fact that, before this action was begun, plaintiff, with knowledge that the note was executed for and in behalf of the church corporation, made use of it as such, brought suit thereon against the corporation, and prosecuted it to final judgment in her favor.

The universal rule is: (1) That, if A deals with B, knowing him to be acting as agent for C, a contract so made is, in law, a contract between A and C, and B is chargeable with no personal liability, if he acts within his authority as agent; and (2) that, if A is not aware of B's representative character, and deals with him in reliance upon his personal credit or responsibility, but later discovers that he acted, in fact, for C, then A may maintain action upon such contract against either B or C, but he cannot recover against both. From this, it follows of necessity, under the familiar rule as to election of remedies, that if, knowing the truth as to the representative character of the person with whom he has dealt, A sues C as the real principal, and prosecutes his suit to judgment, he waives or abandons his right of action against B. *McLean v. Ficke*, 94 Iowa 283, 292; *Keene Five Cents Sav. Bk. v. Archer*, 109 Iowa 419; *Codd Co. v. Parker*, 97 Md. 319 (55 Atl. 623); *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450 (21 N. E. 172); *Lage v. Weinstein*, 35 Misc. Rep. 298 (71 N. Y. Supp. 744); *Pennsylvania Cas. Co. v. Washington P. C. Co.*, 63 Wash. 689 (116 Pac. 284); *McDonald v. New World L. Ins. Co.*, 76 Wash. 488 (136 Pac. 702); *Landers v. Foster*, 34 Wash. 674; *First T. & S. Bank v. Bloodworth*, (Okla.) 174 Pac. 545; *Booth v. Barron*, 29 App. Div. 66 (51 N. Y. Supp. 391); *Aimen v. Hardin*, 60 Ind. 119; *Anderson v. English*, 105 App. Div. 400 (94 N. Y. Supp. 200); *Rounsaville v. Insurance Co.*, 138 N. C. 191; 31 Cyc. 1578; *Rommel v. Townsend*, 83 Hun (N. Y.) 353; *Kingsley v. Davis*, 104 Mass.

178; *Tuthill v. Wilson*, 90 N. Y. 423, 428. In the last-cited case, referring to the rule of the authorities as to the right of the third party to recover against the principal, when known or discovered, or against the agent, it is said:

"He has the right of election as to which of them he will hold responsible; but, having once made an election, he is bound by it."

In perhaps a majority of the precedents, it is held that, if the creditor having such election brings an action upon his claim against either the principal or agent, the election is complete and irrevocable, and relieves the other from all liability. In some jurisdictions, however, it is held that the mere bringing of an action is not a finality upon that question, and the right of election is not necessarily exhausted until the claim against one of them has been prosecuted to judgment. Such seems to be the view of this court in some of its decisions. But see *Courtney v. Courtney*, 149 Iowa 645, 647, 648; *Theusen v. Bryan*, 113 Iowa 496; *Steele Smith G. Co. v. Potthast*, 109 Iowa 413; *McLean v. Ficke*, 94 Iowa 283.

The only suggestion the majority makes in regard to this defense is to say that, if the defendants cannot be held personally liable because of their alleged failure to make their agency or representative character clear in the language of the note or in the manner and form of the signatures thereto, they can still be held as sureties of the church which the opinion concedes was the real borrower. It is a sufficient answer to this proposition to say that, except in this language of the majority, there is not in the record, from beginning to end, an allegation or claim or assertion or word of proof that the defendants or either of them ever undertook to become surety on the note. The evidence clearly disproves such an intent. So far as appears in the record, no surety was asked for, and none offered. The point made by the majority in this respect finds no justifi-

cation in the record, and is irrelevant. The alleged right of recovery against these defendants has been, from the start, and now is, not that defendants were not, in fact, the authorized representatives of the church corporation, or that they, as a matter of fact, intended to bind themselves personally, but that the note which they signed fails to clearly disclose the identity of the corporation as the real promisor, or to clearly indicate their own representative character. Because of this alleged failure, they say that the note must be read as the note of the defendants alone, and not the note of the church, and that extrinsic evidence is not admissible to show that they acted only as agents and officers of the corporation, or that the intent and purpose of all the parties thereto was to evidence by said note a corporate liability, and no more. The main inquiry to which the mind of the trial court and of this court has been directed by the plaintiff is simply whether the note, upon its face, is the note of the church corporation, or the personal note of the individual trustees who signed it. The contention of the defendants has been: First, that the note shows upon its face that it is the obligation of the corporation; or, second, that, in any event, enough appears upon the face of the note to raise doubt concerning the character in which the defendants signed it, thus opening the matter to parol proof of the facts; and that the proof offered, showing that they acted as agents only, is without dispute. If it is the note of the corporation, it is because it was executed by the defendants as its officers and trustees, and the corporation alone is liable. If it is so defective in form or in manner of its signing as to forbid its recognition as a corporate note without reformation, then, upon the undisputed evidence, it should be treated as reformed, in accordance with the intention of the parties. If so reformed, it is still the note of the corporation, and the defendants are not liable. Absolutely the only way in which it is possible,

under this record, to find for the plaintiff, is to resuscitate the discarded and discredited theory applied in *Heffner v. Brownell*, supra, *et id omne genus*, and hold that, even as between the original parties to the note, it is not subject to explanation by proof of the circumstances under which it was given, nor subject to reformation to make it express the real intent of the parties. If that is what the majority wish to declare the law of this state to be, I am, of course, powerless to prevent it.

VI. I confess to no little difficulty in obtaining a clear understanding of what the majority opinion is really intended to hold. It indulges in much comparison of the mere form of the signatures of this note and those of many other notes with which the courts have had to deal, and then states its conclusion to be that "the face of the note in suit did not disclose to the plaintiff who the claimed principal of the signers is, and that, upon the face of the instrument, the signers Ervin, Moulton, and Everett were personally bound." In reaching this conclusion, the *Heffner* case is again given leading place in the discussion. It is then said that plaintiff had no notice that defendants were signing the note in a representative capacity. To do this, it was, of course, necessary to avoid the legal presumption of notice derived through her agent, Shope; and this is done by saying that Shope was also agent for the defendants. This statement is not justified by the record. Shope was, and long had been, the admitted agent of the plaintiff for the loaning of her money. If the church or its trustees, knowing that fact, applied to him for such a loan, it did not make him their agent. Had they gone to any bank in the city to procure a loan, the fact that they procured it through the aid or by the hand of the bank's president or cashier, would not make such officer their agent, in any sense of the word. Not only is the presumption of notice to the plaintiff conclusive, but every act on her part shows,

beyond any reasonable doubt, that she knew and fully understood, from the first, that the note given her was the note of the church, and not the personal obligation of the defendants. She collected the interest from the church; when default was made, she sued the church alone, and took judgment against it; and, so far as appears, never made demand upon these defendants or asserted any claim against them until long afterwards, when it may be presumed that her counsel conceived the idea that the framework of the note was such as to import the personal liability of the signers.

Finally, the majority, speaking of the admissibility of parol evidence to show the representative character of the signer of a note, and to point out the real principal intended to be bound thereby, say:

"It is possibly true that such evidence is admissible as between these parties, and that *Megowan v. Peterson*, 173 N. Y. 1, states the law, if limited to such proof as stops short of varying by parol what is affirmatively expressed in the writing."

Now, if the tendency and bearing of the opinion as a whole were in harmony with that expression, this dissent, so far as the law is concerned, would not have been written; for with that rule as a settled and admitted proposition, the final conclusion reached by the majority would have been impossible. If it be true (as I think it is) that the rule of the *Megowan* case is sound, and parol evidence is admissible, as between these original parties, why is it that the majority, over and over again, put to the front the case of *Heffner v. Brownell*, which confessedly turns upon the theory that parol evidence is wholly inadmissible? Why are this and other cases of that kind collated and pressed upon our minds as controlling authority, with never a word of mention of our decisions which discredit them, and hold that, as between the original parties, or as against any holder with notice, it is a good defense to plead and prove

that the note was signed in a representative capacity only, and was not intended by either party to import a personal obligation (for example, *Western W. Scraper Co. v. Stickelman*, 122 Iowa 396; *Hanna v. Wright*, 116 Iowa 275, 277; *Capital Sav. Bank v. Swan*, 100 Iowa 718, 722; *Lee & J. v. Percival*, 85 Iowa 639; *Stafford v. Fetters*, 55 Iowa 484; *Lacy v. Lumber Co.*, 43 Iowa 510; and others of which I have before made mention)? The mere incidental concession of the correct abstract principle goes for nothing, when, after stating it, the court proceeds with a labored argument based wholly upon precedents which deny that principle, to reach a conclusion which is inconsistent with it. It is admissible in aquatics for an oarsman to face in one direction while rowing in another; but, in the adjudication and protection of human rights by the court, it is a fashion more honored in the breach than in the observance.

Although this dissent has been protracted to a tedious length, I am not disposed to offer any apology for it. The importance of the principle involved is out of all proportion to the mere amount of money concerned in its decision. The maintenance of a reasonable degree of consistency in our opinions is highly desirable. It is even more desirable, when inconsistencies arise, and it becomes necessary for us to choose between opposing theories or rules of law, that we adhere to the one which appeals most strongly to our inherent sense of right, and is best calculated to promote equal and exact justice between man and man. There is no more just rule of law or of morals than this: That contracts and agreements fairly entered into shall be interpreted and enforced according to the actual meaning and intent of the parties. It is a rule which cannot be ignored or violated, without disregard to the basic principles of justice and of right, which underlie all law, and without which courts and court proceedings become engines of oppression. In my judgment, the majority opinion is clearly open to this objection. The judgment below ought to be affirmed.

GEORGE L. SEAGER, Appellee, v. HERBERT E. FOSTER, Appellant.

ABATEMENT AND REVIVAL: Nature of Action. Each of two
1 parties, as hostile principals in an accidental collision, may
maintain a separate action against the other for his damages,
and the action first brought is not pleadable in abatement of the
action last brought.

MUNICIPAL CORPORATIONS: Right of Way at Intersections. A
2 city may validly determine by ordinance which of two vehicles,
traveling on different intersecting streets without change
of direction, shall have the right of way in crossing such intersection.
(Sec. 755, Code, 1897.)

EVIDENCE: Whether Object Moved Slowly or Rapidly. A witness
3 may not, in the absence of some basis for intelligent comparison,
competently give his opinion as to whether an object was moving
slowly or *rapidly*, nor may he, when the basis for comparison
appears, make the comparison for the jury.

HIGHWAYS: Negligence by Not Yielding Right of Way. The
4 driver of a vehicle who fails to yield the right of way to another
vehicle at an intersecting crossing, when he has ample time,
and is under legal obligation to so do, is guilty of negligence.

Appeal from Cedar Rapids Superior Court.—C. B. ROBBINS,
Judge.

DECEMBER 14, 1918.

ACTION for damages consequent on an automobile collision resulted in judgment against defendant as prayed. The defendant appeals.—*Affirmed.*

Treichler & Treichler, for appellant.

Barnes, Chamberlain & Hanzlik, for appellee.

LADD, J.—The plaintiff drove his automobile, weighing about 800 pounds, along Bever Avenue in an easterly direction, as the defendant, with his car, weighing about 3,395

pounds, came northerly up Fourteenth Street, which intersects Bever Avenue. The plaintiff, as he approached the intersection, looked to the north, and thereafter to the south, and testified that he did not observe defendant's car until about 16 feet west of the west curbing of Fourteenth Street, and when defendant was about the same distance south of the intersection. He estimated his speed at about 12 miles an hour, and was unable to say whether he looked toward the south previous to observing the approach of defendant's car. Zook, who was riding with plaintiff, estimated the speed of the car at 15 miles per hour, and swore that it was about half way between Third Avenue and Fourteenth Street, or about 60 feet west of the intersection; and that defendant's car was then about 40 feet south therefrom; and that he called plaintiff's attention to the approach of defendant's car. On the other hand, defendant testified to having been about 50 feet south of the intersection when he looked as far west as the intersection of Bever Avenue and Third Avenue, but said that he did not see the car until after looking to the east, and when it was about 70 feet west of the intersection, and when he was about 40 feet south of it. Defendant's son, who sat in the back seat, testified that he saw the plaintiff's car at the intersection of the avenue, or about 117 feet west of the intersection, and that he immediately told his father. Defendant estimated the speed of his car at 12 miles per hour, and that of plaintiff at 25 miles per hour; while his son thought plaintiff's car was moving at the rate of 14 or 15 miles per hour. The automobiles collided in the intersection, but somewhat south of the street railway track, and both cars were injured. Plaintiff claimed in his petition the expense of repairing his car, as damages; and the defendant, putting in issue such claim, demanded judgment for the damages done his vehicle, and also pleaded, by way of abatement, another action pending.

I. This action was begun in the superior court of Cedar Rapids, December 21, 1916. Prior thereto, on November 17, 1916, defendant began suit as plaintiff, to recover in that action the damages claimed in his cross-petition, and issue was joined thereon by plaintiff in this action, as defendant in that.

1. ABATEMENT
AND REVIVAL:
nature of ac-
tion.

The defendant in the action at bar pleaded the pendency of the suit begun November 17, 1916, in abatement, and the plea was denied. The plaintiff in this action had not, as defendant in the prior suit, asserted any claim to damages consequent on the collision, either by way of counterclaim, set-off, or cross-petition, and was not required so to do, in order to protect such claim. He might so have done, but was not bound to; for he might have elected whether he would assert his claim for damages in that action, or proceed in an independent action to recover the damages, if any he had suffered. *Jones v. Witousek & Co.*, 114 Iowa 14; *Smeaton v. Cole*, 120 Iowa 368. Having elected to prosecute his claim for damages in another and independent action, as was his right, it might not be abated because of the pendency of defendant's suit, previously brought. *Osborn v. Cloud*, 23 Iowa 104; Section 3440. Code; 1 Corpus Juris 83.

II. An ordinance of the city of Cedar Rapids, Section 393, was received in evidence, over objection that it was void because of being covered by Paragraphs 11 and 12 of Section 1571-m18 of the Code Supplement, 1913. The ordinance declares that:

2. MUNICIPAL COR-
PORATIONS:
right of way
at intersec-
tions.

"Except as otherwise provided, vehicles traveling on thoroughfares running at right angles to the Cedar River, which are designated and known as 'avenues,' have the right of way over vehicles traveling on thoroughfares known as 'streets' or other thoroughfares which intersect 'avenues.'"

The court instructed the jury:

"You are instructed that such ordinance means that, where drivers of vehicles, one being on an avenue and one on a street, approach an intersection where they must pass each other, wherever it intersects at the same moment, it is the duty of the person driving the vehicle upon the street to permit the vehicle driven on the avenue to pass in front of the vehicle on the street."

The contention is that this is invalid, for that the subject is covered by Paragraphs 11 and 12 of said Section 1571-m18 of the Code Supplement, which reads:

"11. In cities and towns, motor vehicles turning to the right from one street into another shall have the right of way over vehicles traveling on the street into which same are turning.

"12. In cities and towns, motor vehicles turning to the left into another street shall give the right of way to vehicles traveling on the street into which same are turning."

It will be observed that these paragraphs do not cover the situation where the automobiles approach on different streets intersecting, as at right angles, without turning, but continuing in their course; and the question presented is whether, this not having been touched by the paragraphs quoted, it was competent for the city council of Cedar Rapids to enact the ordinance with respect thereto.

Code Section 753 conferred upon the city the power to regulate the driving of vehicles within the limits of the corporation; and surely, rules defining which shall have the right of way in a situation like that involved in this case are within the terms of this statute, for it concerns the safety of drivers in passing on the intersection of the streets. Nothing to be found in Section 1571-m20 of the Code Supplement, 1913, obviates this conclusion. The fore part of that section forbids the exaction of any fee, license, or permit for the use of public highways, or exclusion from the

free use thereof by local authorities, with certain exceptions, and declares that:

"No ordinance, rule or regulation contrary or in any wise inconsistent with the provisions of this act, now in force or hereinafter enacted, shall have any effect."

As seen, this ordinance is not in conflict with any provision in the act known as Chapter 2-B of Title VIII. Therein appears no purpose on the part of the general assembly to withdraw the power to regulate the driving of automobiles, as conferred by Section 755 of the Code, save as therein specified. We are of opinion that the enactment of the ordinance is within the authority of the city council of Cedar Rapids; and the instruction referred to, in so saying to the jury, has our approval.

III. Plaintiff, having testified that he could not judge the rate of speed at which defendant's car was moving, was asked: "In your opinion, was it going fast or slow?" Objection as "relative in form, and there is nothing to compare it with," was overruled, and the witness answered: "He was coming pretty fast." The ruling was erroneous;

3. EVIDENCE:
whether object
moved slowly or
rapidly.

for there is no criterion that we know of by which to determine whether an automobile is moving fast or slowly. Fifteen or twenty miles per hour seems quite fast to some folks while others would deem a forty or fifty-mile rate scarcely to be denominated as fast driving. Plaintiff's ideas on this subject do not appear; and the jury derived no information from the answer given, and could not have based a finding as to any definite speed upon the answer given. By these reasons, we are persuaded that the ruling, though erroneous, was without prejudice.

IV. Defendant's son swore that, in his judgment, the automobile in which he was riding was moving at a speed of 14 or 15 miles per hour,—not over 15.

"Q. Was it [the Ford] going faster than the car that you were in?"

An objection, as incompetent, irrelevant, and immaterial, as asking for a comparison, was sustained, and the witness was asked: "Was it going fast or slow?" and a like objection was sustained. Possibly a difference in the objection interposed to the last question and the one to that propounded to plaintiff may explain the difference in the ruling. At any rate, the court, as seen, was correct this time. The ruling on the first above question, however, is the one complained of. The question called for a conclusion, arrived at by comparing the speed of one car with that of the other; and for this reason, the objection should have been sustained, as the speed of the car should have been shown, and the jury allowed to make the comparison.

V. The evidence was sufficient to carry to the jury the issue as to whether the defendant was negligent in not yielding the right of way to plaintiff. He observed the plaintiff's automobile approaching, in ample time to enable him to have exercised ordinary care, in yielding the right of way, to have avoided the collision. As to whether plaintiff was guilty of contributory negligence, the evidence is closed; but we think that, in view of the fact that he was entitled to the right of way, the jury might have found him without fault contributing to the injury. The judgment is—*Affirmed*.

4. HIGHWAYS:
negligence by
not yielding
right of way.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

C. P. SICKLES et al., Appellants, v. J. W. LAUMAN, Appellee.

CONTRACTS: Restraint of Trade—Assignability. An agreement, in part consideration for the sale of a business, that the vendor will not, for a stated time, enter into business in the same local-

ity, in competition with the vendee, is *incident* to the property and business sold, and is *assignable* by the vendee, along with a re-sale of the business, and is enforceable by such latter assignee.

Appeal from Buena Vista District Court.—JAMES DELAND,
Judge.

DECEMBER 14, 1918.

ACTION for equitable relief. Petition dismissed, and plaintiff appeals. The facts are stated in the opinion.—*Reversed and remanded.*

F. F. Faville, for appellants.

T. H. Chapman, for appellee.

WEAVER, J.—For a considerable period prior to the transaction hereinafter mentioned, the defendant, J. W. Lauman, was the owner and proprietor of an established business, conducting and carrying on a laundry and the work of cleaning and pressing clothes, also the business of maintaining a station for the buying and shipping of cream. On May 29, 1916, defendant entered into a written contract with one Olive I. Wright, for the sale and transfer to the latter of the business aforesaid, together with the machinery, fixtures, and equipment of every kind and character used in connection therewith, and including in such transfer a list of the customers dealing with the defendant. After describing the business and the property in a general way, the contract contains a clause in the following words:

“The first party hereby sells the good will of his business and as a part of the consideration hereof agrees that he will not directly or indirectly enter into business in Sioux Rapids, Iowa, in competition with said second party for a period of five years from the date hereof.”

The deal was completed, and the said Olive I. Wright entered into possession and control of the business so pur-

chased by her, in June, 1916, and continued therein until January 25, 1917; on which date, while said business, property, and plant were still a going concern, she bargained and sold the entire outfit, property, business, and good will thereof, to the present plaintiffs, C. P. Sickles and Ruth Sickles. These purchasers, when buying said property, business, and good will, were informed and knew of the terms of the sale from defendant to Wright, and as a part of the purchase, they took from Wright an assignment of her contract with defendant, and of all the rights acquired by her thereunder. Such purchase having been consummated, plaintiffs went into possession of said property and business, since which time they have been the owners and proprietors thereof, including not only the good will acquired or attaching to the said business during the proprietorship of their immediate assignor, but during that of her assignor as well.

The petition in this case, after reciting the facts as aforesaid, alleges that, since said purchase by the plaintiffs, the defendant, in violation of the terms of his said contract and the terms of the sale of said property and good will, has re-entered the cleaning, pressing, laundry, and cream-buying business in the town of Sioux Rapids, and has endeavored and is now endeavoring to re-establish such business in competition with plaintiffs, and unless restrained from so doing, will continue to advertise and solicit patronage and customers away from the plaintiffs, and to interfere with the plaintiffs' business, and cause them irreparable injury. Upon this showing, plaintiffs pray the issuance of an injunction restraining defendant from further violation of his said contract, and for general relief.

To this petition the defendant demurred, because:

1. The facts stated by the plaintiffs do not entitle them to the relief demanded; and
2. The contract entered into by the defendant with Wright is not assignable.

The demurrer was sustained; and, plaintiffs electing to stand upon their petition without amendment, it was dismissed, and they appeal. The correctness of the ruling as to the sufficiency of the pleading is the sole question raised by the appeal.

The position taken by the appellee in support of the ruling below is that his agreement not to re-enter business at Sioux Rapids is one of which only his immediate purchaser can take advantage; or, in other words, that the right which the first purchaser acquired under that agreement was personal to that purchaser alone, and could not be lawfully or effectually assigned or transferred to a second purchaser of the same business. This proposition is said to be justified by certain of our own decisions, no other authorities being cited or called to our attention. Of the cases so cited, *Haldeman v. Simonton*, 55 Iowa 145, does not appear to us to be in point, either in fact or in principle. There, the defendant, a physician, in selling his practice, agreed not to "re-settle" in the town of Mitchellville, and this was held not to be broad enough to prohibit his practicing his profession in that town after removing therefrom, and while living in the city of Des Moines. It is, perhaps, in point upon the proposition that contracts of this kind will be construed with care not to unduly or unreasonably extend the agreed restriction beyond the expressed or fairly implied intent of the parties; but otherwise, it affords no light upon the question before us. The decisions in *Streichen v. Fehleisen*, 112 Iowa 612, and *Rapalee v. Malmquist*, 165 Iowa 249, both turn upon the identity of the party agreeing to refrain from entering into competition with a business sold. In each case, the party making the agreement was a named partnership, only; and this was held not to operate as a restriction upon the liberty of an individual member of the firm. Somewhat in the same line is *Barron v. Collenbaugh*, 114 Iowa 71. There, the defendant sold his

livery business to Fogarty & Barron, and agreed not to re-enter the business at that place "during the time said parties of the second part may be engaged in said livery business on the above-named premises." Thereafter, one of the purchasers, Fogarty, sold out his interest to his partner, Barron, who continued the business individually. Collenbaugh then re-entered the livery business, in competition with Barron, who brought action for an injunction. Relief was denied, on the theory that the period of restriction was, by the express terms of the agreement, limited to the time Fogarty & Barron should continue in the business sold to them, and when Fogarty sold out or retired, the obligation of the defendant under the agreement terminated.

The precedents above cited go to the limit of strict construction in favor of the seller of a business entering into an agreement of this character,—further, indeed, than the writer of this opinion believes is justifiable; but none of them, either expressly or by implication, lays down the rule contended for by the appellee, that such a contract gives to a purchaser no more than a mere personal right, which he cannot assign to another to whom he, in turn, sells the business. There is, indeed, an expression in the *Barron* case to the effect that, "had the firm of Fogarty & Barron assigned the contract, no right of action would have passed to their assignee, by reason of the peculiar reading thereof." If we give proper effect to the concluding clause of that quotation, it is probably not open to material criticism; but in any event, it is pure dictum, for the assignability of the contract was not there in question. So far as we have been able to discern, this court has never committed itself to the doctrine for which the appellee contends.

As to property right in the good will of a business, and of its protection in equity, it has been said:

"The good will of a trade or business may be the subject of bargain and sale, when connected with any specific

stock in trade, or with some valuable secret of trade, or with a well-established stand for business. A court of equity will decree specific performance of a contract for the sale of the good will of a trade or business." *Moorhead v. Hyde & Braden*, 38 Iowa 382.

Directly in point upon the question in this case is *Hedge, Elliott & Co. v. Lowe*, 47 Iowa 137. There, Lowe sold his business to one Vorse, by a contract which contained an agreement that he would not re-engage in the same business in the same town for a period of five years, without the consent of Vorse. Vorse sold and assigned an equal interest in the business and contract to one Hedge, and later, sold and assigned his remaining interest therein to one Elliott. Thus, the entire interest of the original purchaser in the business and good will was eliminated. Thereafter, Lowe resumed business of a like nature in the same town, and in defense to an action against him for an injunction, he raised the very objection on which appellee now relies, that the contract between him and Vorse was personal, and could not be assigned. The court held the point not well taken, saying:

"If the agreement not to engage in the agricultural business was of sufficient value to constitute, in part, an inducement to Vorse to purchase, it must be admitted that it might be of equal value to a vendee of Vorse. If Vorse, because of this agreement, was induced to purchase, no good reason can be given why Vorse should not be able to avail himself here of this agreement as a means of effecting a sale. The question here is not whether this agreement may be the subject of transfer in the abstract, but whether it may be transferred with the business to which it originally pertained" (citing *California Steam Nav. Co. v. Wright*, 6 Cal. 258, and 8 Cal. 585; *Guerand v. Dandele*, 32 Md. 561, 569).

This decision does not appear to have been overruled,

nor do we find that its authority has ever been limited or questioned. It is also quite in line with the views expressed on the same subject by nearly all the courts. See *Francisco v. Smith*, 143 N. Y. 488 (38 N. E. 980); *Gompers v. Rochester*, 56 Pa. St. 194; *Fleckenstein v. Fleckenstein*, (N. J.) 53 Atl. 1043; *Public Opinion Pub. Co. v. Ransom*, 34 S. D. 381 (148 N. W. 841); *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (13 N. E. 419); *Up River Ice Co. v. Denler*, 114 Mich. 296 (72 N. W. 157); *Haugen v. Sundseth*, 106 Minn. 129 (16 Ann. Cas. 259); *Webster v. Buss*, 61 N. H. 40; *American Ice Co. v. Meckel*, 109 App. Div. 93 (95 N. Y. Supp. 1060); *Palmer v. Toms*, 96 Wis. 367.

Sporadic instances are not wanting in which a contrary view is announced or suggested, but they are not generally recognized as authoritative precedents. The one most directly in point to that effect is *Hillman v. Shannahan*, 4 Ore. 163. It is there held that the contract, having made no reference to "the heirs and assigns" of the purchaser, must be construed as personal only, and not enforceable in the hands of his assignee. The reasoning employed is by no means persuasive, and the citation of authorities wholly omits reference to or consideration of the numerous precedents to the contrary. The presence or absence of express mention of the words "heirs and assigns" is discussed in several of the cases first above cited, and in each instance, it is held to be immaterial. Indeed, in our own leading case of *Hedge v. Lowe*, supra, the agreement was with the purchaser by name, without any express mention of heirs or assigns; and it was held to be assignable. This decision has been cited and followed in nearly all the other states where the question has come up for adjudication. In many cases, the courts go much beyond what we have had occasion to hold, and say that, even if there is no express transfer of the contract, the good will assigned by the first seller follows the business into the hands of the second pur-

chaser, without any express mention, as an incident to the business,—a rule for which many good reasons may be found. *Public Opinion Pub. Co. v. Ransom*, 34 S. D. 381 (148 N. W. 841, Ann. Cas. 1917A, 1010); *Parnell v. Dean*, 31 Ont. 517; *Palmer v. Toms*, 96 Wis. 367; *Gompers v. Rochester*, 56 Pa. St. 194; *Didlake v. Roden Groc. Co.*, 160 Ala. 484 (18 Ann. Cas. 430); *Fairfield v. Lowry*, 207 Mass. 352 (93 N. E. 598). In the *Gompers* case, the court touches upon a distinction which those who deny the rule in *Hedge v. Lowe* usually overlook. It is there said that the fallacy of the argument denying the assignability of the contract is in regarding it as merely personal in character, “whereas it was alone an incident to property which they had parted with, and the business also. It would not have been binding for want of a consideration, unless as incident to the property.” In the *Palmer* case, *supra*, the Wisconsin court, on the same subject, says:

“To determine the question, * * * the nature of the contract must be understood. It does not constitute a distinct property right, independent of the business it was designed to protect, any more than the good will itself. The purpose of the contract being to protect the property or business to which it related, it was an incident of, and adhered to, such property and business. It could not otherwise exist.”

To construe such contracts as personal only, where the design to so narrow or restrict their effect is not clearly expressed, is to deprive them of much, if not most, of their value. The seller expects a better price, and the buyer is willing to pay a better price, than the business would command without it. But the business, when once purchased, is worth on the market only what the owner can reasonably hope to sell it for; and if he cannot sell it, without destroying its protection against competition by the man who created and built it up, he is quite sure to suffer loss.

To hold that the parties to a contract of sale intend such inequitable and absurd results, the language should reveal it so clearly as to place it beyond all reasonable doubt. What the defendant sold in the first instance was not only the physical property, but the established business, together with its protection for five years against competition by him. It was this property and this business, so protected, which Wright bought and owned, and, as such owner, had the right to sell, and did sell, to the plaintiffs. Though the protection existed as incident to the property and business, it was, nevertheless, a property right which the plaintiffs acquired with the property and business; and as such, the courts will recognize it, and enjoin its wrongful invasion. The defendant undertook to refrain for five years, from competition with the business sold by him, and is presumed to have received a sufficient consideration therefor; and it is but equitable that he be required to perform his agreement in good faith.

In discussion, courts sometimes indulge in the loose generality that the law does not favor contracts in restraint of trade, and therefore, an agreement by which a party undertakes not to enter a specific business in a specified city or town will be strictly construed. What the law does disfavor are contracts which unreasonably restrict the individual in his liberty of occupation and employment. But there is no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement of this character, and such a contract is entitled to the same reasonable construction and the same effective enforcement that are accorded to business obligations in general. For an illuminating discussion of this subject, see *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (13 N. E. 419).

In our opinion, the plaintiffs' petition stated a good cause of action, and the demurrer thereto should have been overruled. The ruling and judgment below are, therefore,

reversed and the cause remanded, with instructions to the trial court to overrule the demurrer, and for further proceedings not inconsistent with the views hereinbefore expressed.—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, J.J., concur.

MAURICE H. SMITH, Appellant, v. ARTHUR FLOWERS et al.,
Appellees.

ANIMALS: Non-Right to Distrain. One may not distrain trespassing animals when his own failure to maintain his portion of the partition fence is the cause of the trespass. In such case, the full measure of his right is to take temporary possession of the stock, in order to protect his property.

Appeal from Tama District Court.—B. F. CUMMINGS, Judge.

DECEMBER 14, 1918.

ACTION of replevin for the possession of plaintiff's own cattle, held in distraint by the defendants as trespassing stock. The trial court sustained defendants' motion for a judgment upon the pleadings, and dismissed the petition. Plaintiff appeals.—*Reversed.*

Huber & Hyland, for appellant.

Jacob Lamb and *J. R. Caldwell*, for appellees.

EVANS, J.—Inasmuch as judgment was entered upon the pleadings, we must deem the allegations of the petition as true, for the purpose of this appeal. Plaintiff's ownership of the cattle is conceded. The defendants' only claim to the possession is that they distrained the cattle while they were trespassing upon their land, and that the township trustees assessed the damages in their favor at \$80. The defendants demand payment of the damages so assessed, and hold the

stock in dstraint until payment be made. It is made to appear from the pleadings that the parties are adjoining landowners. It appears from the plaintiff's pleadings that his cattle were kept in a pasture upon his own lands, and that they escaped therefrom through the failure of the defendants to maintain their part of the partition fence. The defendants plead that there was no partition fence between the respective lands of plaintiff and defendants, and that no part of the partition fence had ever been assigned to the defendants for maintenance, and that the parties had respectively followed the custom of keeping their own stock enclosed upon their own premises. In so far as these statements differ, we must accept the allegation of the plaintiff, for the purpose of this appeal.

The right of dstraint of trespassing stock running at large is conferred by Section 2313 of the Code, which is as follows:

"Any animal trespassing upon land fenced as provided by law may be distrained by the owner of such land, and held for all damages done thereon by it, unless it escaped from adjoining land in consequence of the neglect of such landowner to maintain his part of a lawful partition fence. The owner of the land from which such animal escaped shall also be liable for such damages if it escaped therefrom in consequence of his neglect to maintain his part of a lawful partition fence, or if the trespassing animal was not lawfully upon his land, and he had knowledge thereof. *If there be no lawful partition fence, and the line thereof has not been assigned either by the fence viewers or by agreement of the parties, any animal trespassing across such partition line shall not be distrained, nor shall there be any liability therefor.*"

It will be seen from the foregoing that the statute does not confer the power of dstraint of the stock of an adjoining landowner if there is no partition fence between the ad-

joining lands respectively, and if the stock crosses the partition line; or if the stock escapes through a part of the partition fence in consequence of the neglect of the distrainer to maintain the same.

This section of the statute was before us for consideration in *Miracle P. Stone Co. v. Roth*, 144 Iowa 656, and *Lint v. Malone*, 159 Iowa 155, 156. In the cited cases, we held, in substance, that one adjoining landowner may neither distrain nor recover damages for trespassing stock, under the excepted circumstances specified in such section. The defendants, therefore, had no right to distrain the plaintiff's stock. They added nothing to their rights by calling in the township trustees to assess damages. Unless there was a right of distraint, the assessment of damages was futile. The defendants contend that the action of the trustees in assessing damages was in the nature of an adjudication, and that the only remedy left to the plaintiff was to appeal therefrom. This contention cannot be sustained. The very jurisdiction of the trustees rested upon the right of distraint. If there was no right of distraint, there was no jurisdiction. If they had no jurisdiction to assess damages, they could not acquire jurisdiction by simply assessing the damages. Undoubtedly, the want of jurisdiction could have been pressed upon the attention of the trustees themselves, and they could properly refuse to assess damages, for want of jurisdiction. *Duffees v. Judd*, 48 Iowa 256. But their jurisdiction, nevertheless, was not aided by what they did or what they failed to do.

The sum of the situation, therefore, is that the defendants distrained when they had no right to distrain; though they had a right to take temporary possession of the cattle, for the purpose of protecting their own crops. The plaintiff served a formal written notice and demand for the possession before pressing replevin, wherein he claimed his right of possession of his own cattle and denied the defendants'

right of distraint under the statute. This notice was sufficient to wholly terminate any further right of detention on the part of the defendants. We reach the conclusion, therefore, that, upon the facts appearing in the pleadings, judgment for possession of the property should have been awarded to the plaintiff.—*Reversed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

TONY STAJCAR, Appellant, v. JACOB M. DICKINSON, Appellee.

INTOXICATING LIQUORS: Interstate Shipments for Private Consumption. Interstate shipments of intoxicating liquors which are for the *private consumption* of the consignee are, since the passage of the Webb-Kenyon Act, violative of Section 2419, Code, 1897, and damages may not be recovered for the loss of such a shipment.

CONSTITUTIONAL LAW: Title—Sufficiency. The title to the act which enacted Section 2421-b, Code Suppl. Supp., 1915, relating to the record to be kept by common carriers *in re* shipment of intoxicating liquors, is held to amply meet all constitutional requirements.

STATUTES: Revival of Unconstitutional Act. An unconstitutional, but unrepealed, statute becomes operative, without re-enactment, whenever the constitutional objections are removed. So held as to Sec. 2419, Code, 1897, which was originally violative of the Federal interstate commerce clause, but was subsequently revived by the passage of the Webb-Kenyon Act.

CONTRACTS: Violation of Statute. Contracts which contemplate and require a violation of statute law are absolutely void. So held as to a bill of lading covering a prohibited shipment of intoxicating liquors for the private consumption of the consignee.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

DECEMBER 14, 1918.

PLAINTIFF brought suit in justice of the peace court to
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recover \$7.35, the alleged value of a barrel of beer consigned to him at Valley Junction, Iowa. The shipment was from Omaha, Nebraska, over the line of defendant's railway. Pleadings were filed in justice court, the plaintiff alleging in his petition the purchase and shipment of the liquor from Omaha, Nebraska, and that same was received at the office of defendant in Valley Junction, Iowa, and by its agents delivered to some other person, without the knowledge or consent of plaintiff, and asking judgment for the above amount and costs. Attached to plaintiff's petition was the original bill of lading, showing the name of the consignee, date of consignment, and statement of the goods shipped, which was offered in evidence. Plaintiff testified that he ordered the liquor for his private use, and that he did not intend to keep the same for sale or sell any part thereof. At the close of plaintiff's testimony, the defendant moved the justice to dismiss plaintiff's petition, upon the ground that the evidence showed that the claim was for the value of intoxicating liquors shipped in violation of the laws of the state of Iowa, and that the contract therefor was void, and no recovery of damages could be had on account of the loss of said shipment. The motion was overruled, and judgment entered in favor of plaintiff for the full amount asked. The cause was taken to the district court of Polk County upon a writ of error, which, upon hearing, was sustained, and order entered directing the justice to sustain defendant's motion, dismiss the action, and enter judgment against the plaintiff for costs. The district court further granted plaintiff permission to appeal, as provided by Section 4110 of the Code of 1897. From the order and judgment of the district court, plaintiff appeals.—*Reversed in part; affirmed in part.*

Vernon Koons, for appellant.

J. G. Gamble, F. W. Sargent, and C. A. Robbins, for appellee.

STEVENS, J.—I. The question presented upon this appeal involves the construction of certain sections of the statute, to wit: 2419 of the Code of 1897, and 2421-a and 2421-b, Supplemental Supplement to the Code, 1915, which are as follows:

1. INTOXICATING
LIQUORS:
interstate ship-
ments for pri-
vate consump-
tion.

“Section 2419. If any express or railway company, or any common carrier, or person, or anyone as the agent or employee thereof, shall transport or convey to any person within this state any intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county to which the shipment is made, such company, common carrier, person, agent or employee thereof, shall, upon conviction, be fined in the sum of one hundred dollars for each offense and pay the costs of prosecution, including a reasonable attorney's fee to be taxed by the court. The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. The defendant in a prosecution under this section may show by a preponderance of the evidence as a defense that the character, circumstances and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of this chapter relating to the mulct tax.

“Section 2421-a. It shall be unlawful for any railroad company, express company, or other common carrier, or for any person, corporation, steamboat or steamboat line, to carry any intoxicating liquor into the state or from one point to another within the state for the purpose of delivering, or to deliver same to any person, company or corporation within the state, except for lawful purposes.

"Section 2421-b. It shall be the duty of any railroad company, express company, or other common carrier, or corporation, steamboat or steamboat line, or person, who shall for hire carry any intoxicating liquor into the state, or from one point to another within the state, for the purpose of delivery, and who shall deliver such intoxicating liquor to any person, company, or corporation, to keep, at each station or office where it employs an agent or other person to make delivery of freight and keep records relative thereto, a record book, wherein such carrier shall promptly upon receipt, and prior to delivery, enter in ink, in legible writing, in full, the name of the consignor of each shipment of intoxicating liquor to be delivered from or through such station, from where shipped, the date of arrival, the quantity and kind of liquor, so far as disclosed by lettering on the package or by the carrier's records, and to whom and where consigned, and the date delivered. No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee until such consignee upon such record book enters in ink, in legible writing, his full name and residence or place of business, giving the name of the town or city, and the street name and number where there is such, and certifies that such liquor is for his own lawful purposes or private consumption."

The trial court, in the construction of Section 2421-b. held that the last sentence thereof was intended to authorize common carriers to transport and deliver intoxicating liquors within this state to the consignee

named in the bill of lading, who had caused said liquors to be shipped to him for his private consumption, upon compliance with the requirements of said statute as to certifying said fact upon the record kept by the carrier at the point of delivery. It was contended by counsel for appellee in the court below, as it is in this court, that this provision of the statute is uncon-

2. CONSTITUTIONAL LAW: title sufficiency.

stitutional, for the reason that no reference was made thereto in the title to the act, as required by Section 29, Article 3, Constitution of the state of Iowa, as follows:

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

This section does not, in terms nor by implication, repeal any prior statutes, nor authorize common carriers to transport liquor from a point outside of, or to a point within, this state, or between points therein. What it does, is to provide that certain records of the receipt and delivery of intoxicating liquors shall be kept by common carriers at certain of its offices or stations therein designated.

Separated into its several parts, the statute requires:

(a) That common carriers, or other persons who shall carry any intoxicating liquors into this state or from one point to another therein for hire, and for the purpose of delivery, or (b) who shall deliver such intoxicating liquor to any person, company, or corporation, shall (c) keep at each station or office where it employs an agent or other person to make delivery of freight and keep records relative thereto, a record book, wherein (d) there shall be entered, promptly upon receipt, and prior to delivery thereof, in ink, in legible writing, in full, the name of the consignor of each shipment of intoxicating liquor to be delivered from or through such station, from where shipped, date of arrival, quantity and kind of liquor, so far as shown by lettering on the package or the carrier's record, to whom and where consigned, and the date of delivery, and (e) before delivery, shall require the consignee to enter upon said record book, in legible writing, in ink, his full name, residence, place of business, and his certificate that such liquor is for his own lawful purposes or private consumption.

The subject-matter of the act of which Section 2421-b is a part is different from that of Section 2419. The latter statute, as hereinafter fully discussed, makes certain acts of common carriers a misdemeanor; whereas Section 2421-b requires common carriers to provide and keep a record of liquors received and delivered at certain stations, as above stated. The law relating to the shipment and transportation of intoxicating liquors by common carriers remained the same after the enactment of Section 2421-b as prior thereto. The provisions of the Constitution requiring the subject of every legislative act to be expressed in the title were fully complied with.

The statute requires certain carriers to keep a daily record of shipments of intoxicating liquors, and prohibits delivery thereof without compliance therewith, and makes same a misdemeanor. The title of the act is as follows, and fully complies with the Constitution:

"An act requiring common carriers of intoxicating liquor to keep a daily record of such shipments; prohibiting the delivery of such shipments unless so recorded; providing for inspection of such records by certain public officers designated; and making the failure to comply with the requirements of this act a misdemeanor."

A mere reading of the title will show full compliance with the constitutional requirement; and hence, the holding of the district court that a portion of Section 2421-b is unconstitutional cannot be sustained.

II. Having held the act constitutional, the next questions presented are: What, if any, change resulted, by the above enactment, in the law of this state relative to the shipment of intoxicating liquors therein, and what effect must be given to the statute in question, and what, if any, application must be made of Section 2419 to the facts involved?

2. STATUTES: re-
vival of uncon-
stitutional act.

Section 2419, *supra*, makes the transportation of liquor by common carriers within this state a misdemeanor, except to permit holders who have previously furnished such carrier with a certificate from the clerk of the court of the county issuing the permit to which shipment is made, showing the consignee to be a permit holder. It provides further, however, that, if the defendant in a prosecution for the violation of this section shows, by a preponderance of the evidence, that the character, circumstances, and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of the mulct law, same will operate as a complete defense to such prosecution. It will be observed that this statute does not, in terms, prohibit the common carrier from transporting liquor into this state, but makes it a misdemeanor for it to do so. The effect, however, of the statute is none the less prohibitive.

Section 2421-a, *supra*, supplements Section 2419, and makes it unlawful for any common carrier or person to carry intoxicating liquors into the state, or from one point to another within the state, for the purpose of delivering same to any person, company, or corporation therein, except for lawful purposes. This section does not define the term "lawful purposes," nor need we, at this time, construe or apply the same, as it is not claimed that plaintiff comes within any of the classes designated by statute as specifically excepted from the operation of the statute; and, if prohibited by Section 2419, the shipment was illegal.

The shipment in question was delivered to defendant at Omaha, Nebraska, and shipped therefrom to Valley Junction, in this state. A bill of lading was issued, and the shipment was handled in the ordinary manner for handling other freight.

The Supreme Court of the United States, in *Rhodes v. State of Iowa*, 170 U. S. 412 (42 L. Ed. 1088), held Section

2419 unconstitutional. Although non-enforcible, it remained a part of the statute, and, by the enactment of the so-called Webb-Kenyon Act, became operative and enforcible the same as though it had not previously been declared unconstitutional, or had been enacted by the legislature subsequent to the passage of the law of Congress. *State v. United States Exp. Co.*, 164 Iowa 112; *Miller Brewing Co. v. Stevens*, 102 Iowa 60.

The Webb-Kenyon law, which divested intoxicating liquors shipped from one state into another in violation of the laws of that state of their interstate character, was passed by Congress after the decision in *Rhodes v. State*, supra, and prior to the enactment of Sections 2421-a and 2421-b. supra. The constitutionality of this act was the subject of much controversy among lawyers, until the decision of the Supreme Court of the United States in *Clark Distilling Co. v. Western Md. R. Co.*, 242 U. S. 311, was handed down, on January 8, 1917, holding the law constitutional.

The trial court evidently construed Section 2421-b as conferring authority upon common carriers to transport and deliver intoxicating liquors to persons within this state desiring the same for private consumption; but, in our opinion, the act does not accomplish that purpose. It does no more than provide for and require the keeping of certain records by common carriers at certain offices or stations of the receipt and delivery of intoxicating liquors.

The most that can be claimed for the last clause of this section is that it apparently assumes that the individual had the right to have intoxicating liquors shipped and delivered to him for his private consumption. If this right is not denied by statute, the carrier would be compelled to receive and transport same, and the effect of the statute under consideration would be, to some extent, to regulate such shipments. The purpose of the record to be kept is expressed in Section 2421-d. It is to give publicity to liquor

shipments, and to enable officers charged with the prosecution of violations of the statute prohibiting the keeping for sale or selling thereof to obtain information helpful in making proof of the claimed violation.

Section 2419 makes it a misdemeanor for a common carrier to transport intoxicating liquor within this state, except for delivery to a lawful permit holder, upon compliance with the requirements therein set forth, and exempts it from the penalty of the law, if it is shown by a preponderance of the evidence that the shipment which has been made the basis of a prosecution was to a person who had complied with the provisions of the mulct law, or when the character of the shipment was unknown to it.

The legislature, in the enactment of the latter clause of Section 2421-b, may have assumed that the law as it existed did not prohibit shipments of liquor by common carriers into this state for private consumption, or that it was without authority to do so.

This court, in *State v. Wignall*, 150 Iowa 650, the opinion in which was filed prior to the enactment of the Webb-Kenyon law, used language which might indicate that it held the view that the legislature was without power to prohibit the shipment of liquor into this state for personal use. The language used is clearly dictum, and doubtless the writer of the opinion had in mind the decision of the Supreme Court of the United States in *Rhodes v. State*, supra, declaring Section 2419 in violation of the Federal Constitution. The effect of the enactment of the Webb-Kenyon law, divesting shipments of intoxicating liquors into a state in contravention of the laws thereof of their interstate character, had the effect to revive and render Section 2419 operative without re-enactment. *State v. United States Exp. Co.*, 164 Iowa 112; *Miller Brewing Co. v. Stevens*, 102 Iowa 60. The Webb-Kenyon Act and Section 2419 were in full force at the time the transactions involved in this case were

had, and we have only to determine whether same are applicable thereto, and, if so, the effect thereof.

Section 2419, as above stated, makes it a misdemeanor for a common carrier to transport liquor within this state and deliver same to a person not coming within one of the exceptions contained therein. This statute must be held to apply to all shipments, to whomsoever made, or for whatever purpose. A common carrier charged with its violation would not be permitted to say in defense that the shipment challenged by the prosecution was to a person desiring the liquor for private consumption. The statute makes every shipment a misdemeanor, except those to certain persons specifically named and designated therein.

The United States Circuit Court of Appeals for the Seventh Circuit, in *Hamm Brewing Co. v. Chicago, R. I. & P. R. Co.*, 243 Fed. 143, in which the state of Iowa, as intervenor, appealed "from a decree of the district court making permanent its preliminary mandatory order directing the receiver for the Chicago, Rock Island & Pacific Railway Company to receive, transport and deliver any beer or other fermented malt liquors, sold and consigned in Minnesota, Wisconsin or Illinois by the complainants the Hamm Brewing Company, the Heilman Brewing Company, and the Rock Island Brewing Company, or any other person similarly situated, to persons residing in the state of Iowa who shall have purchased the liquor for their own lawful purposes and private consumption, whenever the purchaser shall in writing authorize the delivery of the liquor by the carrier to some designated person, for the purpose of carrying it from the railway station to the residence of the purchaser, provided the writing certifies that the beer or fermented malt liquor is for the purchaser's own consumption," held as follows:

"What, then, is the sound construction of Section 2419? In express terms, it prohibits only the transportation or con-

veyance to any person of intoxicants; it does not expressly prohibit their possession or receipt by him. But such a receipt necessarily implies a conveyance to and delivery by another. And while the recipient, as such, may not be a violator of the law, his receipt of the liquor from the carrier necessarily involves a violation of the law by the carrier that illegally conveys it to him. The receipt, then, should fairly be deemed to be in violation of the law of Iowa, whether the carrier alone or the recipient as well be punishable therefor. And while the West Virginia act, considered in the *Clark Distilling Co.* case, supra, expressly forbade the receipt or possession of liquor, irrespective of the use to which it was to be put, the Iowa act, in our judgment, no less effectually covers the same ground."

While the above decision is not binding upon this court as a precedent, it is, nevertheless, as the decision of a distinguished Federal appellate court construing the identical statute under consideration, persuasive. The Supreme Court of the United States, in *Clark Distilling Co. v. Western Md. R. Co.*, supra, sustained the constitutionality of a West Virginia act, prohibiting the transportation of intoxicating liquors into that state for private consumption.

It is elementary that damages cannot be recovered for the violation of a contract entered into for an immoral consideration, or where the making thereof is an offense under the statute, or where same is, in terms, prohibited thereby. *Koepke v. Peper*, 155 Iowa 687; *Oscanyan v. Arms Co.*, 103 U. S. 261; *McMullen v. Hoffman*, 174 U. S. 639. As plaintiff does not come within the exceptions mentioned in Section 2419, the shipment of the liquor consigned to him was a violation of the above statute, and no action for damages could be maintained on account of the failure to deliver the liquor to him.

What is said above is without reference to the act of

4. CONTRACTS: violation of statute.

Congress commonly called the "Reed Bone Dry Law," 39 Stat. at L. 1069, which did not become effective until July 1, 1917, but which provided:

"Whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid; provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state; provided, further, that the postmaster general is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

It therefore follows that, in so far as the ruling and judgment of the district court held any part of Section 2421-b unconstitutional, it is reversed; otherwise, the judgment of the lower court is affirmed.—*Reversed in part; affirmed in part.*

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

STATE OF IOWA, Appellant, v. BITTER ROOT VALLEY IRRIGATION COMPANY, Appellee.

APPEARANCE: Procedure under Special Appearance. A special appearance for the purpose of attacking the jurisdiction of the court may be made through the medium of a motion, duly supported by affidavits, to quash the service.

APPEARANCE: Who May Make Special Appearance. A foreign corporation which has not taken out a permit to do business in this state may make special appearance in order to plead to the jurisdiction of the court. (See Sec. 1638, Code, 1897.)

APPEARANCE: What Constitutes General Appearance. One who
3 enters a special appearance, in order to attack the jurisdiction of the court, will not necessarily be held to have abandoned his special appearance and to have made a general appearance, by the fact that he makes an allegation which apparently goes to the merits of the action.

PRINCIPLE APPLIED: The State brought action against a foreign corporation, and alleged that the defendant had been doing business in this state without the statutory permit. Judgment was prayed for the statutory penalty. Service was had on an alleged agent of the defendant. Defendant announced a special appearance, and alleged that the party upon whom service was had, was not its agent. The defendant also alleged: "*That it is not now, and never has been, transacting business in Iowa.*" Held, the latter allegation was manifestly intended to bear solely on the validity of the service, and not on the merits of the petition.

PROCESS: Discharged Agent. Service is ineffectual when made
4 on one who has been defendant's agent, but whose employment has been terminated prior to the service in question.

AFFIDAVITS: Cross-Examination. In the proceedings which are
5 properly heard on affidavits, the court may refuse to require the personal presence of an affiant for cross-examination.

EVIDENCE: Compelling Production. The court may refuse an
6 order for the production of books and papers.. (Sec. 4654, Code, 1897.)

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

DECEMBER 14, 1918.

DEFENDANT appeared specially to object to the jurisdiction of the court, because, as it alleged, no proper notice was served. The trial court sustained the defendant's exceptions, or pleas, to the jurisdiction, and the plaintiff appeals.
—*Affirmed.*

G. P. Linville, County Attorney, and *Rickel & Dennis*, for appellant.

J. M. Grimm, *J. H. Trewin*, and *George W. Miller*, for appellee.

PRESTON, C. J.—The case was submitted upon affidavits and certain exhibits. But we have a record of 288 pages, 147 of which are abstract and additional abstract.

This is an action at law, to recover forfeitures incurred by the defendant, as plaintiff alleges, for a violation of Section 1638 of the Code, by doing business in Iowa, as plaintiff says, without previously obtaining a valid permit from the state for that purpose. The defendant is a foreign corporation. Plaintiff asks to recover forfeitures in the amount of \$100,000. The petition, filed November 6, 1914, alleges that, since July 18, 1910, defendant had unlawfully carried on its business of selling lands located in Montana to different parties; that it had done business at different cities and towns in the state. The trial court, in its ruling, did not pass upon the plaintiff's right to recover against defendant by reason of the alleged forfeiture incurred, so that the only issues tried in the district court were in regard to certain pleas to the jurisdiction of the court, which were filed by the defendant. It is claimed that jurisdiction was obtained by service on three different persons, each of whom, it is claimed, was an agent of the defendant. The persons so served were J. W. Laughlin, Frank Snouffer, and D. E. Dalbey. The notice on Laughlin was served by the sheriff, November 6, 1914, in Linn County; the notice on Snouffer was served by the sheriff on March 8, 1915, in Linn County; and on March 20, 1915, Dalbey accepted service of said notice at Cedar Rapids, and recites as agent of the defendant company. These notices were served and filed at different times, and three separate pleas to the jurisdiction were filed by the defendant. Defendant filed affidavits and

exhibits attached thereto, to sustain its pleas to the jurisdiction, and plaintiff filed resisting affidavits, with exhibits attached. Other motions were made by plaintiff during the trial, which will be referred to later. The three pleas to the jurisdiction were similar, and we shall set out the substance of one, as follows:

"Comes now the defendant, and, appearing especially and only for the purpose of questioning the jurisdiction of the court herein, alleges:

"First. That it is a corporation organized and existing under the laws of the state of Montana, and is not a resident or citizen of the state of Iowa, and is not now and never has been transacting business in the state of Iowa.

"Second. That the original notice in this action was served upon one J. W. Laughlin, claimed to be an agent of the defendant, but that said J. W. Laughlin is not and was not, at the time of said alleged service, nor for a long time prior thereto, an agent or employe of this defendant, and never had any connection whatever, as agent or otherwise, with any of the transactions upon which the claim made in this suit is based, or out of which it grows; and the said J. W. Laughlin, at the time and for a long time prior to the service of the said original notice, had no right or authority whatever to represent this defendant as its agent in any capacity, or in reference to any matter, and had no right or authority to transact any business of any nature whatsoever for this defendant; and that, at the time of the alleged service of said notice upon the said J. W. Laughlin, this defendant had no office or agency in the state of Iowa for the transaction of any business whatsoever in charge of the said J. W. Laughlin or any other person.

"Third. That the alleged service does not confer any jurisdiction over defendant.

"Fourth. That, if the court should assume to assert jurisdiction under such service, the court would violate the

Fifth and Fourteenth Amendments to the Constitution of the United States; that defendant is not, and was not at the time of such attempted service, doing any business in the state of Iowa, nor was said Laughlin its agent, in such sense that service upon him would be service upon the defendant.

"Fifth. That defendant was engaged in interstate commerce, and was not at any time engaged in transacting business in Iowa.

"Wherefore, defendant moves the court to quash the return on said original notice, and to dismiss this action for want of jurisdiction."

It is claimed by appellee that the present case is the outgrowth and aftermath of two suits brought in the courts of Cedar Rapids by J. W. Laughlin, one of the parties upon whom one of the original notices was served in this suit. It appears by defendant's affidavits that said Laughlin claimed, in the two suits just referred to, that there were certain commissions due him from the defendant, and assigned his claim therefor to one Newman. Newman brought suit, and service of notice was attempted to be made upon a clerk in the employ of defendant in their office in Chicago, but who was temporarily in Cedar Rapids for the purpose of getting a traveling bag, which was the personal property of one Lemon, and upon J. W. Laughlin, the assignor of the claim. A plea to the jurisdiction was filed in that case, but the case was finally settled by stipulation, showing that Laughlin had been paid more than the commissions due him. In the settlement, attorneys other than Rickel & Dennis represented Laughlin.

The other of said two suits was brought in the name of Herron against defendant on the claim assigned to him by Laughlin for \$2,000 alleged commissions. Laughlin, assuming to act as agent for the defendant, accepted service of the original notice. Defendant's affidavits show that

said Laughlin never advised defendant company, nor any of its officers or agents, that he had accepted service of said notice. A plea to the jurisdiction was filed in said case, in which it was set up that Laughlin's agency, whatever it was, had terminated before the service on him or the acceptance of notice by him, and that such an acceptance was an attempt to perpetrate a fraud upon the court and the defendant. A petition for removal of said cause to the Federal court was filed, and plaintiff dismissed the case.

Thereafter, the instant suit was commenced. It should have been stated that defendant announced that it appeared specially.

1. The first question raised by appellant is as to whether defendant had the right to plead and rely on Section 3541 of the Code, as amended by Chapter 162, Acts of the Thirty-Fourth General Assembly. Sub-division 4 of which provides:

1. **APPEARANCE:**
procedure under
special appear-
ance.

"Any defendant may appear specially

for the sole purpose of attacking the jurisdiction of the court. Such special appearance shall be announced at the time it is made and shall limit the party to jurisdictional matters only and shall give him no right to plead to the merits of the case."

It will be noted that the statute quoted does not state how the question of jurisdiction may be raised. Appellant's contention is that, because Code Section 3561 provides that defendant may demur to the petition only where it appears on its face "that the court has no jurisdiction of the person of the defendant or the subject of the action," defendant should have raised the question by answer, under Section 3563 of the Code, which provides:

"When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer."

Appellant contends that this would present a question

of fact, for the determination of a jury; or that the question should be raised by answer and plea in abatement, under Section 3642 of the Code. It should be noted that the sections quoted refer to the petition. We do not understand that defendant was in any manner attacking the petition in this case by its special appearance. Appellant cites authority that, under the common law, defects in the service of process may be taken advantage of by a plea in abatement, rather than by motion to dismiss, if the defects in the service do not appear on the face of the proceeding.

Another claim by appellant is that, because Section 1638 of the Code prohibits a foreign corporation which has not taken out a permit from exercising any rights or privileges conferred upon corporations until it has done so, it prohibits the defendant from raising the question of the special appearance as to the jurisdiction of the court over it. But we think this is unsound, and shall not further discuss that proposition.

In this case, the paper filed by defendant was designated a plea to the jurisdiction, but the relief asked was by motion to quash the service. Without determining whether any other form of procedure would have been proper, we think this was so, for the purpose of determining the jurisdiction of the person. The statutes of Iowa specifically authorize the use of affidavits to sustain controverted questions of fact arising on motions. Code Section 3833. And Code Section 3831 defines a motion as a written application for an order, etc. It seems to have been the practice, in our courts and many others, to try such questions on motion, supported and resisted by affidavits. It is claimed by appellee that appellant waived any objection to the method of producing the evidence, by its filing affidavits in resistance, before plaintiff filed the motion to strike out the affidavits, and before raising the question as to the method of procedure. This may be so, but we do not determine.

2. APPEARANCE:
who may make
special appear-
ance.

Wall v. Chesapeake & O. R. Co., 95 Fed. 398, and numerous cases therein referred to, are cited by appellee as being in point. That was a suit brought against defendant corporation, and the return of service made by the sheriff stated that the person served was the agent of the corporation, as in the instant case. The suit was removed to the Federal court, and a motion made to quash the service, supported by affidavits. The contention was that the motion to quash was improper, and that the defendant should have filed a plea in abatement, and had a trial of the question by jury; because such was the practice in the courts of Illinois. But the court said:

"The rule * * * prevailing in the Illinois state courts is contrary to the general rule on the subject in this country, as well as in England. There is no more reason for requiring a plea in abatement and a jury trial to test the question of a sufficient service of a summons than there would be to require the same proceeding, including a jury trial, in all cases where now a motion is held to be the proper remedy. The constitutional right to a jury trial obtains whenever there is any question at issue involving the life, liberty or property of the citizen. But a motion to quash a service of summons, or any other process or order, for insufficiency in the service, involves no such substantial right. * * * Another service can be made, and the action proceed. * * * No substantial right is affected by the decision. There are many matters pending in the progress of the case which are daily determined upon motion that are much more important in affecting substantial rights than a motion to set aside an irregular service of process. Take, for instance, the motion for a new trial upon newly discovered evidence after the plaintiff has recovered a substantial verdict."

The court also quotes the English rule to try such questions on affidavit, and the reasons therefor, and says that

convenience and justice demand that questions of this sort should not be the subject of a plea. The court cites a number of American cases in support of the position that the sheriff's return is not conclusive, and may be disputed by affidavits.

This disposes of appellant's claim that it was entitled to a jury trial unless the answer of the defendant was a plea to the merits.

2. It will be seen, from a reading of the pleading or motion filed by defendant, that, with other matter, there is the statement that it is not now and never has been trans-

acting business in the state of Iowa. Plain-

3. APPEARANCE:
what constitutes
general appear-
ance.

tiff first moved to strike out that part of the answer, because it was a plea to the merits, contrary to the special appearance statute;

and later, upon the overruling of that motion, demanded a jury, because defendant had pleaded to the merits. Doubtless, if this sentence, appearing in the plea with other matter, should be considered as a plea to the merits, it would amount to a general appearance. We think the pleading ought not to be construed as a plea to the merits. There are several reasons for so holding: among them, that defendant announced, and its pleading shows on its face, that it was a special appearance; the trial court so construed it, and refused to pass upon the merits of the case. One place where the sentence referred to occurs, is where defendant is alleging that it is a Montana corporation, and not an Iowa corporation,—for the purpose, doubtless, of showing that it was a foreign corporation. As before shown, service was had upon three parties, as the supposed agents of defendant; and we have no doubt that defendant's theory was that it was not transacting any business within the state, and therefore it could have no agents transacting its business within the state, upon whom service could be had. In fact, one of defendant's claims is, and numerous cases from other

jurisdictions are cited to the proposition, that, whatever had theretofore been done by any of the parties supposed to have been agents, they were only soliciting agents, and that this was not doing business within the state, and that foreign corporations selling goods on orders received from another state are not doing business in the state. It may be that the expression in the answer is unfortunate, and it may be that the court might properly have stricken out the sentence referred to. But, taking the pleading all together, it is quite clear to us that it did not amount to a plea to the merits.

3. As to whether the three persons named, upon whom service was had, were agents of the company, the evidence is very voluminous, and we shall not attempt to set it out in detail. It is enough to say that the af-

4. Process: discharged agent.

fidavits of plaintiff gave circumstances and instances tending to show that these parties, or some of them, were at one time transacting business for the defendant in the state. But this is denied by the testimony on behalf of the defendant; and they deny that the parties, or any of them, had any authority to so act for it, even though they assumed to do so. As to some of them, there was evidence that there was a contract at one time, but that, later, and before the commencement of this suit or the service of notice, it had been cancelled. We are satisfied with the finding of the trial court; and, though the case was heard on affidavits, we think some weight should be given to the finding of the trial court.

4. It is strenuously urged by appellee that whatever the relations between it and the three persons named had theretofore been, at the time of the service and acceptance of notice, such relations had been terminated. It was stipulated on the hearing:

"That Dalbey removed from Cedar Rapids, Iowa, to Montana, about July, 1912, and has not been in Cedar

Rapids, Linn County, Iowa, since that time, and that, at the time of the acceptance of service of the original notice in this case by him, he was a resident of Montana, and had been since about July, 1912, and that said acceptance was made in Montana."

As to Snouffer, it appears that, early in 1912, an arrangement had been made by one Huntington with Snouffer,—Snouffer being the editor of a newspaper in Cedar Rapids,—to run a "display ad" in his paper, with reference to the lands of defendant company, and that his compensation was to be a certain amount per acre on lands sold, out of commissions which would be due from the company to its soliciting agents, on account of sales made in Linn County; that this arrangement with Snouffer was to run a year, subject to termination at any time on 60 days' notice. Plaintiff claims that the contract of Huntington was such that he had authority to employ the subagent, Snouffer. But defendant denies that Huntington had any such authority, and says that it knew nothing about the matter for a long time afterwards, and that the arrangement with Snouffer had long expired, and no further arrangement had ever been made.

The evidence of defendant shows, as to Laughlin, that he was not authorized to do the things which plaintiff says he did do, and which tended to show that he was the agent for defendant. It is shown, too, that his relations with the company had been terminated prior to the service of notice. Indeed, as we understand appellant's argument, this fact is not seriously disputed, for it is claimed that, as to Laughlin, the evidence shows that the matters of his agency were unadjusted and not fully closed, when service was made on him: that is, because there was some claim that there was money due Laughlin from the defendant company,—which the defendant denies. Its evidence, we think, sustains the defendant's claim. Plaintiff further claims that,

as to Laughlin and the others, these parties were such as that notice could be served upon them, because they were the agents who transacted the business out of which the liability grew. We assume that counsel refer to Section 3500 of the Code in this connection, though they do not cite it. However, the cases they do cite refer to this section of the Code. Other cases are *Ockerson v. Burnham & Co.*, 63 Iowa 570; *Bradshaw v. Des Moines Ins. Co.*, 154 Iowa 101, 109; and other cases. The *Ockerson* case did not involve service on a foreign corporation at all, but simply determined the venue of a suit between residents of the state of Iowa; and the *Bradshaw* case grew out of an insurance contract, and it is held that Sections 3530 and 3532 authorize service on agents of insurance companies. The case of *Murphy v. Albany Pecan Dev. Co.*, 169 Iowa 542, is distinguishable in its facts from the instant case in several particulars: among them, that, in that case, inquiry was made of the defendant itself whether the person served was the agent, and the reply was that he was agent. It is denied in the instant case that any of the parties were agents for the defendant at any time. It is doubtful whether there was any business transacted by the parties served, out of which the alleged liability herein grows. The evidence of the defendant shows, and the court was justified in finding, that the defendant had no office or agency in the places where the three persons were served. It is our conclusion that, under the circumstances of this case, the relations between the three parties served and the defendant having been terminated prior to the service of notice, the service thereof was rendered ineffectual; and that the court rightly held that it did not acquire jurisdiction of the person of the defendant.

5. Plaintiff asked that the persons making affidavits for defendant should be required to appear for cross-examination. The trial court refused to make such an order,

5. **AFFIDAVITS :
cross-examina-
tion.**

and this is assigned as error. The defendant resisted such application on numerous grounds: among them, that the affiants are not within the jurisdiction of the court, and that the defendant is unable to produce them for cross-examination, legally or otherwise; that some of them live in one state and some in others. This may not be so as to all the parties, but the evidence is very fully set out in the affidavits. To stop the hearing and attempt to get the parties from other states would delay the trial, and possibly result in not obtaining the presence of affiants. The statutes, Code Sections 3833 and 4678, provide that the parties may be required by the court to appear for cross-examination, etc. We think it is a matter of discretion with the trial court as to whether it will make an order compelling the appearance of affiants for cross-examination, and that, in this case, the discretion was not abused.

6. The plaintiff filed a petition for the production of books and papers, which was denied by the court. The defendant resisted such application, on the following grounds, among others:

6. **EVIDENCE :
compelling pro-
duction.**

That the court has no jurisdiction over the defendant, nor power to grant such an order, there being on file and undetermined a plea to the jurisdiction and motion to quash service of notice; that it is not shown that any of the information sought is material to any of the issues in the controversy; and that the issues on the main case are not made up, no answer on file, and none due; that the application is for a dragnet order; that the application does not specify what books, papers, and documents are sought to be produced, and is vague, uncertain, and indefinite; that the books and papers of the company are in Montana, and are in constant use, and are required by the company in the conduct of its business; that the purpose of said application is other than to

procure evidence in the cause; and that the suit is not brought in good faith, but for the purpose of harassing the defendant, or intimidating and coercing it into an adjustment of the alleged claims of Laughlin. We shall not set out the petition in full, nor discuss all these grounds, but content ourselves with stating that some of the objections are good. At any rate, we held in *Iowa Loan & Trust Co. v. District Court*, 149 Iowa 66, and *Dalton v. Calhoun County Dist. Ct.*, 164 Iowa 187, that it is a matter of discretion in the trial court.

We have examined the record with care; and, while there may be some other incidental matters discussed, it is our conclusion, upon the whole record, that the ruling of the trial court was right, and its judgment is, therefore,—*Affirmed.*

WEAVER, GAYNOR, and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. DAISY BRENNAN, Appellant.

WITNESSES: Antecedent Character of Witness. The permissible

- 1 range of cross-examination may embrace a showing of the depraved habits, antecedents, and character of the witness.

WITNESSES: Contradictory Statements. A witness may be im-

- 2 peached, on cross-examination, by a showing that he has, on another occasion, made statements which are not only contradictory of his present statements, but wholly at variance with the *obvious purpose* of his present statements, even though such contradictory statements very seriously reflect on the moral character and credibility of the party to the action who has called the witness.

WEAVER, J., dissents as to application made.

CRIMINAL LAW: Ouring Error. The full withdrawal of non-

- 3 inflammatory testimony, followed by ample admonition to the jury to wholly disregard the same, cures any error in its original reception.

CRIMINAL LAW: Oral Instructions. Evidence may be withdrawn from the jury by an oral instruction,—even when given during the deliberations of the jury.

TRIAL: Impeachment of Verdict. Jurors may not impeach their verdict by affidavits to the effect that they did not understand the court's rulings with reference to the rejection of certain testimony.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

DECEMBER 14, 1918.

DEFENDANT appeals from a conviction of manslaughter, and judgment sentencing her to the State Reformatory.—*Affirmed.*

T. F. Bevington, for appellant.

H. M. Havner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

STEVENS, J.—The indictment charges the defendant with the crime of murder. The claim of the State is that, on the evening of the 27th day of April, 1917, she killed one McNulty, in an alley in Sioux City, by stabbing him with a knife. The evidence offered upon the trial tended to show that, on the evening of the alleged killing of McNulty, and shortly prior thereto, the defendant went to the home of his mother, to see deceased, where a controversy arose between them over a letter which defendant claimed he had received from another woman. Defendant left the home of deceased's mother in a fit of anger, and was shortly thereafter followed by deceased. Later in the evening, McNulty was found dead in an alley, and between eight and nine o'clock, defendant returned to the home of his mother, very much excited, and told her that McNulty was hurt. She was shortly thereafter arrested, and taken into custody by the police, and later, it is claimed, admitted that she stabbed

deceased with a butcher knife. This was denied by her upon the witness stand, and evidence was offered on her behalf tending to show that the killing was accidental, and that whatever, if anything, she did, was in the lawful defense of her person. While the evidence is conflicting, the verdict is fully sustained by the evidence.

I. Complaint is made of certain questions propounded to the defendant upon cross-examination. The county attorney thereby sought to elicit from her that she had been arrested in Dakota, in connection with her husband, and that she had been incarcerated in jail for a time, at Sioux City. This evidence bears directly upon her credibility as a witness, and was clearly proper. *State v. Pugsley*, 75 Iowa 742, 743; *State v. Chingren*, 105 Iowa 169; *State v. Peirce*, 178 Iowa 417; *State v. Brooks*, 181 Iowa 874.

II. The evidence also tended somewhat strongly to show that defendant was infatuated with deceased, and that she had complained to him, during the afternoon of the day on which he was killed, of a letter which another woman had written him, and which she claimed to have taken from his brother's mail box. The conversation regarding the letter occurred at the home of the mother of deceased, and in the presence of several witnesses, who testified that, during the course of the conversation, she became very angry, and left the house in an angry mood.

Her husband was called as a witness, and examined in her behalf. He testified in chief that he resided with his wife at 1601 East Fifth Street in Sioux City; that he and defendant were married on March 4, 1909, and had continuously resided together as husband and wife since their marriage. He also testified that he was an invalid, and that, on the evening in question, defendant had, at his request, gone to the store to get him some oranges; that she

1. WITNESSES:
antecedent character of witness.

2. WITNESSES:
contradictory statements.

later returned, without bringing the oranges; that, when she reached the house, she was very much excited, and told him that deceased had assaulted her in the alley, and had said to her, "If I can't have you, nobody can have you,"—and kicked her in the abdomen. He also testified that deceased had the reputation of being a quarrelsome person, and to other matters material to the defense.

The county attorney, upon cross-examination, elicited from the witness the statement that his wife had always been devoted to him, and that they had lived happily together: whereupon he was asked if he remembered filing a petition for divorce, in November, 1914, in which it was alleged that his wife had been cruel to him; that they were living separate and apart; that she had committed acts of prostitution, and was an habitual drunkard. Portions of the divorce petition were read to the witness, and he was asked whether he remembered them, and as to the truth thereof. The witness denied the truth of much of the matters alleged in the petition, or that he had consciously made these statements. Timely objection was made to all of the questions propounded to the witness; and it is now urged by counsel for appellant that the court erroneously permitted the county attorney to pursue this line of cross-examination, and that all of the testimony as to the divorce proceedings, and particularly the allegations of the petition, was extremely prejudicial. It must be confessed that this evidence strongly reflected upon the moral character of the defendant, and her credibility as a witness. The obvious purpose of counsel in examining this witness concerning his marital relations was, so far as possible, to overcome the unfavorable effect of the testimony of several of the State's witnesses, tending to show an improper attachment between the defendant and deceased; that, instead of defendant's being infatuated with him, she was a faithful and devoted wife; and that she and the witness had continuously resided

together; and that it was extremely improbable that the relations between her and deceased suggested by the evidence of the State, would exist. The witness sought by his testimony to create a wrong impression. If the allegations of the divorce petition were true, his testimony could not well be believed, and he was seeking to aid the defendant by giving false testimony upon the trial. The State had a right to show, if it could, that he had made contradictory statements, and for this purpose, his attention was called to the allegations of the petition filed in the divorce proceedings. The witness sought to evade direct answer to the questions of the county attorney, by saying he did not remember; whereupon, the county attorney handed him the original petition for his examination, and to refresh his recollection. It is true that this testimony tended to reflect upon the defendant, who was necessarily more or less prejudiced thereby; but that it was proper cross-examination is beyond question. *State v. Peirce*, 178 Iowa 417. Counsel was not seeking to cross-examine the witness upon matters elicited by him, as counsel for defendant argued, but upon matters sought to be established in chief.

III. One Richards was examined by the State regarding a conversation which he claimed to have had with the defendant, in which he recited to her what a negro by the name of Scott had told him concerning the

3. CRIMINAL LAW: killing of McNulty. Counsel for defendant
curing error.

objected to all that part of the conversation relating to what Scott said, and later, the court orally withdrew this evidence from the jury, cautioned it not to consider the same in any of its deliberations, or to give weight thereto, and at the same time admonished counsel not to refer to it in argument or otherwise, in the presence of the jury during the trial. After the jury had been out for a couple of hours, the court, in response to a question from the foreman as to what consideration should be given to

Scott's story, recalled it, and, in the presence of defendant's counsel, again orally instructed that they give no weight or consideration whatever to this evidence.

The contention of counsel for defendant is that the evidence in question was of a character inherently and necessarily prejudicial to the defendant, and that the attempted withdrawal thereof from the consideration of the jury was ineffectual to cure the error in its admission. While the evidence was important, and related to a vital issue in the case, it was not of a character to arouse the prejudice of the jury; and we see no reason why its withdrawal, under the careful admonition and caution of the court, should not have been effectual to cure the error, if any, in its admission. *State v. Walker*, 133 Iowa 489.

IV. Defendant also complains because the instruction of the court to the jury, when recalled, to give no weight or consideration to the evidence objected to, was not in writing.

Section 3705, Code Supplement, 1913, does

4. CRIMINAL LAW: not require instructions withdrawing evidence from the consideration of the jury to be in writing, and the court properly orally withdrew same. *State v. Helm*, 97 Iowa 378; *State v. Hogan*, 115 Iowa 455; *State v. Scroggs*, 123 Iowa 649; *State v. Cristy*, 154 Iowa 514.

V. Affidavits of jurors were attached to defendant's motion for a new trial, stating that they did not fully understand the court's ruling, but understood that the jurors were at liberty to consider the alleged statements of the witness Scott to Richards, regarding the killing of McNulty. The instructions of the court were clear, and it is difficult to conceive how the jurors could have understood they were to consider evidence twice specifically withdrawn from their consideration. Jurors should not be permitted to thus impeach their verdict. *Strand v. Grinnell Auto. Gar. Co.*, 136

5. TRIAL: impeachment of verdict.

Iowa 68; *State v. Dudley*, 147 Iowa 645; *State v. Rand*, 170 Iowa 25.

The record comes before us in the form of a typewritten transcript, and we have examined the same carefully. Many instructions were requested by the defendant, and exceptions taken to the charge of the court; but we find no error in refusing the requested instructions, and the charge of the court is full, clear, and eminently fair. It is quite apparent that defendant was accorded a fair and impartial trial, and the verdict of the jury is fully warranted by the evidence. As we find no error, the judgment of the court below must be, and is,—*Affirmed*.

PRESTON, C. J., LADD, EVANS, GAYNOR, and SALINGER, JJ., concur.

WEAVER, J. (dissenting). The cross-examination of the defendant upon matters in no manner referred to on her direct examination exhibits wanton and utter disregard of the statute which provides that the cross-examination of an accused person testifying in his own behalf "shall be strictly confined to the matters testified to in the examination in chief." Code, Section 5485. The cross-examination of defendant's husband was, if possible, even less justifiable, and should have been rigidly excluded. The course pursued in these matters was a manifest (and apparently quite successful) effort to drag in irrelevant and collateral matter, not because it had any tendency to establish defendant's guilt, but to prejudice her and her witnesses in the minds of the jurors. The State should not lend itself to this kind of unfair practice, and convictions so obtained should not be upheld. *State v. Thompson*, 127 Iowa 440, 442; *People v. Gotshall*, 123 Mich. 474 (82 N. W. 274); *People v. Crapo*, 76 N. Y. 288, 292; *Buel v. State*, 104 Wis. 132 (80 N. W. 78); *Allen v. United States*, 52 C. C. A. 597; *People v. Rod-*

riquez, 134 Cal. 140; *Johnson v. State*, 8 Wyo. 494; *State v. Grant*, 144 Mo. 56.

In my judgment, the judgment below should be reversed.

STATE OF IOWA, Appellee, v. CHARLES SMITCH, Appellant.

PENITENTIARIES: Defined. "The Reformatory," at Anamosa, is a penitentiary, within the meaning of Section 4897-a, Code Supp., 1907,—now appearing, in an amended form, as Section 4897-a, Code Supp., 1913.

Appeal from Jones District Court.—F. O. ELLISON, Judge.

DECEMBER 14, 1918.

THE defendant, while serving a term in the penitentiary, is charged in the indictment with and was convicted for having escaped from custody when on a public road and railway, going from his work in a place owned by the state outside of the penitentiary enclosure. He appeals.—*Affirmed.*

George C. Lawrence, for appellant.

H. M. Havner and *B. E. Rhinehart*, for appellee.

LADD, J.—The accused was serving a term of less than life in The Reformatory, at Anamosa. While being conducted by one of the guards from the place where he was employed at the state stone quarry, to The Reformatory, upon a road or railway, about September 22, 1911, he escaped from the custody of said guard, and ran away. The court instructed the jury that, if they so found, he should be convicted. The contention of the appellant is that Chapter 147 of the Acts of the Twenty-ninth General Assembly did not denounce as a crime the escape of a convict from The Reformatory. That section provides that:

"If any person confined in a penitentiary for any less period than for life, breaks such prison and escape therefrom; or while employed on work for the state in places and buildings owned or leased by it outside of the penitentiary enclosures, or while on public roads or other ways going to or returning from such places of employment, escapes from custody, he shall be imprisoned in such penitentiary for a term not to exceed five years, to commence from and after the expiration of the original term of his imprisonment."

Prior to the enactment of Chapter 192 of the Acts of the Thirty-second General Assembly, in 1907, what is now known as "The Reformatory" was one of the penitentiaries of the state, and so denominated in the statutes. Section 1 of that chapter declares that:

"Hereafter the penitentiary at Anamosa shall be officially known and designated as 'The Reformatory,' and shall be the reformatory department of the state penitentiary of Iowa."

According to this, it continues a penitentiary, but is merely to bear the name "The Reformatory;" and, to avoid any misunderstanding as to its character, the legislature declared that it shall be a part of the penitentiary,—i. e., the reformatory department.

Section 5 provides for the retention in The Reformatory of certain persons committed to the penitentiary prior to July 4, 1907; and Section 6, for the transfer of convicts from the penitentiary at Fort Madison to said Reformatory. See Sections 5718-a4, 5718-a9, and 5718-a10 of the Code Supplement, 1913. It is manifest, from these statutes and others of this chapter, considered in connection with Section 5718-a4, quoted above, that the legislature changed the name of the penitentiary at Anamosa so as to distinguish it from that at Fort Madison, in the adoption of measures for the reformation and better discipline of prisoners,

and in so doing, did not render the institution at Anamosa other than a penitentiary. This is the more apparent from the meaning of the word "penitentiary." In *State v. Nolan*, 48 Kan. 723 (29 Pac. 568), the court declares that "'penitentiary' is an English word in common use, signifying a prison or place of punishment, * * * and means the place of punishment in which convicts sentenced to confinement and hard labor are confined by authority of law." Such prisons are denominated penitentiaries in some states, and state prisons in others. *United States v. Smith*, 40 Fed. 755.

In *Cross v. State*, 132 Ind. 65 (31 N. E. 473), use of the word "penitentiary" instead of "state's prison," in a verdict, was held not to involve error.

In *Henderson v. People*, 165 Ill. 607 (46 N. E. 711), the statute differed from that now under consideration, the reformatory being expressly established for youths not over sixteen years; and the court held that, as the statutes of that state dealt with the institution as distinct and different from the penitentiary, "one sentenced to the reformatory could not have been said to have served in the penitentiary." See, also, *Beard v. City of Boston*, 151 Mass. 96 (23 N. E. 826).

For these reasons, we are content with the ruling of the trial court that "The Reformatory" at Anamosa was a penitentiary, within the meaning of Chapter 147 of the Acts of the Twenty-ninth General Assembly.—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. HARRY TAYLOR, Appellant.

CRIMINAL LAW: Suspicion Only. No verdict of guilt will be permitted to rest solely on a conjecture of guilt.

Appeal from Wapello District Court.—F. M. HUNTER,
Judge.

DECEMBER 14, 1918.

THE defendant, having been convicted upon a charge of stealing chickens, and sentenced to imprisonment in the penitentiary, appeals. The material facts are stated in the opinion.—*Reversed.*

W. W. Epps, for appellant.

H. M. Havner, Attorney General, and F. C. Davidson, Assistant Attorney General, for appellee.

WEAVER, J.—Mrs. Hattie Hill is a resident of Ottumwa, and, at the date of the alleged larceny, was the fortunate owner of four chickens—three “Rhode Island Reds” and one “Plymouth Rock.” Across the street is a house where the appellant, a native American citizen of African descent, makes his home, when allowed by his wife, of whom the accused says in evidence: “Jessie is larger than I am; she is the best man of the two.” On another street, bearing the title “Smoky Row,” not far away, lives the family of one Clutter, acquaintances and friends of appellant and his wife. On the night of November 28, 1917,—at what hour there is no evidence,—the four chickens belonging to Mrs. Hill disappeared, or at least were not in their accustomed place in the morning. The police being notified of the event, a plain clothes man made a circuit of investigation through the neighborhood. About ten o'clock in the forenoon, the policeman went to Clutter's place, where he saw the defendant's wife, engaged in cleaning four headless chickens. The officer was evidently a connoisseur in chickens; for, though one was already dressed, and the others at some intermediate stage of the cleansing process, he identified them as three Rhode Island Reds and one Plymouth Rock. Mrs. Taylor and the chickens were in Clutter's kitchen. The de-

fendant was not there; but the officer saw him in bed in the adjoining room, but did not disturb him at that time. Being asked where she got the chickens, Mrs. Taylor "named somebody, or tried to describe him." In this connection, the officer also says:

"I found a fellow there by the name of Burns, a white fellow, a fellow that has the habit of coming to town and tanking up and hanging around some of those places. She didn't say it was him."

Elsewhere, he says she told him she got the chickens from Burns. Later, after visiting the Hill home and inspecting the bodiless heads of four chickens there found, the officer, Mr. Grey, returned to Clutter's, where defendant was still in bed, and arrested him. Grey further testifies that, in the discharge of his duties, he was a somewhat frequent caller at this place; that Mrs. Taylor (who, as will appear, had been for some time separated from her husband, the defendant) had been staying there; but that this was the first time he had seen the defendant there. When arrested, the defendant had one arm in bandages, a circumstance of some importance in the history of this case. Grey further swears that, on one of the trips to the Clutter neighborhood, he found an empty grip "in the first house below," which item of property he took into his possession, and introduced in evidence. The State produced a witness who testified that, on the night before the arrest, he met defendant on the street, some distance west of Mrs. Hill's, and saw he was carrying a "traveling case;" and that the grip produced by the State "looks like it."

The foregoing is the entire sum and substance of the State's case. Just how the "grip" referred to is thought to cut a material figure in the case, is not very apparent. It is not shown to have belonged to the defendant. It was not found in his possession, but "in the first house below." There is no showing that it exhibited blood-marks or feathers

of the Rhode Island Red or Plymouth Rock variety, or that chickens of any kind or description had ever been packed or carried in it. Indeed, there is not the slightest proved fact connecting this item of evidence with defendant, except the far-fetched inference drawn from the evidence of the witness, who says no more than that he met defendant in the street, in the darkness of night, and saw in his hand a grip which looked like the one in court; and the still farther-fetched inference that, because it would be possible to pack four dead chickens in such a conveyor, the chickens stolen from Mrs. Hill must have been hidden therein.

The story of the defendant, in which, for the most part, he appears to have been fairly well corroborated, is that he and his wife quarreled and separated, some considerable time before the alleged larceny, and that, after leaving him, she took up her home at Clutter's. Defendant was employed as a porter in a barber shop, and, on the evening before his arrest, his wife called him by phone, and asked him to come to Clutter's for an interview looking to an adjustment of their differences. He answered the call, with the result that a fresh quarrel ensued, and Jessie undertook to make the desired adjustment by the vigorous use of an iron poker. She struck defendant with her weapon across the upper arm, inflicting a painful bruise. A physician was called, who treated the injury and dressed the arm in splints and bandages. The physician testifies that he has no doubt of the genuineness of the injury; that it must have been very painful; and that the muscles of the arm were badly bruised. The defendant denies that he was out of the house that night, or had any part in stealing the chickens, if any were stolen. He also swears that he never owned or had possession of the grip put in evidence, and never saw it until it was produced on the trial; and that his only knowledge of the chickens is the information given him by his wife, that she got them from the man Burns,—who, as we

have already seen, the policeman describes as a worthless "white fellow," who "tanks up," and hangs around such places. The defendant shows that he has been a resident of Ottumwa 14 years, an industrious laborer in various employments; and his good character as an honest man is sustained by the testimony of numerous witnesses, against which the State makes no counter showing.

The testimony falls far short of that conclusive character which will fairly sustain a conviction of crime. Every word of evidence on the part of the State may be accepted as the literal and exact truth, and it justifies no inference or finding that defendant stole the chickens in question. That the stolen property was found in the possession of his wife, with whom he was not living, and in a house of which he was not the owner or proprietor, and in a room which he neither occupied nor controlled, raises no presumption of guilt on his part, and casts on him no burden or necessity to explain the presence of the chickens in that house, or the manner in which his wife came into their possession. While it is not for this court to say that a law which makes it possible to punish the theft of a chicken with a long-term imprisonment in the penitentiary is too drastic, yet the serious results which follow upon a conviction ought to lead both court and prosecutor to the exercise of care that, before the accused is made to suffer such a penalty, the case against him shall be established by evidence sufficient to satisfy the just and impartial mind beyond a reasonable doubt. That such a case is not shown by this record, we are abidingly satisfied.

Indeed, the State presses its argument for an affirmation with a hesitant hand, and frankly admits that "there is no presumption of law against a colored defendant from finding stolen chickens in his wife's possession on Thanksgiving morning," but adds that "a situation of this kind has been known to raise something more than a suspicion in

the minds of those who are acquainted with the proclivities of such people." In other words, while conceding that no presumption of law arises against the accused on account of the color of his skin, it is nevertheless suggested that there is a presumption of fact which may justify the verdict. This appeal to popular prejudice to justify a conviction of crime, without substantial competent evidence, we are quite sure would not have been made by the great State of Iowa, had it been able to find any better reason in the record. There may be a popular impression that an unguarded chicken offers peculiarly strong temptation to a man of color; it is an equally popular impression that a chicken well cooked in any style appeals with very strong inducement to men in holy orders, without regard to color; but we trust the point is not yet reached when the mere fact that a colored porter or lily-white minister of the gospel is seen upon the street at night with a suit case in his hand, is judicially held sufficient to convict him of being a chicken thief, even though it should appear that, on the selfsame night, some evil-minded person had burglarized a poultry coop somewhere in the city.

The judgment of conviction will be reversed and cause remanded, with recommendation that, unless other competent evidence is obtainable, the prosecution be dismissed.
—*Reversed.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. J. F. WATERBURY, Appellant.

FALSE PRETENSES: Immateriality. One charged with obtaining

- 1 property by means of false pretenses may not show that, subsequent to the consummation of the entire deal, part of the property received by him was taken from him by the vendor's creditors.

WITNESSES: Contradictory Statements. A witness may, on proper foundation, be impeached through the medium of a transcript of the witness's former testimony, which is inconsistent with his present testimony.

CRIMINAL LAW: Other Offenses Bearing on Intent, Etc. On the issue whether worthless notes had been negotiated under the pretense that they were valuable, evidence is admissible tending to show that accused had had other notes of the same makers, and had negotiated them under circumstances similar to the ones charged.

Appeal from Benton District Court.—B. F. CUMMINGS,
Judge.

DECEMBER 14, 1918.

INDICTMENT for cheating by false pretenses. There was a verdict of guilty, and judgment thereon. The defendant appeals.—*Affirmed.*

C. E. Wheeler and *Crissman & Linville*, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson*, Assistant Attorney General, *Kirkland & White*, and *Hugh Mossman*, for appellee.

EVANS, J.—The crime for which the defendant was convicted was perpetrated in connection with the purchase of a stock of goods from one Scott. In partial payment therefor, the defendant transferred to Scott a note of \$4,000, signed by Frank Schulte and Charles Schulte. The signers were strangers to Scott. The defendant represented them as being sons of Joe Schulte. It appears from the evidence that Charles and Frank Schulte, the sons of Joe Schulte, were financially responsible, and that Scott, upon inquiry, so ascertained. It also appears in the evidence that Charles Schulte and Frank Schulte, sons of John Schulte, were not financially responsible. The signers of this instrument were, in fact, the sons of John Schulte, and not the sons of

1. FALSE PRE-
TENSES: im-
materiality.

Joe Schulte. Relying upon the defendant's representation, Scott parted with his stock of goods.

Eight errors are assigned as grounds of reversal, six of which pertain to the admission of testimony. The defendant offered to prove that Scott was indebted in an amount of from \$1,800 to \$3,000, and that such indebtedness was enforced against the stock of goods in the hands of the defendant. He also offered to prove that Scott never returned to the defendant any of the purchase money actually received by him. The implications of the proffered testimony are that, in some ways, the transaction had proved less profitable to the defendant than it otherwise would have been, if Scott had had no creditors. None of the offered testimony had any tendency whatever to negative the testimony of the State in support of the charge against the defendant. It was enough that the defendant had received value on the faith of his false pretense. Scott was not required to return any partial payment made by the defendant, nor were his creditors bound to refrain from availing themselves of their rights under the Bulk Sales Law. The defendant's guilt, if such, was complete, and independent of all subsequent developments.

Complaint is made over the introduction in evidence of a transcript of previous testimony given by the defendant. It is urged that such previous evidence was wholly consistent with his present evidence. If so, he suffered no prejudice. We think, however, that it was not consistent therewith. It was especially inconsistent with that part of the testimony at the last trial wherein he claimed to have informed Scott that the signers of the note were the sons of John Schulte.

Complaint is also made of the cross-examination of the defendant, whereby he testified that he had held another note of \$4,000 against the same signers, and had turned the

2. **Witnesses :**
contradictory
statements.

same in another trade, previous to the Scott transaction. This evidence was admissible, as bearing upon the guilty knowledge and intent of the defendant. If these signers were financially worthless, the fact that the defendant had used their note for \$4,000 in more than one trade was a circumstance not wholly insignificant. In any event, it was within the rule of proof of intent.

Some complaint is made of defects of specification in the indictment. No such question was raised in the lower court, except on motion for a new trial. We think the indictment covers every requisite of the statute. We find no error in the record. The guilt of the defendant appears beyond reasonable doubt. The judgment of conviction is—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. HERBERT WILCOX, Appellant.

WITNESSES: Husband and Wife. A wife is not a competent witness against her husband, who is charged with an assault to commit a crime the *consummation* of which would be a crime against herself. So held on a charge of assault with intent to commit rape. (Sec. 4606, Code Supp., 1913.)

APPEAL AND ERROR: Sufficiency of Brief Point. A brief point to the effect that it was error for the court to overrule a seven-pointed motion to direct a verdict, and likewise error to overrule a nineteen-pointed motion in arrest of judgment, is fatally lacking in particularity.

Appeal from Boone District Court.—G. D. THOMPSON,
Judge.

DECEMBER 14, 1918.

THE controlling question is whether an assault by a

husband with intent to commit rape is within the exception to Section 4606 of the Code, which permits one spouse to testify against the other "in a criminal prosecution for a crime committed one against the other." The conviction rests mainly upon permitting the wife of this appellant to testify against him on his trial, on the charge of having committed such an assault, and of which he was convicted, and from which conviction he appeals.—*Reversed and remanded.*

D. G. Baker, for appellant.

H. M. Havner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

SALINGER, J.—I. Section 4606 of the Code provides that:

"Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other."

1. WITNESSES:
husband and
wife.

In *State v. Chambers*, 87 Iowa 1, and *State v. Schultz*, 177 Iowa 321, at 327, we held that the testimony was receivable on a prosecution for incest; in *State v. Bennett*, 31 Iowa 24, and *State v. Hazen*, 39 Iowa 648, on charge of adultery; and in *State v. Sloan*, 55 Iowa 217, and *State v. Hughes*, 58 Iowa 165, that it was competent on a prosecution for bigamy. The State urges that the reason underlying the holding in said cases sustains permitting the wife to testify against the husband on the prosecution for assault with intent to rape, at bar. If the reception of this testimony was proper, it must be because the reason of said decisions justifies it. It is no justification that an instruction limited the application of the testimony of the wife to the charge being tried. On the contrary, if the testimony was incompetent, such instruction was injurious, because the charge emphasized that such testimony was permissible

on a prosecution for assault with intent to commit rape.

In *People v. Westbrook*, 94 Mich. 629 (54 N. W. 486), it is held that an indecent assault by a husband on his nine-year-old daughter fails to make the wife a competent witness against the husband, because such assault is not a "personal" wrong or injury to the wife. The State differentiates this with the argument that the Michigan statute is unlike our own, in that it prohibits receiving such testimony, except where the action "grows out of a personal wrong or injury done by one to the other." We are not prepared to say there is any substantial difference in the statutes; for, while a crime committed against the other may possibly include more than a personal wrong committed by one against the other, of necessity it includes such wrong. In other words, while a crime committed by husband against wife cannot be more than a personal wrong committed against her by him, such crime is at least as much as that. But suppose that, to now, it has never been held that the wife may not testify on a prosecution of the husband for assault with intent to rape. There must be a first time for right and reasonable decisions. For that matter, it may be said that no decision that the testimony here is receivable has ever been made, unless holding that such testimony is proper on prosecutions for incest, adultery, or bigamy settles that it is proper on a charge of assault with intent to rape. Of course, adultery by the husband is a crime against the wife. And of necessity, incest and bigamy include adultery. That fact alone is a sufficient reason why holding that adultery, bigamy, and incest are within the exception is no warrant for holding that an intent to commit which, if consummated, would involve adultery, brings the case within this exception. How can it, in reason, be said that a naked intent to ravish a third person is "a crime committed against" the wife? The State concedes the exception applies to nothing but sexual crimes. How can it be maintained

that an unaccomplished intent to rape is a "sexual" crime? It is entitled to some consideration that the prohibition of and punishment for the crime of rape and that of intent to commit rape are grouped in the statute with murder, and under the general classification of "Offenses against lives and persons," while adultery, bigamy, and incest are found in another chapter, and classified as "Offenses against chastity, morality, and decency." We do not hold this to be controlling; but without it, it seems to us the ruling complained of cannot be sustained, unless this court, in reviewing a conviction for a statute crime, becomes an ecclesiastical court, and must give literal application to the words of Holy Writ, "that the man who looketh upon a woman and lusteth after her has already committed adultery in his heart." Such argument can easily be carried too far. If the intent with force or otherwise to obtain illicit sexual connection is the equivalent of the accomplished act, then a divorce should be obtainable because the defendant intended to commit adultery. If the words, "prosecution for a crime committed against the other," apply to a prosecution for assault with intent to commit rape, it must be because the words of the exception should be read, "a prosecution for an act which is in any way offensive or injurious to the other." If that be the true interpretation, then, if the husband commit murder, the wife may testify against him. Surely, it must deeply shock, hurt, offend, and, in a sense, injure any good woman to find herself married to a murderer. It is sufficiently indicated in our own decisions that this is not the correct construction of the statute words, because, for one thing, we held, in *Molyneux v. Wilcockson*, 157 Iowa 39, that the husband's forging the name of the wife did not bring the prosecution within the statute exception.

We are of opinion that the statute exception does not apply to a prosecution for assault with intent to commit rape.

II. The point is made that, at all events, the wife of the defendant was not a competent witness, because the evidence shows she had condoned the offense of her husband, if it be assumed that the assault for which he was prosecuted was such offense. In view of the conclusion reached, it is unnecessary to pass upon this assignment.

III. In Instructions 5 and 8, it is said, in effect, to be no defense that "defendant expected to accomplish this purpose without opposition on the part of the prosecutrix." It is urged in the exceptions as to this instruction that this left the jury to conclude that defendant might be convicted if he, at the time of the assault on trial, "expected to have, at any future time, sexual intercourse with the prosecutrix with opposition;" and that the instruction erred for not confining the expectation to have sexual intercourse "to then and there at the time of the assault;" further, that the charge was too indefinite "as to time and place as to when the said defendant expected to accomplish such purpose." In our opinion, these complaints are hypercritical.

IV. A motion to direct verdict for defendant has seven grounds. Motion in arrest of judgment has nineteen grounds. There are four exceptions to the instructions, and some of these are so subdivided as to amount to a distinct exception. The appellant's brief urges that it was error to overrule the motion to direct and the motion in arrest of judgment, and to overrule the exceptions, for each and all of the reasons stated in the exceptions. These are all too general to entitle appellant to review.

For the error in permitting the wife of defendant to testify against him, the judgment must be reversed, and the cause remanded.—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

2. APPEAL AND
ERROR: suffi-
ciency of brief
point.

C. O. STRICKLEN, Appellant, v. PEARSON CONSTRUCTION COMPANY, Appellee.

MASTER AND SERVANT: Exemplary Damages. Acceptance of
1 compensation under the Workmen's Compensation Act forecloses
all opportunity to recover exemplary damages of the master.

DAMAGES: Non-Absolute Right. Recovery of exemplary damages
2 is a matter of grace, not of absolute right.

MASTER AND SERVANT: Standards of Safety. A master is not
3 deprived of the benefit of the Workmen's Compensation Act by
failing to initiate proceedings for the establishment of "standards of safety," as provided by Section 2477-m19, Code Supp., 1913.

Appeal from Polk District Court.—C. A. DUDLEY, Judge.

DECEMBER 14, 1918.

ACTION at law, to recover damages for personal injury. The material facts are stated in the opinion. There was a judgment for the defendant for costs, and plaintiff appeals. —*Affirmed.*

Chester J. Eller, for appellant.

Sullivan & Sullivan and *Miller & Wallingford*, for appellee.

WEAVER, J.—The defendant company was engaged in the construction of a building in the city of Des Moines, and, in the course of such work, excavated a hole or pit, in which to lay the foundation of a pier. The plaintiff, being then in the employ of the defendant, was by its foreman sent into the pit to perform certain labor there; and while he was so engaged, the earth caved in upon him, causing him serious injury. Both parties had expressed their consent to the terms of the Workmen's Compensation Act; and in

1. **MASTER AND SERVANT:** Exemplary damages.

compliance with the terms of said statute, plaintiff was awarded damages or compensation for his injury, since which time the defendant has paid, and plaintiff has received, the installments of such compensation as they have become due. Plaintiff now brings this action at law, to recover from the company exemplary damages, in addition to the compensation which has already been awarded him. In support of this claim he alleges that his injuries were received by the gross and reckless negligence of the defendant and its foreman, and that, while plaintiff has received and accepted the compensation awarded him under the Workmen's Compensation Act, it was not received or accepted in full, or in release or in satisfaction of his claim for exemplary damages, for which he now demands a recovery. To this petition a demurrer was filed and sustained; and plaintiff thereupon filed an amended and substituted petition, alleging that Alexander Pearson is the "sole owner and proprietor" of the Pearson Construction Company, and his name is, therefore, substituted as defendant, and he is charged with negligence resulting in plaintiff's injury in the manner already described. It is further alleged that it was the duty of defendant, acting with the Industrial Commissioner, to fix the standard of safety for safety appliances and places of work; that this duty was not performed; and that, for this reason, defendant cannot rely upon the protection of the statute, as a defense to plaintiff's claim. The defendant moved to strike the amended and substituted petition, as being a mere repetition of the matters in the original petition, to which demurrer had been sustained. The motion was sustained; and, plaintiff refusing to further plead, and electing to stand on his petition as amended and substituted, judgment was entered for the defendant for costs.

I. The pleadings are not, in all respects, quite clear; but, as we understand the record, the first and principal

claim advanced by plaintiff is that, although both the parties had accepted the terms of the Compensation Act, and damages had been awarded and paid, pursuant to such act, the plaintiff may still sue his employer at law, and recover exemplary damages, if his injury was received under circumstances which would have justified the assessment of exemplary damages, had the Compensation Act not been adopted.

2. DAMAGES : non-absolute right.

The proposition is unsound, and no authority holding otherwise has been called to our attention. Generally speaking, exemplary damages are never a matter of right. If a party suffers an actionable injury, the extent of his right to demand a recovery of damages is the sum or amount which the jury (or court, if it be tried without jury), finds from the evidence will fairly compensate him. If the jury or court, in any given case, goes beyond that measure of recovery, and increases the amount found in his favor by an allowance of exemplary damages, it is not because they are needed to make him whole, but because the wrongful act of which he complains has been done in malice, or in such high-handed or reckless disregard of duty that the award is thus increased, by way of punishment or example. It is true, the plaintiff gets the benefit of exemplary damages, when recovered and collected; but they come to him by the grace of the law, and not as a matter of right. If a plaintiff is awarded fair compensation for his injuries, no court will grant him a new trial because the jury has failed to award him exemplary or punitive damages. That allowance rests wholly in the discretion of the jury. *Constantine v. Rowland*, 147 Iowa 142, 148; *White v. International Text Book Co.*, 164 Iowa 693. And the jury may properly allow exemplary damages only when the plaintiff is found also entitled to recover actual or compensatory damages. *White v. Text Book Co.*, supra; *Myers v. Wright*, 44 Iowa 38; *Connelly v. White*, 122 Iowa 391; *Boardman*

v. Marshalltown Groc. Co., 105 Iowa 445. It follows, of necessity, that, if a petition states facts which clearly negative any right on plaintiff's part to recover compensatory damages, it fails to state a cause of action for exemplary damages. In his case, plaintiff concedes that he has been allowed and has accepted compensation for his injury under the Workmen's Compensation Act; and, by the express terms of that act, his employer is thereby "relieved from other liability for recovery of damages or other compensation for such personal injury." Section 2477-m, Code Supplement, 1913. In short, plaintiff, having accepted compensation from his employer for the injuries of which he complains, can have no standing in court to assert the employer's further liability to him on that account.

II. But plaintiff says—somewhat inconsistently—that defendant is not entitled to the benefit of the Workmen's Compensation Act, because the demurrer and motion, in legal effect, admit the allegation of the petition that he has not complied with the provisions of Section 2477-m19 of that act. That section reads as follows:

3. MASTER AND
SERVANT: stan-
dards of safety.

"The Iowa Industrial Commissioner co-operating with the employers affected by this act, or any committee or committees appointed by such employers or the Iowa Industrial Commissioner, shall fix standards of safety for safety appliances or places of employment, except mines," etc.

The simple reading of the section makes it perfectly evident that this section places no affirmative duty upon the employer, save, perhaps, as there may be an implication of duty in the employer to observe any "standard" of safety so "fixed" by the industrial commissioner. The employer is not required to take the initiative in this matter, nor is there any provision making his failure so to do work a forfeiture of the protection of the statute. The allegation in the substituted petition, with respect to defendant's alleged

failure to take action under said section of the statute, is, therefore, wholly immaterial. The substitution of Pearson as defendant, instead of the construction company, amounts to no more than a correction in the name or designation of the person of this employer. Neither the petition nor the substituted petition states a cause of action against the company or against Pearson.

III. It should be said that the defendant's foreman, Drumhiller, was made a defendant. As to him, the trial court overruled the demurrer to the petition, and the argument in this court has been directed entirely to the question whether the plaintiff's pleading, even if taken as true, discloses any cause of action against the employer; and this is the only question on which we assume to pass.

There is no error in the record, and the rulings and judgment below are—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

R. M. TOWNSEND, Appellee, v. ROSALIND WOODWORTH, Appellee, et al., Appellants.

REFORMATION OF INSTRUMENTS: Mutual Mistake. A mutual

- 1 mistake in the execution of a deed, by which less land is conveyed than is called for by the contract, demands reformation as between the parties to the deed.

HOMESTEAD: Failure of Wife to Join in Sale Contract—Estoppel.

- 2 A wife who *does not sign the husband's contract for the sale of the homestead*, but intentionally furthers the sale by correctly pointing out the boundaries, in accordance with said contract, and then abandons all homestead interest in the property, and, when the consideration is paid, joins with her husband in a deed, is estopped to prevent such reformation of the deed as will cause it to speak the mutual intention of all the parties.

ESTOPPEL: Sale of Homestead—Inconsistent Conduct of Wife. The

- 3 conduct of a wife who has not joined in her husband's contract for

the sale of the homestead may work an estoppel which will be equal to a statutory conveyance by her.

Appeal from Floyd District Court.—J. J. CLARK, Judge.

DECEMBER 14, 1918.

ACTION to reform a deed, and to quiet title in the plaintiff. Opinion states the facts. Decree for the plaintiff in the court below. Defendant appeals.—*Affirmed.*

F. & F. M. Lingenfelder, for appellants.

H. J. Fitzgerald, J. C. Campbell, and J. H. Lloyd, for appellees.

GAYNOR, J.—This action is brought in equity, to reform a certain deed executed by the defendants Krueger and wife to the plaintiff, and to have the title to the premises quieted in him against any claim made by them and against any claim made by the other defendant, Rosalind Woodworth.

1. REFORMATION OF
INSTRUMENTS:
mutual mistake.

Prior to the happening of the matters out of which this controversy grows, Fred C. Krueger was the owner of two lots, known as 6 and 7. These lots were occupied as a homestead by the Kruegers. Measured as one body, they were 124 feet and 6 inches east and west, and 132 feet north and south. For the purposes of this opinion, the lots will be described as running due east and west. The whole property is bounded on the south by Hulin Street, and on the west by Milwaukee Street. A two-story building, 38 feet wide by 60 feet long, situated on the west end of these lots and facing south on Hulin Street, was occupied by the Kruegers as a home. There is a porch on the south side, facing Hulin Street, and a bay window on the east. A wide cement walk extends from Hulin Street to the front porch, a distance of 20 feet. A narrow cement walk, about 2 or 2½ feet wide, leads from this wide walk

around the east side of the house, past a bay window, to the kitchen and woodshed, on the north.

The controversy in this case arises over a strip, approximately 4 feet, running along the east side of this house.

On the 27th day of October, 1910, Fred C. Krueger entered into a written contract with the plaintiff, by which he sold and agreed to convey to the plaintiff the west 66 feet of these lots; and on the 2d of January, Krueger and wife executed and delivered to the plaintiff a deed describing only the west half of these two lots, or the west 62 feet and 3 inches. After the execution of this contract, and before the deed was made, Krueger and wife moved out of the building and off the premises, and surrendered the same to the plaintiff. On the 5th of January, 1912, the Kruegers conveyed the east half of these two lots to the defendant Rosalind Woodworth. This action is brought; not only to reform the deed given by Krueger to the plaintiff, and to make it conform to the contract which preceded the execution of the deed, but also to quiet title in the west 66 feet against the Kruegers, and against any claim asserted by Rosalind Woodworth under her deed.

It will be noticed that these lots, east and west, were 124 feet and 6 inches long, and each lot, 66 feet wide. The west 66 feet were given to the plaintiff in the contract, leaving 58 feet and 6 inches on the east half of the two lots. The Kruegers undertook, however, to convey to Rosalind Woodworth the east half. The east half would be 62 feet and 3 inches, which would cover about 3 feet and 9 inches of the land covered by the contract made between the Kruegers and the plaintiff; and this is the strip over which the controversy arises.

On the hearing below, the court found for the plaintiff, and that he was entitled to have his title quieted in this west 66 feet of the two lots, and reformed the deed to correspond with the contract made between Krueger and the plaintiff.

This, of course, had the effect of giving Mrs. Woodworth 3 feet and 9 inches less than she was entitled to under her deed from the Kruegers, and to compensate her for this, the court found that she was damaged in the sum of \$250. The Kruegers alone appeal.

It will be noted that the original contract for the west 66 feet of these lots was not signed by the plaintiff's wife. The contract was dated on the 27th day of October, 1910, and provides:

"That the party of the first part [F. C. Krueger] hereby agrees to sell to the party of the second part [plaintiff], on the performance of the agreements, hereinafter stated, a fee simple title clear of all liens and incumbrances whatever by good and sufficient warranty deed."

On the day of the execution of the contract, plaintiff paid Krueger \$100, and agreed to pay \$4,000 in two payments, \$2,000 on November 1, 1910, and \$2,000 on January 2, 1911, the deed and abstract to be given on that date, and the abstract to show perfect title.

On the 2d day of January, all the conditions precedent to plaintiff's right to the deed were performed by the plaintiff, and on that day, the deed was executed by the Kruegers and delivered to him. The deed was immediately recorded. The deed, however, instead of providing for the west 66 feet of the two lots, covered only the west half of the two lots. Krueger and wife lived in the house on the premises for about 30 days after the contract was made. Then they vacated, and delivered the key of the house to plaintiff. Plaintiff did not move in with his family until in February, although he took possession as soon as the Kruegers moved out, and did some painting and papering and repairing.

As between Krueger and the plaintiff,—assuming that there are no intervening rights,—there can be no question as to the duty of the court to reform the deed to make it correspond with the contract. The contract provides for the

west 66 feet of these two lots. Both parties supposed, at the time, that plaintiff was getting the west 66 feet of these lots. At the time the deed was made, Krueger supposed that the *west half* was the same as the *west 66 feet*, and when he made the deed, it was with the understanding that the deed conformed to the requirements of the contract. He said he knew it was not worded the same; but there is no question that he intended to convey to the plaintiff the land described in his contract—the west 66 feet. The mistake of Krueger was in thinking that the west half of these two lots covered the same territory as described in his contract. The plaintiff did not examine the deed, and understood that it covered the land described in his contract. There is no question that the plaintiff supposed, when he took the deed, that it gave him the west 66 feet, and there is no question that Krueger, too, supposed he was conveying the west 66 feet. The walk around the house was so laid that it could be used only in connection with the house. It was laid on and over this disputed strip, and was used only in connection with the dwelling. There were steps leading from the walk to the porch on the east side of the house. The walk ran around to the kitchen, woodshed, and well. There was no property situated on the east half, with which this walk had any connection, nor were there any buildings to which it led. After plaintiff discovered that the description in the deed did not conform to the contract, he notified Krueger, and Krueger promised to rectify it. This conduct of Krueger's emphasizes the fact that he, too, believed that the deed, as prepared and delivered to the plaintiff, covered the same territory described in his contract. Every fact in this record shows that there was a mistake made—we may assume, an honest mistake—in preparing the deed; that the intention of Krueger was to convey the same ground described in his contract, and that the thought of the plaintiff, in receiving the deed, was that it covered the same ground

described in the contract. The consideration agreed to be paid, and paid, was for the land described in the contract. When the contract was made and the purchase agreed upon, both had in mind the west 66 feet.

It is claimed, however, that, as to Mrs. Krueger, the reformation cannot be sustained. It will be noted that she did not join in the contract to convey the 66 feet. She

joined only in the deed, conveying the west half of the two lots. She did, not in the same joint instrument, convey to the plaintiff the land in dispute. It is claimed that the property was her homestead; that she and Krueger occupied it as a home, at the time this deed was made; that, therefore, not having joined in an instrument to convey more than the deed purported to convey, she cannot be held bound by the contract, or by any representations or statements made by her husband prior to the execution of the deed.

2. HOMESTEAD:
failure of wife
to join in sale
contract; estop-
pel.

It is true that this was her homestead; that she and Krueger occupied the property at the time as a home. The title, however, was in Krueger. Her rights in the property were only such as came to her through the homestead law—the right of possession. It is true that, under our statute, no conveyance of the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not. Section 2974, Code, 1897.

It does not appear definitely from the record, but we may assume that both lots were occupied by the Kruegers as a homestead at the time this contract was executed. The right of homestead remains as long as the property is used and occupied as a home. When it is deliberately abandoned as a home by the party who claims the homestead right, it no longer has protection under the homestead law; or,

in other words, the party in whom the right of homestead vests, may abandon that right by abandoning possession. Before the commencement of this action, Mrs. Krueger had joined with her husband in the conveyance of both lots. She no longer occupied or had possessory right of homestead in any of the land. She did not have a homestead right in either the east or the west half, at the time she conveyed the east half to Mrs. Woodworth. Soon after the making of this contract, Mrs. Krueger and her husband abandoned the entire property, and ceased thereafter to have or claim any homestead interest in any of the property. If it should be held, as a matter of fact, that this strip in dispute was part of the homestead, and was used in connection with and as a part of the homestead at the time the contract was made, it is evident that, before the deed was made, she had abandoned the homestead, and at that time, she had no homestead in any part of the tract. She had abandoned any right to claim a homestead even in this strip, when she made her deed. It is apparent that Mrs. Krueger, in those two deeds, the one to the plaintiff and the one to Mrs. Woodworth, conveyed all her right in the property, including this strip. If we should hold that she did not part with this strip to the plaintiff, then she did part with it when she made her deed to the other defendant. The home occupied was on the west half of these lots. Although there is some dispute in the evidence, we are satisfied that, before plaintiff purchased, Mrs. Krueger pointed out the east line of the land which she claimed to constitute the homestead, and that that included this strip in controversy. We are satisfied, further, from the whole record, that she knew, at the time that plaintiff purchased, that he was purchasing this strip in controversy; that she knew it was the purpose and intent of her husband to give him this strip in controversy. It had always been used by them in connection with the home. The sidewalk was placed there for

use in connection with the home. It served no useful purpose except in connection with the home. It was the home place that plaintiff was buying. There is no doubt that Mrs. Krueger understood, when she joined in the deed, that she was conveying the home place, and this strip in controversy, as a part thereof. In fact, everyone connected with the deal seems to have considered that the strip in controversy was included in the home place. The same mistake, we have no doubt, that led to the description in plaintiff's deed, was involved in the description in Mrs. Woodworth's deed. It was supposed that the 66 feet gave an equal portion to each. They had overlooked the fact that the lots were 132 feet north and south, and not 132 feet east and west. Mrs. Woodworth never discovered that this strip was included in her deed until after she had made her purchase, and found that the east half of these lots purchased by her carried her west line over this disputed strip.

What is the situation of Mrs. Krueger in this suit? She had parted with whatever homestead right she had in the land, either to the plaintiff or to Mrs. Woodworth. She is bound by no covenant or warranty to Mrs.

3. ESTOPPEL: sale of homestead: inconsistent conduct of wife.

Woodworth that she is bound to defend. If she prevail, the profitable results of her defense must go to Mrs. Woodworth. She can neither gain nor lose in this suit. The only question is whether this disputed strip shall go to the plaintiff or to Mrs. Woodworth. If it goes to the plaintiff, the defendant Fred C. Krueger is alone liable to her for any deficiency in the land conveyed to her. The reformation of the deed in no way affects Mrs. Krueger, or any rights that she has in the premises. Mrs. Woodworth has not appealed, and is not complaining of what she has lost in the land by the decree of the court. Krueger has no ground for complaining, for the reason that he contracted with the plaintiff to convey to him just what the plaintiff is now claiming. When he

made the deed, it was in the full belief that he was conveying to plaintiff the land covered by the contract. When he received the consideration, he knew that plaintiff was paying him for the land described in the contract. The evidence tends clearly to show that, if the plaintiff received no more land than is covered by his deed, he will be seriously handicapped in the comfortable occupation of the home supposed to be covered by his contract, and he may have to make expensive changes, in the way of removing the bay window, in order to have access to the rear end of his lot over a walk. The only ground on which Mrs. Krueger can contend for what she is now contending for is that, technically, under the statute, the deed which was signed by her did not cover this strip of land, and that she is not bound by the action of her husband, because of the provisions of Section 2974 of the Code of 1897. We are of the opinion that, when she pointed out the east boundary of this home property, and in so doing included within its limits the land in dispute, she is now estopped to claim that the plaintiff is not entitled to have the deed reformed so as to express the true intent of all the parties at the time the deal was consummated. See *Engholm v. Ekrem*, 18 N. D. 185 (119 N. W. 35, 38). The homestead statute in Dakota, so far as the matter in controversy here is concerned, is like our own. In that case, there was an oral contract of sale, followed by possession. It was contended that the sale was void, because the property was a homestead, and that the oral agreement was void, because in contravention of the statute. It was also contended that estoppel cannot be made available to supply the place of the statutory conveyance; that an estoppel cannot be predicated on the void conveyance of a homestead. The court said:

"It is, of course, manifestly true that the alleged oral contract of sale was void under the statute of frauds, it not being in writing. It is equally true that, because of the

homestead character of the land, the written contract of Nels O. Engholm [her husband], in the absence of his wife's signature, was a nullity. What, then, are the rights of the parties under the facts aforesaid? Can the equitable doctrine of estoppel by conduct be invoked in respondent's behalf? If, as appellants' counsel contend, this question must be answered in the negative, then a wrong has been suffered by respondent for which he may have no adequate remedy. The appellants by their conduct induced respondent to pay a portion of the purchase price, and to enter into possession of the premises in good faith, and to make valuable improvements. Upon the plainest principles of justice, respondent should be held to be the equitable owner of the premises, and appellants should not be permitted in a court of equity to deny such ownership in him. Neither the statute of frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel *in pais*. While it is true some courts have held to the contrary, the weight of modern authority is to the effect that the doctrine of equitable estoppel will be applied to a married woman, as well as to a *feme sole*. The doctrine is not invoked to render valid a contract which is void under the statute of frauds or under statutes for the benefit or protection of the homestead claimants, but it is invoked to prevent the successful perpetration of fraud by preventing wrongdoers from urging the provisions of such statutes to shield them in their tortious conduct. We are agreed that, under the facts as disclosed by this record, the appellants should be, and are, estopped from asserting title to the premises as against the respondent."

See authorities cited in support.

In the instant case, it appears that the Kruegers intended, in making the conveyance to plaintiff, to part with their home and their homestead rights in the premises, and,

at the time, considered this disputed strip as a part of the home; that, soon after making the contract, and before the deed was made, they did abandon the premises and surrendered all homestead rights in the premises; that, at the time the deed was made, Mrs. Krueger had no homestead right in this property; that they had never occupied the east half of these two lots, as a home, separate and apart from her occupancy of this building on the west half; that, when they left, they surrendered all homestead rights in the property. It further appears that they abandoned the home in consideration of the plaintiff's promise to purchase, and in reliance upon his paying the consideration stipulated in the contract therefor. An estoppel can be invoked against a married woman, as well as against a single woman, whenever, by her conduct, she has led another to the doing of a thing which it would be inequitable afterwards to permit her to deny his right to do. Equity will not permit this statute, made for the protection of women in a home, to be invoked as a shield to perpetrate a fraud. These statutes were not enacted to encourage frauds and cheats. In this case, plaintiff paid the price agreed to be paid for the property, took possession, expended large sums of money in improvements: all of which, we think this record shows, was known to Mrs. Krueger. She is now estopped to deny that which she encouraged the plaintiff to believe to be a fact, and which she must have known he relied upon as a fact in consummating the deal, and in paying her husband the money called for by the contract.

We have not adverted to the matters discussed by Mrs. Woodworth in her brief, for the reason that she has not appealed from the judgment of the court, and we are not in a position to grant her any relief.

Upon the whole record, we think the judgment of the court was right, and it is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

ANDREW J. WANGEN, Appellee, v. UPPER IOWA POWER COMPANY et al., Appellants.

TRIAL: Question Failing to Disclose Proposed Evidence. Prejudice
1 will not be presumed from the exclusion of questions when the
3 record does not disclose what counsel expects to prove thereby.

MASTER AND SERVANT: Non-Delegable Duty. The master may
2 not delegate his duty to provide the servant with a safe place
in which to work.

RELEASE: Degree of Proof to Overthrow. A fair preponderance
3 of evidence is sufficient to overthrow a release on the plea of
mental incompetency at the time of signing.

RELEASE: Tender in Case of Avoidance. Where it is sought to
4 set aside a release or settlement on the ground of fraud, a tender of the consideration paid need not be made *before* action is commenced.

Appeal from Allamakee District Court.—A. N. HOBSON,
Judge.

DECEMBER 14, 1918.

ACTION to recover damages for personal injuries received by plaintiff while employed by defendants.—*Affirmed.*

Frank Sayre and D. J. Murphy, for appellants.

Wm. S. Hart, for appellee.

STEVENS, J.—I. While plaintiff was engaged, with a fellow workman, in mixing concrete, upon a staging or scaffold, for a dam, the scaffold fell, throwing him to the ground, injuring his shoulder and breast, and breaking some of his ribs. At the time of the accident, there was a mortar box on the platform, containing about two tons of mixed concrete. Appellant complains of several rulings of the court, excluding evidence offered on behalf of the de-

1. **TRIAL:** question failing to disclose proposed evidence.

fendant. The physician who dressed plaintiff's injuries and attended him was called as a witness by defendant, and was asked to state whether, when he first saw plaintiff, at a shanty near the dam, the latter was reclining or sitting up. The evidence showed that plaintiff walked immediately from the scene of the accident to a shanty, where he was placed upon a cot. The question propounded was objected to, upon the ground that the witness was incompetent, under Section 4608 of the Code. At this point, a controversy arose between counsel, and the jury were sent out of the room, but were soon recalled, and the court ruled that the witness could not be examined upon the question of "injuries sustained by plaintiff while he was in attendance upon him." No further questions were propounded to the witness, nor did counsel indicate what they expected to prove by the witness.

We have frequently held that, where the record does not, in some way, disclose what answer the witness would have made to the question, or otherwise reveal what counsel expects to prove thereby, no prejudice is shown, and none will be presumed. *Arnold v. Livingston*, 155 Iowa 601; *Jacobs v. City of Cedar Rapids*, 181 Iowa 407. It is, therefore, unnecessary for the court to discuss the question of waiver, argued by counsel.

II. The sixth instruction given by the court was as follows:

"The duty of defendant to furnish plaintiff a reasonably safe place in which to work could not be delegated to others, and it is not material, so far as this case is concerned, by whom the scaffold and platform were constructed."

The portion of the instruction excepted to is printed in italic. Defendant offered some evidence that plaintiff assisted in the construction of the platform upon which he was working at the time he was injured; but the preponder-

2. MASTER AND SERVANT: non-delegable duty.

ance was to the contrary, and the jury, in answer to a special interrogatory, so found. It was, of course, the duty of defendant to use reasonable care to provide plaintiff a reasonably safe place to work. *Looney v. Garfield Coal Co.*, 166 Iowa 136; *Winslow v. Commercial Bldg. Co.*, 147 Iowa 238; *Christian v. City of Ames*, 167 Iowa 468; *Aga v. Harbach*, 140 Iowa 606; *Hook v. Chicago G. W. R. Co.*, 168 Iowa 304. And this duty could not be delegated to another, so as to escape liability. *Christian v. City of Ames*, supra; *Winslow v. Commercial Bldg Co.*, supra.

No evidence tending to show that plaintiff was guilty of contributory negligence in the construction of the platform was offered. The portion of the instruction complained of was, in any event, clearly without prejudice, and requires no further consideration.

III. The accident occurred on December 10, 1908; and, on February 23d following, the defendant claims to have made a full settlement with plaintiff for his injuries,

for which \$125 was paid him, and an alleged

3. RELEASE: degree of proof to overthrow.

receipt taken therefor was offered in evidence. The settlement was fully pleaded in defendant's answer. In reply, plaintiff denied the settlement, or that he was paid a sum of money therefor, and alleged that, at the time it is claimed the settlement was made, he was of unsound mind, and incapable of comprehending or understanding the nature of the alleged transaction.

In this connection, counsel for defendant requested the court to instruct the jury as follows:

"If you find that plaintiff gave defendant a written statement of settlement of his claim herein, then, unless you also find, by clear and convincing evidence, beyond a reasonable controversy, that plaintiff, at the time of giving such statement, was in such a state of mind that he did not know and could not understand its meaning, and that he

did not agree thereto because of such state of mind, then your verdict should be for the defendant."

The offered instruction was refused by the court, and the jury was instructed that, while the settlement was, on its face, valid, it could be overcome by a preponderance of the evidence in favor of defendant.

Authorities from other jurisdictions cited by counsel perhaps tend to sustain the requested instruction; but this court has often held that, where fraud or mental incompetency is pleaded for the purpose of setting aside or overcoming a release or settlement, a preponderance is all that is required therefor. *Reddington v. Blue & Raftery*, 168 Iowa 34; *Platt v. American C. P. Co.*, 169 Iowa 330; *Seymour v. Chicago & N. W. R. Co.*, 181 Iowa 218; *Owens v. Norwood White Coal Co.*, 157 Iowa 389. It follows that the court did not commit error, either in refusing the offered instruction or in the instruction given.

Counsel for appellant also urges that plaintiff was required to return the consideration paid him for the alleged settlement, before commencing an action for damages. This

question was not raised in any way in the court below, either by demurrer, answer, motion for verdict, or request for an instruction, and must, therefore, be deemed to have

been waived. *Ormsby v. Budd*, 72 Iowa 80. But, whether waived or not, plaintiff, in reply to the allegation of defendant's answer of settlement, set up that same was obtained while he was of unsound mind, by the fraud and duress of the defendant, and specifically denied that any consideration was paid him. Plaintiff also testified that he had no recollection or knowledge of the settlement, or that defendant paid him any sum whatever. The jury found that plaintiff, if he signed the receipt offered in evidence, did not voluntarily and knowingly do so. Where it is sought to set aside a release or settlement upon the

4. *RELEASE*: tender
in case of avoid-
ance.

ground of fraud, a tender of the consideration paid therefor need not be made before action is commenced. *See v. Carbon B. Coal Co.*, 159 Iowa 413; *Reddington v. Blue & Raftery*, 168 Iowa 34, 45; *Jeez v. McDonald Mfg. Co.*, 179 Iowa 193.

V. Without reviewing the evidence in detail, suffice it to say that we have carefully examined the record, and are of the opinion that there was sufficient evidence to take the case to the jury, and that the verdict is not so excessive as to indicate passion and prejudice upon the part of the jury, or to justify our interference therewith. As we find no error in the record, the judgment of the court below must be, and is,—*Affirmed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

WILLIAM WINNIKE, Appellant, v. T. F. HEYMAN, Appellee.

FIXTURES: Intention and Manner of Construction. Improvements are not trade fixtures, but a part of the realty, when added by a tenant with intention to permanently annex them to the realty, or when, with a contrary intent, he so constructs them that they may be removed only by doing substantial injury to the realty.

FIXTURES: Innocent Purchasers. Purchasers of realty which is in the possession of a tenant, take title to improvements placed thereon by the tenant, when such improvements appear to be a permanent part of the realty, and no fact suggests any inquiry to the contrary.

Appeal from Carroll District Court.—M. E. HUTCHISON,
Judge.

DECEMBER 14, 1918.

ACTION to recover damages consequent upon the removal of a second floor constructed by a tenant in one end of the demised building, and a stairway thereto. At the close

of evidence, the court, on motion, directed a verdict for defendant, on which judgment was entered. The plaintiff appeals.—*Reversed.*

Brown McCrary, for appellant.

W. C. Saul and *W. I. Saul*, for appellee.

LADD, J.—I. MacLagan owned Lot 1 and part of Lot 2 in Block 21 in Carroll, on which stood a brick building. The defendant, as lessee of MacLagan, occupied one room thereof, 19 feet wide and 39 feet long, and basement, as a candy store and ice cream parlor, from about 1902 until sometime in 1916. In 1909, MacLagan conveyed the premises by warranty deed to Guy. It appears that there was a balcony at the back end, about 6 or 7 feet wide, and 7 feet above the floor, with a narrow stairway up to it. This balcony was attached by two iron rods to the joist above, and rested on a 2x4 scantling, the back and the ends being nailed to the walls and two posts in front. According to Heyman, MacLagan told him he could build onto the balcony or take it down, and he built onto it twice, prior to the conveyance to Guy, and put in an oak stairway after such conveyance. Heyman yielded possession in 1916, and in doing so, removed the balcony, as extended, and also the stairway; and in this action, plaintiff, Winnike, who went into possession as lessee of Guy, for himself as assignee of Guy, seeks to recover the value of the property removed, and the consequent damages to the building. The defendant alleged that the floor and stairway constituted trade fixtures, and that he had the right to remove them.

But two questions are involved, though appellant's argument has taken a wide range: (1) Whether the extended balcony and stairway were trade fixtures; and (2) whether Guy acquired title to said balcony as extended, under his warranty deed from MacLagan.

"Trade fixtures" is a term usually employed to describe property which a tenant has placed on rented real estate, to advance the business for which it is leased, and which may, as against the lessor, be removed at the end of the tenant's term. *Ray v. Young*, 160 Iowa 613, where rules on the subject are gathered. That the floor or extended balcony was constructed in connection with the defendant's business, there can be no doubt; and from the evidence, the jury might have concluded that defendant had no intention that the additions should become a permanent part of the improvement. He bore the expense, and MacLagan had no connection therewith, save in saying to defendant that "he could build onto the balcony or take it down." There was nothing in its appearance, as extended, to indicate that it was other than a permanent structure. Brick were removed from the wall, and the ends of the joists inserted in the holes left, and the floor rested on these joists. From the first floor, an oak stairway led to the floor above. In 1916, defendant notified Guy that he would yield possession, and Guy leased the premises as they then were, to plaintiff. Guy was without information as to who had constructed the second floor; and, though the stairway was installed after he obtained title to the property, he knew nothing concerning this. Shortly thereafter, defendant removed the floor and stairway, leaving some of the joists sticking in the walls, and the holes out of which the ends were taken were not repaired. The brick were replaced and plastered in by plaintiff at considerable expense; and for this, recovery was sought.

One Johnson testified that he had removed the floor and stairway for defendant; "took it out in pieces, the stairway in one piece;" and that there was no substantial injury to the building after the brick should be replaced; that they could have pried the joists out, but sawed them off; that the floor had the appearance of being fastened into the

building, and "it would not hurt a great deal to tear the floor down to the building. It would probably injure it some. * * * It would not injure the walls of the building after it was repaired. You may mar it, but you can't fix it. Even if plastered up, it could not be the same as before."

Hoffman swore that, "by taking the stringers out and putting the brick in there and walling that up, I don't think it would hurt the building. I think it was a twelve-inch wall, and would not take over one brick out;" and that the building was more rentable with the two floors in than with but one.

From this evidence, we think the issue as to whether the floor and stairway were trade fixtures was open to the jury. The manner of putting in the joists was strongly indicative of a purpose to make them a part of the building. Nothing about the floor or stairway suggested any separation from the building, and there was room for finding that the removal of the floor with the joist wrought an injury thereto. In a somewhat similar case, the appellate court of Illinois held that the floor might not be removed without injury, even though the wall continued about "as strong as ever," and declared it a part of the realty. In *Shapira v. Barney*, 30 Minn. 59, a platform was erected in "defendant's building, by Finkelstein & Co., his tenants, while occupying it as a furniture store; that they erected it with the knowledge and consent of defendant, and at their own expense, to be used in displaying their goods; that it was fastened to four scantlings, which were nailed to the walls of the building, the stairs to it being fastened at one end to the platform, and at the other end to the floor; that, although it could not be removed without being taken apart, yet it was capable of being severed and taken away without any great injury to the building." The court held that it was a trade fixture.

Whether the additions in question are to be regarded as trade fixtures depends on the intention of defendant in putting them in, the manner of their attachment to the building, and the manner and purpose of their use in connection therewith; and possibly other matters. If the tenant intended permanently to annex them to the building, or if they might not be removed without substantial injury thereto, they are not to be regarded as trade fixtures, but as a part of the realty. If, however, the tenant entertained no such intention, and they might be removed without substantial injury to the building, then they are trade fixtures, and defendant had the right to remove them. The issues as to intent and as to substantial injury to the building should have been submitted to the jury.

II. The assignor of plaintiff, the owner of the premises, purchased same of MacLagan without notice that the balcony or upper floor had been erected by defendant, or that any claim to it as a trade fixture existed. The evidence was such as to warrant a finding that the floor, including the joist, appeared to be a permanent part of the building, there to be used as part of the realty, and essential to its beneficial enjoyment. If so, the law protected Guy as an innocent purchaser, and the floor passed under the conveyance to him. *Bullard v. Hopkins*, 128 Iowa 703; *Stillman v. Flenniken*, 58 Iowa 450; *Roth v. Collins*, 109 Iowa 501.

Appellee relies on *Crooks v. Jenkins*, 124 Iowa 317, where it was held that the notice charged by possession of a tenant is not limited to rights incident to his tenancy, but extends to all interest acquired by collateral or subsequent agreements, and on the doctrine of Mr. Pomeroy, that:

"Possession of a third person is said to put a purchaser upon inquiry, and he is charged with notice of all that he might have learned by a due and reasonable inquiry of the

2. FIXTURES:
innocent purchaser.

occupant, with respect to every ground, source, and right of his possession. Anything short of this would fail to be reasonable and due inquiry."

This in no manner conflicts with the decisions cited above. Had there been anything about the floor reasonably to have put Guy upon inquiry in purchasing the property, as to whether it was a trade fixture, he must have ascertained the facts in relation thereto from the tenant. But, in so far as appears, there was no more reason for so doing than to inquire concerning who had put down the first floor, or other parts of an apparently completed building. Nothing about the premises or possession thereof suggested inquiry concerning the upper floor or interest of the tenant therein; and plaintiff, as assignee of Guy, under the evidence, was entitled to recover damages consequent on the removal of said floor. There was sufficient evidence, at least, to carry to the jury the issue as to whether plaintiff might recover damages consequent on the removal of the floor. As to whether plaintiff was entitled to a directed verdict, we express no opinion.—*Reversed*.

PRESTON, C. J., EVANS and STEVENS, JJ., concur.

MARIE YOCUM, Appellant, v. BOYD HUSTED et al., Appellees.

APPEAL AND ERROR: Presumptions—Exclusion of Evidence—

- 1 **Necessity to Disclose Purpose.** Counsel need not *formally* state just what he expects to show by his excluded questions, when the same may be reasonably inferred from the form of the questions, judged in the light of the entire record.

EVIDENCE: Admissions—Acquiescence or Silence. Failure of a par-

- 2 **ty** (under circumstances which, in reason, call upon him to assert the truth of a material fact) to either deny or affirm the truth of material and relevant statements attributed to him by a stranger to the litigation, is admissible as an implied admission.

CONSPIRACY: Civil Liability—Evidence. On a charge that, at 3 the funeral of plaintiff's husband, the defendants conspired to accuse plaintiff of having caused the death of deceased by criminal means, evidence is admissible to show that such accusation was made; that said accusation was made by all, or by certain of the defendants; that defendants requested that public officials be consulted, prior to going on with the funeral; and that such officials were consulted, etc.

EVANS and PRESTON, JJ., dissent as to the sufficiency of the evidence to present a jury question, and as to the correctness in form of the questions propounded.

LIBEL AND SLANDER: Evidence—Defamatory Sense of Words. 4 The understanding of people as to the sense in which words were spoken is admissible on the issue whether the words were spoken in a defamatory sense.

PLEADING: Issue, Proof, and Variance—Conspiracy to Slander— 5 **Individual Slander.** An averment of a conspiracy to slander will not, on failure of proof of conspiracy, authorize a judgment for an individual slander. (Secs. 3599, 3639, Code, 1897.)

Note: See *Overstreet v. New Nonpareil Co.*, 184 Iowa 485.

Appeal from Clarke District Court.—THOMAS MAXWELL,
Judge.

MAY 13, 1918.

REHEARING DENIED DECEMBER 14, 1918.

SUIT to recover damages because defendants engaged in a conspiracy to slander the plaintiff. The defendants are jointly impleaded for this alleged conspiracy, and it is further charged that each and all of them carried out the objects of the conspiracy, and did slander the plaintiff. There were directed verdicts for each of the defendants, jointly and severally, and plaintiff appeals.—*Reversed and remanded.*

Mason & Dyer, for appellant.

O. M. Slaymaker, for appellees.

SALINGER, J.—I. The petition was in three counts. We need consider the first one only, because all matter added

in the second and third count to the allegations of the first has no support in the evidence. The first count charges that the defendants, Boyd Husted, Earl Husted, and Gale Husted, conspired together at the funeral of their father, who was the husband of the plaintiff, to publish the false accusation that plaintiff was guilty of the murder of her said husband, by poison administered.

At the close of all the testimony, all three of the defendants moved jointly and severally that verdict be directed for them, on the general ground that there was no competent evidence of conspiracy or of joint action, to support a recovery on the petition. The court finally directed verdict for all of the defendants, and appellant complains.

The record is out of the ordinary, in that most of it exhibits exclusions of testimony. Practically all received was this: Plaintiff was married to the father of the defend-

1. **APPEAL AND ERROR:** presumptions: exclusion of evidence: necessity to disclose purpose.

ants on May 27, 1913; she lived with him until his death; all arrangements were made for having the funeral cortege depart, but the departure was held up for something like an hour; while in the carriage in the funeral procession, with her daughter and the daughter's husband, the defendant Earl Husted, the latter said to plaintiff she never would have come out and married his father if she hadn't wanted to get his money; she answered, "Do you think, as happy as your papa and I lived together, that I would do anything to shorten his days?" and he replied, "It looks that way;" and after the death, plaintiff and some of the sons called on the doctor who attended decedent in his last illness, bottles of medicine were brought, and the substance of the talk was a statement by Earl, in connection with the death of his father, that they suspected the poisoning of the father by plaintiff. But, on the authority of *Campbell v. Park*, 128 Iowa 181. we may consider what would be in the record, had it not

been wrongfully excluded. As was said in *Ballinger v. Connable*, 100 Iowa 121, at 129:

"It is well to consider what the question propounded to the appellant and the testimony which it was proposed he should give, tended to prove."

At this point, appellee urges that there should be no reversal for exclusion, unless there be a formal offer to show what answer is expected. The writer took that position in the dissent in *American Exp. Co. v. Des Moines Nat. Bank*, 177 Iowa 478, but was in the minority. Beyond debate, it is easier to infer what would have been answered in the case before us than to infer it in the *Express Company* case. And within the rule of that case, the form of questions here, in the light of the whole record, sufficiently indicates what plaintiff was attempting to prove. It may be added that proffert was frequently made and frequently rejected or excluded.

Had some of the exclusions complained of not been made, it may reasonably be said that much would have been added to the weight of the testimony for the plaintiff. We should now know why proceeding with the funeral procession was delayed. Had it not been stricken out, the record would show that the undertaker, Benson, said, in the presence of Gale Husted and of others, "Mrs. Husted, you have already got more trouble than you could bear; I have still another to add to it; your son accuses you of his father's death;" that plaintiff then inquiring what son it was, Benson replied, pointing to Gale, "that one there," and said it was Gale; that Gale remained silent, and did not deny he was making such accusation. Under the principle declared in *Foster v. Trenary*, 65 Iowa 620, at 624, this made it at least a question for the jury whether Gale was making such accusation. Had it not been stricken out, it would be in the record that, after being told of the attitude of

2. EVIDENCE: admissions: acquiescence or silence.

Gale, plaintiff went to an upstairs room, where her daughter and defendant Earl Husted were; that, in the presence of Earl, she said to her daughter, "Do you know why they have held the funeral?" The daughter replying, "Why?" plaintiff said. "The boys are suspicious of me being the cause of your father's death." The daughter exclaimed, "Oh, Earl," and fainted; and Earl seems to have remained silent, except for the statement in the carriage, made later, and already set out. Had it been received, we would

have an answer from plaintiff as to whether, on the day of the funeral, there was an accusation or charge made against her, accusing her of being the cause of her husband's death, and who made it. We would have an answer from the undertaker, on whether either of the defendants asked him as to the wisdom of calling up, or told him to call up, the coroner or county attorney, and whether he did call these officers up, and at the request of the defendants, or one or more of them. The undertaker did testify he had conferences with some of the defendants in two places, but was not allowed to say whether, as a result thereof, he called up the county attorney, and inquired whether, under the circumstances, he should proceed with the funeral; whether or not, from what he heard the defendants, or some of them, say, he believed it his duty not to inter the body until after the facts had been laid before the peace authorities. The county attorney was not allowed to say whether the undertaker called him up in reference to this subject, and if he did, what he said. Had his testimony been received, it is reasonable to infer he might have said Benson informed him that members of the Husted family were objecting to the interment of the body; that these members claimed the death of their father was caused by foul play; and that the undertaker wanted the advice of the county attorney on whether the body should be interred then, or further de-

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civil liability:
evidence.

velopments be awaited. Had answers been permitted, there would have been such testimony as is permitted by cases like *Arnold v. Lutz*, 141 Iowa 596, *Barton v. Holmes*, 16 Iowa 252, *Kidd v. Ward*, 91 Iowa 371, *Wimer v. Allbaugh*, 78 Iowa 79, and *Prime v. Eastwood*, 45 Iowa 640, as to the understanding of words spoken, leaving it a question for the jury whether the words were used in a defamatory sense. Had reasonable latitude in receiving testimony been indulged in, there is every reason to believe it would have become a question for the jury whether what each of the defendants said, did, or omitted to do, established that they were acting together in charging the plaintiff with having murdered her husband. It may be conceded that no one of the items excluded would make a case for a jury, or even that all the excluded matters would not make such a case, without being added to what was received. But a litigant is not bound to make his case by one answer, and it is clear there was error in excluding many proper items of proof. This is so unless a conspiracy may not be shown by circumstantial evidence and reasonable inferences and deductions therefrom—which is not the law. See *Spies v. People*, 122 Ill. 1 (12 N. E. 865).

We are of opinion that the exclusions which have been referred to were erroneous, and that the testimony received, plus what it is reasonable to believe would have been added, had there not been such exclusions, required submitting the charge of conspiracy to the jury. This, of course, is a contingent holding; and whether, on retrial, this charge shall be submitted to the jury, depends upon whether the answers erroneously rejected will be, in substance, what we have assumed they will be. This is necessarily the situation, whenever there is a reversal for exclusion. We cannot reverse without inferring that what was excluded is material. But it may always transpire that,

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SLANDER: evi-
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of words.

when answer is made, nothing material is adduced.

II. The trial court held that, though proof of conspiracy had failed, yet any individual defendant might be held liable, if there was evidence that, as an individual, he did what the petition charged; and it was

5. PLEADING: issue, proof, and variance: conspiracy to slander: individual slander.

further of opinion there was evidence of such individual action against the defendants Earl Husted and Gale Husted. In some of the earlier cases, this court took the view that, where a joint tort is averred, a joint tort must be shown, and if that fails, no judgment of any kind should be rendered. See *Barnes v. Ennenga*, 53 Iowa 497. This holding of the *Barnes* case was, in effect, overruled in *Boswell & Tobin v. Gates*, 56 Iowa 143, at 144, in *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, at 544, and in *State v. McAninch*, 172 Iowa 96, at 105. The great weight of authority in the present day is against said ruling in the *Barnes* case. Charges of joint action are now dealt with "on the simple theory that two equals two times one; that an accusation that A and B committed a murder is, in logic, equivalent to asserting that A committed murder and that B did, and that, therefore, B may not escape because A proves innocent." And see *Rush v. Commonwealth*, (Ky.) 47 S. W. 585; *State v. Wadsworth*, 30 Conn. 55, 57; *State ex rel. Griffin v. Mills*, 39 N. J. L. 587; *State v. McClintock*, 8 Iowa 203, at 206; Chitty on Criminal Law (3d Am. Ed.), 270, 271; *State v. Hunter*, 33 Iowa 361; *Commonwealth v. Brown*, 78 Mass. 135; *Boswell v. Gates*, 56 Iowa 143, 144. It is said in *Commonwealth v. Brown*, supra:

"It is a well-established principle, in all cases, civil as well as criminal, that a charge in tort against two is several, as well as joint, against all and each of them. All or part may be convicted, and all or part may be acquitted."

And in *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, we say that this rule "is alike applicable to actions *ex contractu*

and *ex delicto*." In *Young v. Gormley*, 119 Iowa 546, the charge was that a mayor and two councilmen conspired and confederated together unlawfully to injure plaintiff's real estate, etc.; and we held that, to bind all, a conspiracy must be shown; but that, where a tort may have been committed by one or more, independent of any conspiracy, the allegation of conspiracy is immaterial, and recovery of damages may be had against any participating in the tort. We adhere to this rule. But though we do so, we are of opinion that, on retrial, such rule should not be applied to this case. The basis of the rule is that an act is complained of which the defendants may do jointly or severally.

Now, libel may be the joint act of several. One may furnish the material for the publication, and another publish it. After the publication is made, a third person may ratify it, or be jointly held for circulating the published libel, by selling the publication or helping sell the same, or otherwise putting the libelous article before those who, without his aid, might not see it. See *Fogg v. Boston & L. R. Co.*, 148 Mass. 513 (20 N. E. 109); Wharton on Criminal Law (10th Ed.) Section 211a; *State v. Armstrong*, 106 Mo. 395 (16 S. W. 604). But though this be so of libel, it is not true of slander, because there cannot be a joint slander. See *Hinkle v. Davenport*, 38 Iowa 355, 358. When several say the same slanderous words of the same person, it is, in the very nature of things, an individual offense, and never a joint act. No joint liability arises unless there is a conspiracy to slander. Hence, slander is an exception; and if there be a suit for conspiracy to slander, the case is at an end if there be no evidence of conspiracy, even though there be evidence that the defendants, as individuals, did slander.

Having held that, if the proof failed on concerted action, the plaintiff might not proceed against either defendant, it, of course, becomes unnecessary for us to pass up-

on the complaint that the trial court erred in compelling the plaintiff to elect against which one of the defendants she would proceed as an individual.

III. Many other exclusions of testimony are claimed to have been erroneous. As to these, it suffices to say that the exclusion made was either right, or, if erroneous, was harmless; and that still others are not likely to recur on retrial. The direction of verdict in favor of the defendants was erroneous. Wherefore, the judgment below is reversed. —*Reversed and remanded.*

LADD, WEAVER, GAYNOR, and STEVENS, JJ., concur.

EVANS, J. (dissenting). I. I cannot concur in the reversing opinion. A careful consideration of the record satisfies me that the judgment of dismissal should be affirmed. The petition was in three counts. The first count charged a conspiracy to slander. The second count charged that the defendants slandered plaintiff, in that they accused her of the crime of bigamy. The third count charged that the defendants slandered her in that they accused her of being an adventuress. The opinion sustains the action of the trial court in dismissing the second and third counts of the petition for want of evidence to support the same. I concur in this view, and therefore have no need to consider those branches of the case. The allegations of Count 1 are as follows:

"That she is now, and has been for nearly three years last past, a resident of Clarke County, Iowa, having lived from April 8, 1913, until December 7, 1914, upon the farm of one T. W. Husted, now deceased, whose said farm was near Lacelle, Clarke County, Iowa. That, during the major portion of the time herein described, she was acting as housekeeper, and performed the duties of housekeeper and housewife for the said T. W. Husted upon his farm, and that, up to December 6, 1914, she enjoyed the respect, con-

fidence, and esteem of the people of that community and the communities where she had hitherto dwelt, during her life of forty years. That upon said date, viz., December 6, 1914, and at the funeral of the said T. W. Husted, the defendants herein named confederated and conspired together to publish and did publish, in the presence and hearing of one W. H. Benson and others there assembled to attend the funeral services of said T. W. Husted, as nearly as plaintiff can recall, the following words and matter, to wit: That the plaintiff was guilty of murder of the said T. W. Husted, by means of having administered to him poison, whereof he died; that she was guilty of bigamy committed with the said T. W. Husted; that she was an adventuress, and came to the Husted farm for the purpose of procuring an interest in his estate, or getting money from him. That they desired to stop the funeral, and demanded a post-mortem examination by the coroner of Clarke County. That each and all of these said statements so made were maliciously made by one or the other of these defendants, in the presence of a large concourse there attending the funeral, and that similar statements were maliciously made at the church, after the funeral cortege had left the house. That each and all of these said statements, made in manner and substance as indicated herein, were malicious, false, and untrue, and by the defendants known to be false and untrue, and were made by them for the express purpose of depriving plaintiff of the benefits of public confidence and esteem and regard of her neighbors and friends of the said T. W. Husted, and for the purpose of putting plaintiff in fear and consternation, and to prevent her from claiming any share of the estate of the said T. W. Husted, or presenting any claim for services which she had rendered the said T. W. Husted during his lifetime, and for the purpose of compelling plaintiff to leave the state of Iowa."

The majority opinion treats the foregoing as a charge

of conspiracy to slander. In the construction thus put upon the petition, I concur. The majority opinion holds that the evidence, including that offered and rejected, was sufficient to go to the jury on the question of conspiracy. I am not able to concur in this view. The opinion further holds that material and proper evidence was erroneously rejected. I am not able to concur in this view. I shall presently set forth all the evidence introduced which has any tendency to prove a conspiracy. I shall also set forth specifically the questions appearing in the record which were held objectionable by the trial court which relate to the rejections indicated in the majority opinion as erroneous exclusions.

It will be noted that the petition charged a completed conspiracy to slander the plaintiff, at the time of the funeral, and in the presence of the persons there attending. It is charged also that, in pursuance of such conspiracy, they did so slander her at such time and place. While the majority opinion states that the plaintiff was the wife of the deceased at the time of his death, neither the plaintiff nor her counsel have been willing to commit themselves to that statement. Her petition alleged that she was "his housekeeper and housewife." The plaintiff testified, also, that a marriage ceremony had been performed. Her counsel, in his brief, refers to her as the "putative wife." She does not appear ever to have borne the name of the deceased. The implications of the record, as a whole, are that the plaintiff rested at all times under the obligations of a prior marriage to another husband, whose name she still bore. See, also, *Yocum v. Taylor*, 179 Iowa 695. The defendant Boyd Husted was the brother of the deceased. The other two defendants were the sons of the deceased. It may fairly be inferred from the evidence that these sons did not look with favor upon the relation of the plaintiff and their deceased father, and that they were dissatisfied with the circumstances attending the death, and that they were in

doubt as to their duty in the premises. I set forth herein all the evidence introduced which tends in any degree to prove the alleged conspiracy or slander, as charged in the petition. I set the same forth by question and answer, omitting all objections and rulings. The plaintiff herself testified as follows:

"Q. What did Mr. Benson say, in the presence of Gale Husted and in the presence of those parties here named,—confining your answer to what was said in response or in respect to Mr. Husted's death and its cause? A. He says: 'Mrs. Husted, you have already got more trouble than you could bear. I have still another to add to it,' he says, 'your son, he accuses you of his father's death.' Q. And what did you say? A. I said, 'What son?' and he said, 'That one there;' and that was Gale. (The defendants now move the court to strike from the record and to withdraw from the consideration of the jury the answer of the witness, for the same reason as stated in the objections.) Q. Mr. Benson pointed to someone? A. Yes, sir. He said that son. He said that was Gale. Q. What did you do, right in this very connection? A. I went upstairs to a room where my daughter was, and broke down. Q. Who was present when you went to the room of your daughter? A. Earl Husted, the husband of my daughter. Q. What was said by you in their presence—confining your answer to what was said in connection with the death of T. W. Husted and who caused it? A. I says to my daughter: 'Do you know why they have held the funeral?' and she says, 'Why?' and I says: 'The boys are suspicious of me being the cause of your father's death.' Q. What did your daughter say—confining her remarks to what was said in the presence of Earl Husted? A. 'Oh, Earl!' and fainted. * * * A. I think it was about an hour that the funeral was held up. We went from the house to the church. Q. Who occupied the same carriage with you? A. Myself, my daughter, her

husband, and I think Mr. Husted's son Guy. Q. Was there anything said, going from the house to the church or from the church to the cemetery, in respect to what caused Mr. Husted's death, by Earl Husted? You can answer that, yes or no. A. Yes, sir. Q. I will ask you to state the conversation in respect thereto. A. I said: 'Earl, do you think, as happy as your papa and I lived together, that I would do anything to shorten his days?' and he says, 'It looks that way.'"

W. H. Benson, the officiating undertaker at the funeral, testified in her behalf as follows:

"Q. Now, when you got there, were there any objections being made as to the funeral going on, by any of these defendants? A. Not when I first got there. That is, not right on the first start. Q. Who was it said anything to you about the funeral not going on at once? A. Well, as you have stated the question, there was nothing said about holding the funeral. May I state what was said? Mr. Dyer: Yes, sir. * * * Q. Do you see any of these defendants? A. Well, Boyd, I know very well, but the other boys I don't know, one from the other. We were quite a ways apart when the boys grew up. I know they are Husteds. I do not know which is Earl and which is Gale. I had a conversation that day with Boyd and the two boys. I am not quite certain where it took place—whether at the door yard near the door or out at the barn. I had more than one conversation with these three, and they were all in respect to the one subject, in connection with this funeral. Q. What did either of these defendants say to you in respect to the cause of T. W. Husted's death? A. There was nothing said to me about the cause of his death, at any time. Q. And that, as a result of these conferences, if you had more than one,—did you have more than one with these parties, or some of them? A. One in one place, then we moved on a little, and had another one there. Q. Now, Mr. Benson, you remember of go-

ing to see the plaintiff in this case and having some talk with her in reference to Mr. Husted's death, did you not? Answer that, yes or no. A. Not in reference to his death. Q. In reference to what? What was it in reference to? Well, let me inquire. I will withdraw that. You recollect of seeing her when Gale Husted was present, and perhaps Mrs. Siefkas and Mrs. Switzer? Do you remember of talking to Mrs. Yocum in the presence of these people? A. Yes, sir. Q. At that time, you stated to Mrs. Husted, or Mrs. Yocum, that the boys, meaning the Husted boys, were suspicious of Mr. Husted's death. Do you remember of such a conversation? A. There was nothing of the kind said. Cross-examination: Neither of these defendants did say that this woman had anything to do with the death of T. W. Husted."

R. W. Meeker, the officiating minister, testified in her behalf as follows:

"I know the defendants Boyd and Gale Husted, and saw them that day at the funeral. Q. Where did you see them first? A. I think perhaps they were in the living room of the house. I first met them on that day. Q. Did you see them when they were alone together? A. Two of them. I had a conversation with them at the barn. I am not certain whether all three of the defendants or but two of them were present. If only two, it was Boyd Husted and Earl Husted. I did not meet and talk with the three defendants alone at any other place. It was between half past nine and ten o'clock. * * * Q. What was said in this connection, Mr. Meeker? A. The statement was made that they were undecided as to whether to proceed with the funeral, on account of being dissatisfied. Q. Was there any discussion at that time as to whether there should be a post mortem held? A. There was not. Q. How long was the cortege held up there at the house? A. I think about an hour. That is, we were about an hour late, leaving the house. Q. Did you hear any of these defendants make a

statement in respect to the manner of T. W. Husted's death, and whom they thought was responsible therefor? A. No, sir. * * * I had another conversation with some of these defendants. It was near what I would term a woodhouse, in the same yard with the dwelling house. There was present at the conversation the three Mr. Husteds and Mr. Benson. Q. Was there anything said at that time in respect to the manner of his death, by any of these parties? A. No, sir. Q. At this meeting at the woodhouse, as you called it, were you invited to attend it, by some of the defendants? A. No, sir, I was not invited at all. Q. Do you know, as a matter of fact, that these defendants, or some of them, were making a charge on that day and a claim on that day that the plaintiff in this case was responsible for T. W. Husted's death in some way? A. I don't know."

The foregoing is all the evidence of what occurred on the day of the funeral which tended to show either conspiracy or slander at that time.

To the foregoing it should be added that, two weeks later, the plaintiff and the two sons of the deceased brought the remnant of medicines to the office of Dr. Douthett for examination. On that day, Dr. Douthett had a conversation with the sons, concerning which he testified as follows:

"Well, they came into my office. There were some patients waiting there, and they said they wanted to speak to me privately, and I took them into the private office, and they said they had suspected their father had been foully dealt with. That they suspected, they said, that their father had been foully dealt with,—I don't know the exact language. That was it in substance. I asked them what the trouble was, and they said—it kind of surprised me, and I asked them what the trouble was—and they said that they suspected that he had been poisoned, and I said, 'By whom?' and they said,—I don't know the exact language,—

'By that woman down there.' I think that is what they said—that is my recollection. Q. Whom did you understand they meant by 'that woman?' A. This lady sitting here,—Mrs. Husted, or Mrs. Yocum."

The petition predicated nothing upon what was said and done on that day. We may assume, therefore, that this evidence was offered in aggravation of damages, for which purpose it was admissible. I do not think that it could be regarded as in the nature of an admission by the defendants of the existence of a past conspiracy on the day of the funeral. Nor has such contention been made for it by appellant's counsel.

I do not understand the majority opinion to hold that the evidence actually introduced was sufficient proof of the alleged conspiracy. I need not, therefore, dwell upon that proposition. The emphasis of the opinion appears to be laid upon the erroneous exclusion of appropriate testimony, which, if admitted, might have been sufficient to sustain the allegations of the petition. I have set forth the foregoing evidence which was actually introduced, partly because of its important bearing on the question of exclusion. To this question I now turn.

II. In the examination of the plaintiff herself as a witness, the following questions, put to her by her counsel, were held to be objectionable:

"(1) I inquire of you whether, upon the Sunday morning, the day of the funeral, there was an accusation or charge made against you in respect to accusing you of being the cause of T. W. Husted's death.

"(2) I am inquiring whether Mr. Husted, in the carriage going from the house to the church or from the church to the cemetery, stated to you that you would never have come out there and married his father, if it hadn't been that you wanted to get his money.

"(3) And in connection with that visit, did you bring

to Dr. Douthett all the vials of medicine and everything of the kind, and in Dr. Douthett's office, and in the presence of Earl Husted, say: 'Here are all the medicines and everything that was given him. I wish you would examine them, and see if there is anything wrong with the medicines,'—in the presence of Earl Husted?"

In the examination of the witness Meeker, on behalf of plaintiff, the following questions put by her counsel were held to be objectionable:

"(4) I will ask you to answer the question propounded to you. What was said in respect to the funeral going forward or its not going forward?"

"(5) I inquire whether one or the other of these three defendants stated, in your presence and hearing, that they were not satisfied with the manner of Mr. Husted's death.

"(6) I inquire of you whether these defendants there present asked you whether or not they ought to hold the body until there was a post-mortem examination held.

"(7) Was there anything said there by these defendants—I am talking now of the barn episode—that conveyed to your mind the thought and idea that they believed that this man had met death in a foul way? (The Court: You may show the words stated, and then show how the words were understood by the person to whom the words were addressed. Plaintiff excepts.)

"(8) Was the question there discussed as to whether or not the authorities should be advised, or the county attorney, or the coroner?"

"(9) Do you know, as a matter of fact, that these defendants or some of them were making a charge on that day and a claim upon that day that the plaintiff in this case was responsible for T. W. Husted's death in some way? (The Court: The question is too general. It does not ask specifically. However, the witness may answer, if he

knows.) A. I don't know. Q. I inquire of you whether, since the funeral, you have heard such charges."

In the examination of the witness Benson, in plaintiff's behalf, the following questions put by her counsel were held to be objectionable:

"(10) Did either of these defendants say to you that you should call up, or it would be wise to call up, the coroner or the county attorney? Was that discussed in your presence or in the presence of Boyd or Gale Husted or any of them?

"(11) I inquire of you—you called up the county coroner or the county attorney, did you not?

"(12) And they were called up at the request of these defendants, or one or more of them?

"(13) From what you learned that day, and what you learned and heard from these defendants, or some of them, you believed that it was your duty not to inter this body until the facts had been laid before the peace authorities of Clarke County?

"(14) What you learned from the conferences had with these defendants, or one or more of them, you are led to believe and did believe that they were suspicious, to say the least, or led you to believe that they suspected that this man, T. W. Husted, had been poisoned, and therefore it was your duty, under your situation, to inquire of the peace authorities of Clarke County before interment.

"(15) I want to inquire if the lateness of this funeral was not due and occasioned by statements and innuendoes made by these defendants, or some of them, in respect to the manner of T. W. Husted's death.

"(16) That the occasion of the delay of this funeral,—that the statements made by these defendants, or some of them, were of such a nature and character that would lead you to suspect, or would lead anyone to suspect, possibly—

I will withdraw that latter clause—that T. W. Husted met his death in a foul way?

“(17) I will ask you if these defendants, or some of them, did not say to you that they were not satisfied with the manner of T. W. Husted’s death.

“(18) And in that connection, the same defendants indicated that the plaintiff in this action was in some way responsible for that death?”

In the examination of Henry Stivers, county attorney, on behalf of plaintiff, the following questions pertaining to a telephone conversation between the witness and Benson were held objectionable.

“(19) Did he state to you that members of the Husted family were objecting to the interment of the body, or in substance that?

“(20) Did he state to you that members of the Husted family had claimed that the death of Husted was caused by foul play, and he wanted your advice in the premises whether he should inter the body then or await further developments?”

While the record contains much colloquy and repetition, the foregoing questions which I have set forth comprise, without repetition, all the questions put by plaintiff’s counsel to her witnesses which were held objectionable. The majority opinion does not indicate any specific question as having been erroneously rejected, and yet the trial court, upon a retrial, must be confronted with that very question. If there was an erroneous exclusion of evidence, the error must be found in the rejection of some or all of the questions which I have herein set forth. It will be noted at a glance that many of them are leading and suggestive. Many others call for conclusions and impressions of the witness, and for hearsay. The trial court repeatedly advised counsel of the grounds of rejecting the questions propounded along these lines. It will be noted, also, that the matters

sought to be elicited by some of these questions were later testified to by the same witnesses, as will appear from the testimony actually received, which I have set forth above. I have numbered the rejected questions, as above set forth, for convenience of reference.

No. 1 was clearly objectionable. No. 2 was later answered by the witness, in that the conversation was fully stated by her. No. 3 was clearly immaterial. Furthermore, the circumstance was fully testified to by Dr. Douthett. Matters inquired about in Nos. 4, 5, and 6 were testified to by the witness Meeker, and are above set forth. No. 7 was modified, upon the suggestion of the court and answered, and is included in the testimony introduced, which I have above set forth. No. 8 was of doubtful materiality, and had been negatived by the witness. If it had been answered in the affirmative, it could not change the result in this case. No. 9 was a double question, the first part of which was answered. The unanswered part called for hearsay, purely. Nos. 10 to 18 were questions put to Benson. The first four pertain to consultation between the witness and the county attorney. If each question had been answered in the affirmative, it could not have affected the result. Each of the questions was clearly objectionable in form. The other rejected questions put to this witness called for the merest conclusions, and were objectionable for that reason. Nos. 19 and 20 were questions put to the county attorney, and called for the merest hearsay.

Turning now to that part of the majority opinion which deals with the excluded evidence, much of the evidence recited therein which is deemed to have been erroneously objected to was, in fact, received, as will be seen from what I have set forth herein.

Though the majority opinion does not specify (as I think it ought to do) the particular rejected questions which ought to have been permitted, the necessary effect of the

holding is to say that the rejected questions Nos. 19 and 20 were proper, and should have been permitted; likewise, that rejected questions 13 and 14 were proper, and should have been permitted. I cannot think so. The question of difference between us at this point is so elementary that I will not discuss it. The opinion treats the rulings of the trial court as having excluded evidence which might have been material, and quite ignores consideration of whether the questions propounded were proper questions. In order to maintain her case, the plaintiff was required, not only to adduce material evidence, but she was required to adduce it by appropriate interrogation. It was not permissible to her to adduce even material evidence by improper questions. Even improper questions might adduce proper evidence. It was the duty of the trial court, nevertheless, to hold counsel to proper interrogation. This is what was done in this case. Having gone through this record with much care, I am unable to find any ruling of the court in the rejection of evidence which can fairly be said to be erroneous. I think, therefore, that the case ought to be disposed of here upon the evidence appearing in the record. It will hardly be contended, I take it, that this is sufficient to justify a reversal. Indeed, the emphasis of appellant's argument here is laid upon the claim of alleged slander perpetrated, and not upon the conspiracy, as is indicated by the following quotation from her brief:

"The trial court seem to think that conspiracy was the gravamen of the charge. It was merely an incident of the charge. The real charge was slander."

The opinion holds that conspiracy is the gravamen of the charge, and not slander. With this view I agree. I think, therefore, that the record does not justify a reversal as to any defendant.

I am constrained to direct specific attention to the state of the record as pertaining to the defendant Boyd Husted.

There is not a word in the evidence, either that rejected or that introduced, which connects him in any way with either the alleged conspiracy or the alleged slander. His name is barely mentioned in any of the evidence received or in any of the rejected questions. All that appears is that he was a brother of the deceased's, and was at the funeral, and may have been present at the conversation with the officiating minister, Meeker. This conversation was testified to by Meeker, and of a certainty disclosed nothing upon which a verdict against this defendant could rest. I would affirm.

PRESTON, C. J., concurs in this dissent.

W. M. KEYS et al., Appellants, v. AMERICAN BRICK & TILE COMPANY, Appellee.

APPEAL AND ERROR: Absence of Exceptions. A judgment of the district court, on an award of the Industrial Commissioner under the Workmen's Compensation Act may not be reviewed on appeal when the record reveals no exceptions to such judgment.

Appeal from Cerro Gordo District Court.—F. M. EDWARDS, Judge.

JANUARY 14, 1919.

THE compensation statute committee on arbitration made the plaintiffs an award, on the ground that their son had met his death through injury in the course of employment by defendant. The industrial commissioner, sitting in review, modified this award. The parents claim that they duly removed this finding to the district court. At any rate, that court did review the finding of said commissioner, and, as we gather it, seems to have affirmed his finding. But the parents have perfected an appeal from that action of the district court.—*Affirmed.*

Garfield E. Breese, for appellants.

Blythe, Markley, Rule & Smith, and *Miller & Wallingford*, for appellee.

SALINGER, J.—I. These plaintiffs obtained an award by the arbitration committee. The defendants caused this award to be reviewed by the industrial commissioner, and he modified the award, in some particulars. The plaintiffs filed in the district court an application which asserted that the award of the committee and said decision of the industrial commissioner had been duly rendered, and thereupon asked the court to render a decree in accordance with said decision of the industrial commissioner, "as provided by law, and particularly Section 2477-m33 of the Supplement to the Code, 1913." The court applied to entered a decision which, as we understand it, was substantially the finding of the industrial commissioner. The plaintiffs asked the court to render a decree in accordance with said finding. From the action of the court which they had requested, plaintiffs now appeal. Ordinarily, no one would contend that he could maintain an appeal from any judgment he had asked a court to enter. It is not clear that this is so, but we take it to be the thought of appellants that the judgment of the court upon the finding of the commissioner was, while a necessary form, still merely a form; that appellants could not have the finding of the commissioner reviewed until the district court entered judgment thereon; that, therefore, they were bound to request such judgment; and that, as it is a prerequisite to reviewing the finding of the commissioner in this court that the district court should enter judgment upon such finding, it cannot be that taking of the steps which alone made appeal possible can have the effect of destroying the appeal. But we cannot consider whether this position, if it be that of the appellant, be well taken, nor many other questions presented by the parties.

We do not need to determine whether the situation at bar might not have been avoided by applying to the court, not to enter judgment upon the finding of the commissioner, but to give such judgment as the finding of the industrial commissioner should, as matter of law, have been. There seem to be at least two insuperable obstacles to giving the appellants any relief. First, under the abstract of the appellee, which has not been met by certification, it would seem that the record was not lodged in the district court in such manner as, under the statute, to give that court the power to proceed as prayed; second, we are of opinion that, though the application prayed for decree, that the judgment of the court upon the application was not the entry of a chancery decree, reviewable here *de novo* as such. That being so, nothing in the statute differentiates this judgment from judgments as to which an exception is required, in order that appellate review may be had. Be the function of the district court what it may, in entering judgment upon the finding of the commissioner or the award of the committee, it may not be complained of after it is entered by one who made no objection to it below after it was entered. It follows appellants may have no relief here if they took no exception below to the judgment which formulated and made effective that of which they now complain. It appears by the abstract for appellee, which, as said, has not been met by certification, that neither party took any exception, and that no exception was entered. Appellee makes this point, and we find nothing in the argument for appellant that meets it.

In our opinion, the action of the district court must be, and the same is,—*Affirmed*.

LADD, C. J., EVANS, PRESTON, and STEVENS, JJ., concur.

SCHUSTER BROTHERS et al., Appellees, v. DAVIS BROTHERS, INCORPORATED, et al., Appellants.

JUDGMENT: Absence of Prayer. Prayer for relief is just as essential as plea and proof. So held where personal judgment was erroneously entered in the absence of any prayer therefor.

APPEAL AND ERROR: Failure to Question Insufficient Cause of Action. A legally insufficient cause of action becomes sufficient, in the absence of attack thereon in the trial court.

PLEADING: Necessity for Prayer, Etc. Plea, prayer, and proof are essential conditions precedent to the entry of judgment. So held where the court erroneously entered judgment in the absence of either plea or prayer.

CORPORATIONS: Equitable Ownership of Property. Property purchased by an officer of a corporation in his own name, with funds paid him by the corporation as compensation for official services, does not equitably belong to the corporation, simply because no formal contract existed as to what compensation should be paid for such services.

FRAUDULENT CONVEYANCES: Reliance on Representation. One may not predicate reliance on a representation which is contradicted by an authorized public record, of which he is charged with notice, and by his own personal knowledge.

Appeal from Mahaska District Court.—HENRY SILWOLD, Judge.

JANUARY 14, 1919.

CREDITORS of the defendant corporation prayed that certain real estate, standing in the individual name of Jenkin E. Davis and John W. Davis, be subjected to the payment of corporate debts. The trial court granted this prayer, and, in addition, entered personal judgment against said two individuals for the amount of said corporate debt, and against defendant Evans, on the theory that he was a subscriber to stock of said corporation for which he had not

paid, for the par value of such stock. Defendants appeal.—
Reversed.

W. R. Lacey and O. C. G. Phillips, for appellants.

H. H. Sheriff and Burrell & Devitt, for appellees.

SALINGER, J.—I. The plaintiffs obtained judgment against the defendant Davis Brothers, Incorporated. For the purposes of the point now under consideration, it suffices to say that the petition alleges: First, that the defendants Jenkin E. Davis and John W. Davis conspired together for the purpose of fraudulently taking title to described real property in their own names; that their purpose was to place said property beyond the reach of any creditors of the corporation; and that it was part of the conspiracy to pay for the property with funds belonging to the corporation; that they had power so to pay and did so because they were the officers and directors of the corporation; second, that the two Davises, acting as officers and directors of the corporation, have, for many years, represented to “their” creditors (meaning, probably, the creditors of the corporation) that the property, the title to which they had placed in their individual names, was the property of the corporation, and thereby induced the creditors to furnish merchandise to the corporation; and that said judgments were obtained because the creditors were not paid for that merchandise; third, that the Davises violated the statute governing incorporations; that, on account of the imperfect and improper organization and the fraudulent management of the business of the corporation by the Davises, as well as on account of the other matters aforesaid, the two Davises are personally liable to plaintiffs for what the corporation owes the plaintiffs. It is further alleged that, notwithstanding the placing of the title of property out of which the

1. JUDGMENT:
absence of
prayer.

creditors seek satisfaction in the individual name of the two Davises, the equitable title thereto is in the defendant incorporation, and that the plaintiffs have a lien on said real estate to satisfy their said judgments.

Assume it debatable whether, if all that is charged were admitted, it would make the two Davises personally liable to pay the debts owing by the corporation, or a judgment obtained against the corporation alone. But the petition was in no manner attacked, and if these allegations are proved, the defendants Jenkin E. Davis and

2. APPEAL AND
ERROR: failure
to question in-
sufficient cause
of action.

John W. Davis are in no position to say that the facts set forth in the petition do not create such personal liability. But something more than plea and proof is necessary for relief, and that is, prayer for relief. One prayer of the petition is that a receiver be appointed to take charge of the property in question. None was appointed. The only other demand for relief is, "that their judgment be declared a first lien on the property above described from October 13, 1904." On this prayer, the decree not only established the lien prayed, but ordered personal judgment against the two Davises, and special execution to make any deficiency on sale of the property. This was done because the court found that they had been guilty of fraudulent conduct in organizing and managing the corporation, and possibly, also, because of a finding that said other matters charged were established. In addition, and without even an allegation of fact to cover the point, personal judgment was entered against defendant Evans on the theory that he had become the holder of \$200 of shares in the defendant corporation, of the par value of \$200, without making payment therefor. As to the defendants Jenkin E. Davis and John W. Davis, this much of the decree cannot be sustained, for want of prayer therefor. As to the defendant Evans, the same is true, and, in addition, there is no allegation of fact whereon to base the relief.

Section 3559 of the Code provides that, among other things, the petition shall contain a demand of the relief to which the plaintiff considers himself entitled. This require-

8. PLEADING:
necessity for
prayer, etc.

ment has some purpose, and would seem to indicate on its face that no relief not so demanded shall be given. While it is said in *Browne v. Kiel*, 117 Iowa 316, at 318, that "a judgment must follow the prayer for relief, and cannot be extended beyond it," this hardly controls here, because the judgment spoken to in that case was on default, and is governed by a special statute. Perhaps the declaration of *Byam v. Cook*, 21 Iowa 392, that, in a suit in equity, relief will not be granted which was not asked in the petition, is also not controlling, because this was said in a case where the court refused to grant such relief. But from *Stokes v. Sprague*, 110 Iowa 89, it can well be inferred that nothing should be awarded beyond the relief demanded, because the decision recognizes that the prayer is material, in that it holds that a demurrer in an equity suit is sufficient in form where it complies with the statute form by charging that the facts stated do not entitle plaintiff to the relief demanded. In *Baker v. Oughton*, 130 Iowa 35, it is declared to be error not to instruct that no more should be allowed on a single item, in an account exhibiting several items, than was claimed for that item, though the verdict was less than the aggregate amount of all the items. We held in *Mobley v. Dubuque Gas L. & C. Co.*, 11 Iowa 71, that a court of equity will not decree foreclosure against a defendant when the bill asks for no such decree. In *Marder, Luse & Co. v. Wright*, 70 Iowa 42, suit in equity to enforce a vendor's lien, it was held error to grant relief entirely distinct from that demanded in the petition, even though such relief might be warranted by allegations of the reply, if that were the pleading in which to ask relief. In *District Twop. v. Farmers' Bank*, 88 Iowa 194, there was a reversal, among other

things because relief was granted where no relief of the kind was asked. In *Lafever v. Stone*, 55 Iowa 49, it is conceded the court had jurisdiction to grant the relief given, were it prayed, and there was a reversal for the sole reason that, while there was power to give such relief, it was improperly granted because not prayed for. It is squarely ruled in *Tice v. Derby*, 59 Iowa 312, that neither party should be granted relief greater than is demanded. In that case, a suit to quiet title, the court decreed plaintiff a larger interest than he claimed. It is said in *Bottorff v. Lewis*, 121 Iowa 27, 31, 32, that it was error to award the plaintiff seven thirtieths of land involved in a partition suit when she asked for but a tenth interest, and said that:

"We have uniformly held it is error for the court to grant relief not called for by the petition, or a judgment or decree different from that prayed for."

Among other cases, this case cites *Marder, Luse & Co. v. Wright*, 70 Iowa 42, *District Twp. v. Farmers' Bank*, 88 Iowa 194, and *Tice v. Derby*, 59 Iowa 312, upon which we have already commented. The departure, then, was more radical than in all said cases.

The personal judgments cannot be sustained.

II. We have disposed of those allegations of the petition wherewith it is attempted to base a personal liability of the defendants other than the defendant corporation. It

will be remembered the petition does ask the relief of establishing the judgments obtained by the plaintiffs against the defendant corporation as a lien upon certain property.

The statements that the individual defendants violated the statute in organizing said corporation and fraudulently managed the same, and that they induced the complaining creditors to believe that said property belonged to the incorporation, despite the fact that title thereto was taken in the individual names of the two Davises, and possibly other

4. CORPORATIONS: equitable ownership of property.

statements, are pleaded as the basis for obtaining personal judgment against the individuals who are made defendants. They have been considered in connection with the holding that there was no prayer entitling plaintiffs to the personal judgments entered. But, while the allegation that the Davises fraudulently took title in their own name to the property in question, and used their powers as managers and officers to pay for same from the funds of the corporation, may be a basis for claiming personal judgment, it unquestionably well pleads a basis for making said judgments a lien upon said property. The allegation was in no manner attacked. Whether it is worked by failure to attack, or by the fact that the allegation is well pleaded, there is, then, a basis in the petition for making said judgments a lien upon said property, despite the fact that the title thereto is in the name of the two Davises. And *that* relief is prayed. The question remaining, then, is whether there is any evidence of the alleged fraudulent practices. The record is quite confused, and we have been compelled to study it with exceptional care. Such examination satisfies us that the evidence does not sustain the charge. It discloses that the individual Davises purchased the property before the corporation came into existence; that, originally, they undertook to pay for it in relatively small monthly payments, quite within their means; that the purchase price of \$6,000 was in part paid off, and that then \$5,400 was borrowed by these individuals of Evans upon their individual notes and mortgage to Evans, which have since been cancelled through payment. That this \$5,400 was paid from funds belonging to the corporation, there is no evidence. The utmost there is, is a claim in the briefs that the payments must be held to have been from the funds of the corporation, because the two Davises performed no services for it except such as their official position in the corporation obligated them to render, and that payment made for

those services is unlawful, because there was no formal contract as to what compensation should be paid for such services. There is not even evidence that the payments were made from the compensation received for services. But if there were, the fact that no formal contract for the services had been entered into would not work that paying for property with such compensation would put the equitable title to such property in the corporation. In one word, there is no evidence whatever to sustain a holding that the real estate which the creditors seek to subject, is or ever was the property of their judgment debtor; or, stating it another way, there is no evidence that the property was paid for by the funds of the corporation.

III. There is strong reason for holding that the claim of the plaintiffs is, in any event, barred by the statute of limitations, and that the two Davises hold title by adverse possession. The plea is not artificially made in answer, but it does appear therefrom that dismissal of the petition is prayed on the ground that, much more than ten years before this suit was brought, the deed to the two Davises was put on record, and that some of the creditors, at least, had actual notice through their agents that the title was in the name of the two Davises, and that they were claiming to be owners. It is unnecessary to enlarge upon this point or to make it controlling, in view of the fact that we find that the claims of the plaintiff are not established, without reference to the affirmative defenses aforesaid.

IV. The defendant Jenkin E. Davis, while a managing officer of the defendant corporation, made alleged statements to a commercial agency, the material part of which is that the defendant corporation owned some undescribed real estate, estimated to be worth between \$7,000 and \$8,000. While it may be conceded the corporation was bound by these statements, if it be compe-

5. FRAUDULENT
CONVEYANCES:
reliance on
representation.

tently shown that any were made, the evidence shows without dispute that the defendant John W. Davis and the defendant Evans had nothing to do with making these statements, and knew nothing about them. It follows that, even if this corporation and Jenkin E. Davis might be affected by the making of these statements, they have in no view any effect upon the rights of the defendants John W. Davis and Evans. So far as any effect upon the corporation and Jenkin E. Davis is concerned, it is first to be noted that the statements themselves were shown by what was confessedly a copy, without the laying of any foundation for secondary evidence, and over objection that they were not the best evidence. Passing that, there is no evidence that any plaintiff other than Schuster knew anything about these statements, or relied upon them. The credit man for the plaintiff Schuster does say that he saw the copies, and did rely upon them, and through such reliance extended credit to the corporation. He could not rely upon the statements for more than they asserted. He confesses he did not know, when he read the assertions, that the corporation had real estate, what that real estate was, or where it was. Reading such a statement will not authorize the reader to say that he gave credit upon the assurance that the corporation owned the particular piece of property out of which it is now sought to make satisfaction. No one can say whether credit would have been extended if plaintiff Schuster had known that the statement referred to this property. To be told and to believe that the corporation owned real estate of some kind, somewhere, worth \$8,000, is quite a different thing from being induced to give credit in reliance upon the assertion that the corporation owned a particular piece of property in Oskaloosa. While influenced by the ownership of property believed to be worth \$8,000, no one may say whether he would have believed the property was worth that, had he been advised that this was this property.

Passing that, in turn, it appears without dispute that, at the very time when these statements were being issued, the records of Mahaska County asserted that this particular piece of property was not the property of the corporation, no matter how much real estate it might own or not own. And it is further undisputed that the representative of Schuster who sold the goods in question was informed, at all times before credit was given, that the title to this particular property was in the name of the two Davises, and that they claimed to be its owner. Grant every possible effect for the naked statement that the corporation owned real estate of some kind, somewhere, estimated to be worth between \$7,000 and \$8,000, and there is nothing to estop Jenkin E. Davis from now asserting what is the established fact: to wit, that the title to this particular piece of property was of record in such manner as to advise all the world that the corporation did not own it, and that the like information was given to any who claim reliance upon the statements by the actual notice which was given to the representative of Schuster.

It follows from what we have said that, in our judgment, the decree of the district court must be—*Reversed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

DAVENPORT LOCOMOTIVE WORKS, Appellant, v. CITY OF
DAVENPORT et al., Appellees.

MUNICIPAL CORPORATIONS: Notice of Intention to Construct Sewer. A notice of intention to construct a sewer, which fails to give the *location* of the sewer and the *kind* of materials which will be used in the construction, is fatally defective, even though the notice makes reference to the engineer's plat where such information is set forth. (Sec. 965, Code Supp., 1913.)

Appeal from Scott District Court.—F. D. LETTS, Judge.

OCTOBER 25, 1918.

REHEARING DENIED JANUARY 15, 1919.

THE plaintiff prayed that the collection of a sewer tax be enjoined. To its petition a demurrer was interposed and sustained. As plaintiff elected to stand on the ruling, the petition was dismissed. Plaintiff appeals.—*Reversed.*

Ely & Bush, for appellant.

Waldo Becker and E. M. Sharon, for appellees.

LADD, J.—It appears from the petition that the plaintiff is owner of about 45 acres of land in the city of Davenport, separated into three tracts; that, about March 5, 1913, the council of that city adopted a resolution directing the city engineer to prepare a plat for the construction of sewers, as required by Section 965 of the Code; and that, in pursuance thereof and subsequent proceedings, a sewer system was constructed, and \$4,315.75 levied against the plaintiff's property as its proper proportion of the cost. The plaintiff contends that all proceedings subsequent to the adoption of the resolution of necessity were without jurisdiction, in that notice of the intention to make the improvement did not comply with Section 965 of the Code, for that it did not specify its location or the kind of material to be used. That section provides that:

"Before the council orders any street improved or sewer constructed, it shall direct the engineer to prepare a plat, showing the location and general nature of the improvement, the extent thereof, the kind, or, in case of sewers, the size and kind of material to be used, and an estimate of the cost thereof, and the amount assessable upon any railway or street railway and upon each lot or parcel of land adjacent to or abutting on such improvement per front foot or square

foot in area, and file such plat and estimate in the office of the clerk or recorder. Notice of its intention to make such improvement shall be published by the city clerk or recorder in three consecutive issues of a newspaper of such city, stating that such plat is on file, and, generally, the nature of the improvements, its location, kind of material to be used, and the estimate of its cost, and fixing the time before which objections thereto can be filed, which time shall be not less than five days after the last publication of such notice. The council, after considering such objections, shall determine what changes, if any, shall be made in the plan shown by such plat, and may, by resolution, order such improvement, prescribing generally the extent of the work, the kind, and, in case of sewers, the size and kind, of the materials to be used, when the work shall be completed, the terms of payment, and provide for the publication of notice asking proposals for doing such work, and the time the same will be acted upon."

The resolution of necessity was in conformity with these requirements; but the notice, as is contended, omitted to state "the general nature of the improvement, its location, kind of material to be used." The notice, save that portion fixing the time for hearing, was in words following:

"Notice is hereby given of the intention of the city council of the city of Davenport to construct the following sanitary sewers, with the necessary manholes and connection pipes, to wit: Thirteenth district main sewer, as per plat, profiles, estimates now on file in the office of the city clerk in the city hall. Estimated cost, \$60,656.24.

"The cost of said sewer will be assessed as a special tax against the property abutting and adjacent upon such sewers in proportion to the special benefits conferred upon said property by said improvement. The city engineer's plat of the above described improvement, showing the location and general nature of said sewer, the extent thereof, the

size and kind of material to be used, and the amount assessable against each lot and parcel of land abutting on or adjacent to said improvements, is now on file in the office of the city clerk for inspection of all parties interested in said improvement."

The general nature of the improvement is sufficiently specified, but the notice contains nothing to indicate its location or the kind of material to be used. It is said therein that this may be ascertained from consulting the engineer's plat, on file. This much were possible in any event; for the notice must, in addition to reciting the location and kind of material to be used, state that a plat is on file, and this means such a one as is described in the statute quoted. The manifest design of exacting such a notice is to challenge the attention of the abutting or adjacent property holders, by specifying the proposed location of the improvement and of what it is to be constituted, to the end that they shall be directly advised, and be afforded an opportunity to be heard. If these may only be ascertained by inquiry at the city offices, and upon examination of plats, few, if any, would be likely to do this, and many might doubt their ability so to do.

Reverting to the notice, it will be observed that the sewer is designated as the "thirteenth district main sewer." This district is said to include an area of from 700 to 1,000 acres; and the question at once would arise, in the minds of those paying little heed to such matters, Where is the thirteenth district? In what part of it is the main sewer to be located? No reference whatever is made to lateral sewers, though several were to be laid, the plan contemplating eight sections. A person without information on the subject would be unable to fix the locality of any one of these from anything contained in the notice, nor would he be informed as to the material to be employed in their construction. The notice, as published, served no other pur-

pose than to direct attention to the circumstance that there was to be a main sewer somewhere in the thirteenth district, without indicating its whereabouts or that of the sewer. The rule is well established that the adoption of a resolution of necessity and the publication of a notice of intention to improve are conditions precedent to ordering or making the improvement, and that the statutes requiring same are to be somewhat strictly followed. As these are essential to the exercise of power by the city council, they are jurisdictional, without which all subsequent proceedings are invalid.

Objections to the location of an improvement like that here contemplated, or to the kind of material to be used, would be of no avail to the abutting or adjacent owner, unless interposed previously to the order that the improvement be made.

Section 965 of the Code is so similar to Section 810, the former being applicable to cities under special charter, and the latter to all others, that decisions with reference to what is essential to the exercise of power by the city council in either class of municipalities are controlling, and these uniformly exact substantial compliance with the terms of the statute, as conditions precedent to the making of the improvement. *Shaver v. Turner Imp. Co.*, 155 Iowa 492; *Gilcrest & Co. v. City of Des Moines*, 157 Iowa 525; *Nixon v. City of Burlington*, 141 Iowa 316; *Dunker v. City of Des Moines*, 156 Iowa 292; *In re Appeal of Apple*, 161 Iowa 314; *Spalti v. Oakland*, 179 Iowa 59.

The notice of intention was not in substantial compliance with Section 965 of the Code, for that it omitted what the statute expressly required; and, owing to such omission, the city council was without power to order the improvement.—*Reversed.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

GEORGE H. FRUSH, SR., Appellant, v. WATERLOO, CEDAR FALLS
& NORTHERN RAILWAY COMPANY, Appellee.

NEGLIGENCE: Absence of Warning Signals. One who has full knowledge of the presence of a train in ample time to avoid all injury may not predicate proximate cause on the absence of warning signals.

Appeal from Black Hawk District Court.—GEORGE W. DUNHAM, Judge.

NOVEMBER 19, 1918.

REHEARING DENIED JANUARY 15, 1919.

SUIT by an administrator to recover for the negligent killing of his decedent. At the close of plaintiff's evidence, there was a directed verdict for the defendant, and the plaintiff appeals.—*Affirmed.*

H. E. Tullar and W. I. Atkinson, for appellant.

Pickett, Swisher & Farwell, for appellee.

EVANS, J.—The plaintiff is the administrator of the estate of his wife, who was killed as the result of a collision upon a highway crossing, between plaintiff's automobile and one of the trains of the defendant. It is averred that the killing resulted from the negligence of the defendant in the operation of its train. The specific negligence charged is that the servants of the defendant approached such highway crossing with their train without sounding appropriate warning signals of its approach, whereby the plaintiff, as the driver of the automobile, failed to discover such approach in time to prevent the accident.

It appears from the testimony for the plaintiff that he was approaching such crossing, going west along the highway; that, on his left side, and between him and the ap-

proaching train, for a considerable distance, was a growth of bushes and trees, and a corn field; that this highway was crossed by the railway of the defendant at right angles; that the approaching train came from the south; that he listened for a signal, and heard none; and looked for a train and saw none, until he was within a comparatively short distance from the crossing. His wife was one of the occupants of the automobile. He testified, also, that, as he approached the crossing, he slowed down for a distance of "two or three blocks," to 8, 10, or 12 miles an hour; that, when he came within 50 or 60 feet of the crossing, he saw the train entering the highway and passing in front of him; that he brought his car practically to a stop; that, after the train had gone by, as he supposed, "he threw on the power" again and drove forward, and collided with the last car on the train. The train consisted of an interurban car, operated by a motor, and two gondola cars in the rear. The interurban car proper was much higher than the other cars. When this passed by, he did not observe the other cars, and as a result, he struck the last of them. The collision caused injuries to his wife which resulted in her death, some days later.

It appears, therefore, from the plaintiff's evidence that he, as the driver of the auto, saw the train in time to protect the auto and to permit the train to pass on. He not only *could* stop his car for that purpose, but he *did* do so. The question of whether there was a warning signal, therefore, loses its materiality. The purpose of a warning signal would be to enable the driver of the auto to do that very thing. If it were true that there was a failure to give the signals, yet such failure was not the cause of the accident. *Carrigan v. Minneapolis & St. L. R. Co.*, 171 Iowa 723; *Missouri, K. & T. R. Co. v. Bussey*, 66 Kan. 735 (71 Pac. 261); *Morris v. Chicago, B. & Q. R. Co.*, 101 Neb. 479 (163 N. W. 799); *Texas & P. R. Co. v. Marrujo*, (Tex.) 172 S. W.

588; *Glick v. Cumberland & W. Elec. R. Co.*, 124 Md. 308 (92 Atl. 778); *State v. Baltimore & P. R. Co.*, 58 Md. 482; *Philadelphia & B. C. R. Co. v. Holden*, 93 Md. 417 (49 Atl. 625); *International & G. N. R. Co. v. Matthews Bros.*, (Tex.) 158 S. W. 1048; *Ackerman v. Pere Marquette R. Co.*, 58 Ind. App. 212 (108 N. E. 144); *Seaboard Air Line R. Co. v. Tomberlin*, 70 Fla. 435 (70 So. 437); *McGee v. Wabash R. Co.*, 214 Mo. 530 (114 S. E. 33); *Green v. Missouri Pac. R. Co.*, 192 Mo. 131 (90 S. W. 805); *Williams v. Atchison, T. & S. F. R. Co.*, 100 Kan. 336 (164 Pac. 260).

It will avail us nothing to inquire whether the driver of the auto was negligent; nor whether, if negligent, such negligence could be imputed to the wife, who was sitting upon the back seat. The act of the driver in starting his car too soon, whether done negligently or excusably, was the proximate and controlling cause of the accident. We are compelled to say, therefore, that the trial court ruled properly, and its judgment is—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. LESTER MOSS, Appellant.

MALICIOUS MISCHIEF: Evidence — Sufficiency. Evidence reviewed, and held sufficient to justify the jury in finding that the accused, and not a third party, was guilty of the act charged.

MALICIOUS MISCHIEF: Elements—Injury to Dwelling House—
2 Terrorizing Inhabitants. Malice is a necessary element of the act of injuring a dwelling house and terrorizing the inhabitants thereof, as defined in Sec. 4799, Code, 1897, and such element may be shown by evidence which enlightens the jury as to former difficulties, etc., between the accused and the injured party.

CRIMINAL LAW: Instructions—Circumstantial Evidence. It is
3 not necessarily error for the court to tell the jury that guilt is generally shown by circumstantial evidence. Instruction reviewed, and held not to disparage defendant's direct denial of guilt.

CRIMINAL LAW: Conduct of Counsel—Asking Objectable Questions. Prejudicial error does not necessarily result from the mere asking of an objectionable question, without intent or purpose to insinuate prejudice against the accused.

WITNESSES: Impeachment—Character Witness—Cross-Examination. A good-character witness may, on cross-examination, be asked if he has not heard certain disparaging reports concerning the one whose reputation he has testified was good.

CRIMINAL LAW: Conduct of Counsel—Argument Aside Record. Argument reviewed, as to remarks alleged to be outside the record, and, in view of the withdrawal of the statement, held not to justify a presumption of prejudice.

Appeal from Guthrie District Court.—W. H. FAHEY, Judge.

JUNE 24, 1918.

REHEARING DENIED JANUARY 15, 1919.

THE defendant was convicted of the crime of shooting with a gun at a dwelling, with intent to injure or deface the same, and appeals.—*Affirmed.*

Gwin & Garber and A. M. Fagan, for appellant.

H. M. Havner, Attorney General, for appellee.

LADD, J.—I. The accused lived with his parents on a farm, about a mile and a half west of Guthrie Center. He worked that farm. Their house is near the highway, and on the south side of the division line between such farm and that of J. H. Shroyer and family, the house of whom is a considerable distance from the road. At about 7:30 o'clock in the evening of April 22, 1916, the Shroyers left their house, with lamp burning, for Guthrie Center. Both testified that, in passing the Moss home, they observed the accused looking out of the window toward their house. Upon their return, the lamp was still burning; but somebody had fired 11 bullets through the south window. 3

1. MALICIOUS
MISCHIEF:
evidence: suf-
ficiency.

through the west window, and 6 in the end of the house. Glass from the window, leaves from house plants, slivers of wood from the window sash, and several bullets, were found on the floor. Appellant contends that the evidence was insufficient to warrant his conviction. Near an apple tree, about 200 feet southeast of the house, and on the premises of Moss, 14 empty shells were found. Twigs on plum bushes, in line from this tree to the house, showed bullet marks, and near them two empty 22-caliber shells and one loaded shell were found. In short, the evidence was such as to have warranted the conclusion that at least 14 shots were fired from near to or beneath the apple tree. All the shells appear to have been what is known as "22 shorts." Defendant owned a 22-caliber rifle, and, on the following morning, the sheriff, Boots, examined this rifle, which was a repeater. Defendant informed him it "would hold 18 shorts." The sheriff fired it six times, and thereby obtained that number of empty shells, and testified that:

"If you would mix the shells up that I got, and those that I found at the apple tree, you could not tell them apart; and, in my estimation, the mark of the firing pin was identical. * * * The mark that firing pin on the 22 rifle would make on the cartridge would not be the same in all makes of guns. Some have round firing pins and some a triangle, and some have a square, or a little narrower, or oblong. There are a great many different makes of guns, and there would probably be some of them pretty near alike; and in the same make of gun, the firing pin would make the same mark. I don't hardly think there are a number of different makes of guns that have the same shape of firing pin."

These shells, as well as the 14 found under the tree, were introduced in evidence. Other evidence was adduced. Doubt as to the identification of the pin mark was raised by other evidence. An employee testified that he left the

house at about 7:30 o'clock; and that only he and the defendant made use of this gun; and that defendant had said that he "had quite a bit of ammunition;" and that he thought it consisted of "22 shorts." The parents of defendant denied that they had ever used the gun, and his brother, four years older, was in Montana at the time of the trial, though at home on the evening in question. The evidence tended to show that the defendant and the Shroyers had several difficulties, and that there had been considerable feeling between the families, especially the defendant and Shroyer and wife, for several years; that the accused had manifested a disposition to do them physical violence, on several occasions; as, having fired his rifle in front of Shroyer's team when passing, having discharged a bullet into the windmill on their premises, and having addressed both Mr. and Mrs. Shroyer with violent and obscene language. That someone fired the bullets with defendant's gun into the Shroyer house might well have been found by the jury. Who was that person? The defendant contends that the evidence was insufficient to identify him.

As seen by the process of elimination, either he or his brother Harold might have been found to have been the offender,—but which one? The gun and ammunition belonged to the defendant. Patterson testified that, during the 5 or 6 weeks of his employment there, only defendant and the witness used the gun. The defendant, not Harold, worked the farm. The occupation of the latter was that of school teacher, and, in so far as the record discloses, he had not participated in the troubles, save by assisting defendant, at one time, in repairing a fence, and had manifested no ill feeling toward the Shroyers,—was apparently without motive. These circumstances were sufficient to carry to the jury the issue as to whether defendant, rather than Harold, did the shooting. The facts of the case distinguish the holding from those in *State v. Johnson*, 19 Iowa 230; *State*

v. Clifford, 86 Iowa 550; and *State v. Saling*, 177 Iowa 552. The evidence was such as to preclude interference with the verdict.

II. The indictment charged the offense defined by Section 4799 of the Code, declaring that:

"If any person, with intent to injure or terrorize the inhabitants of any dwelling house * * * or with intent to injure or deface any such structure * * * shoots' thereat, with such intent, any gun, pistol or revolver," he shall be punished accordingly.

2. MALICIOUS MISCHIEF: elements: injury to dwelling house: terrorizing inhabitants.

Considerable evidence of trouble between these families over the care of chickens and the like was received in evidence over objection, as tending to show motive on the part of the defendant. Error is sought to be predicated on the proposition that, inasmuch as malice is not designated in the definition of the crime, such evidence was not admissible. Though the evidence was introduced to establish motive, rather than malice, it may well be said that an intent, such as described in this statute, involves malice; for how else than maliciously might one entertain an intent to injure or terrorize? The evil purpose is an essential ingredient, and proper to be shown.

III. The seventh paragraph of the charge was in the language following:

"In no case is it necessary, in order to establish the crime charged, that there should be direct proof of his guilt by eyewitnesses, who were present and saw him commit the crime, but in criminal as well as civil cases, the evidence may be, and frequently is, not direct, but circumstantial; in fact, in criminal cases, the guilt of the defendant, if shown at all, is most generally shown by the latter

3. CRIMINAL LAW: instructions: circumstantial evidence.

kind of evidence; that is, by the proof of such facts and circumstances as establishes the guilt of the defendant. And when the evidence in a case consists of a chain of well authenticated and proven circumstances, it is often more convincing and satisfactory, and gives a stronger ground of assurance of the defendant's guilt, than the direct testimony of witnesses, unconfirmed by circumstances. But to justify the inference of guilt from circumstantial evidence, the facts proven, from which it is asked that the guilt of the defendant be inferred, must be consistent with each other, and must not only clearly point to his guilt, but must be inconsistent with any other reasonable hypothesis upon which his innocence may be maintained. And where the prosecution relies upon circumstantial evidence alone to establish the conviction of a person of a crime charged, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the crime charged has been committed by someone in the manner and form as charged in the indictment; and further, that all the circumstances proven are consistent with defendant having committed the crime; and that the facts and circumstances proven are such as to be inconsistent with any other rational conclusion than that the defendant is the person who committed said act."

Exception is taken to that part of the instruction saying that, "in criminal cases, the guilt of the defendant, if shown at all, is most generally shown by the latter kind of evidence" (circumstantial). The language following that quoted also is criticised, for that, as is said, it discriminates in favor of circumstantial evidence, as compared with direct evidence, to defendant's prejudice, as he testified directly in denial of his guilt. The instruction purports to deal solely with evidence tending to show guilt, and none other than circumstantial evidence was adduced by the State. The jury was merely told that circumstantial evidence is often more conclusive than direct evidence,—and,

of course, this, as well as the contrary, often is true; but from the saying of this it is not to be inferred that the one class of evidence is more reliable than the other. The language could not well have been so construed, but it was well calculated to advise jurors that circumstantial evidence might not be rejected as unreliable. What follows in the instruction obviates any deduction that reference was had to defendant's denial of having committed the offense. One accused of crime can do little else than deny, save by proving circumstances which, when considered in connection therewith, tend to exculpate him from the charge. The instruction was not open to the criticism of the one reviewed in *State v. Crofford*, 121 Iowa 395, but, in the light of the evidence adduced, was without error.

IV. . Complaint is made that the county attorney, in questioning witnesses, propounded questions insinuating the commission of other offenses by the accused, and, in argument to the jury, traveled outside the rec-

4. CRIMINAL LAW: conduct of counsel: asking objectionable questions.

ord. Several questions relating to the conduct of defendant toward the Shroyers were asked; but, as these were not persisted in,

nor asked merely for the purpose of insinuating prejudice against him before the jury, the mere asking ought not to be denounced as prejudicial error. Other questions complained of were put in the cross-examination

5. WITNESSES: impeachment: character witness: cross-examination.

of witnesses who had testified that defendant's moral character was good. As these questions related to what the witness had

heard concerning the accused, they were within the bounds of propriety. As some of these witnesses had heard disparaging reports concerning defendant, it ought not to be assumed that the inquiries were not made in good faith. The facts were not sought to be shown, but merely what the witnesses had heard said of him whom

they had sworn to have possessed a good moral character. There was no prejudice. *State v. Kimes*, 152 Iowa 240.

In the closing argument, the attorney for the State referred to the defendant as having been twice acquitted in justice court of alleged offenses by the testimony of his folks; but, upon objection interposed, he withdrew his statement as to two such acquittals, and said that the matter had been mentioned inadvertently. Counsel for the defendant insisted that there was no such

6. CRIMINAL
LAW: conduct
of counsel:
argument
aside record.

evidence; but the record was otherwise as to there having been one acquittal. Some talk between the court and counsel for defendant as to whether there were two acquittals followed. The county attorney suggested that, as "his folks" were present, it might be assumed that they had testified. The court thereupon remarked that the jury would remember what the testimony was, and added, "It is not the province of the county attorney to tell you what the testimony is;" and the argument proceeded. As nothing further appears, it may be assumed that the controversy ended here. No prejudice is to be inferred. The statement as to two acquittals was withdrawn, and nothing was claimed as to "the folks," further than that they had testified concerning some charge in justice court,—merely an incidental matter; and that was left to the memory of the jury.

We discover no error, and the judgment of conviction the light is so arranged that it shoots up more than 42

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

MARSHALLTOWN LIGHT, POWER & RAILWAY COMPANY et al.,
Appellants, v. A. H. WELKER, County Auditor, Appellee.

TAXATION: Capital Stock of Street Railways. Formula for determining the value of the capital stock of a street railway com-

pany "over and above" the value of the tangible property of the corporation: Determine the *total* value of such *stock* by giving due consideration, *inter alia*, to the value and earning power of the business, its debts, dividends, etc., and subtract therefrom the value of the tangible property as fixed by the assessor in an *unquestioned* assessment on such tangible property. (Secs. 1323, 1343, Code, 1897.)

Appeal from Marshall District Court.—CLARENCE NICHOLS,
Judge.

JANUARY 12, 1916.

OPINION ON REHEARING, JANUARY 17, 1919.

THIS case is now before us for decision on rehearing. The material facts are recited in the opinion.—*Modified and affirmed.*

Edwards, Longley, Ransier & Smith, Hasner & Hasner, and Binford & Farber, for appellants.

McCoy & McCoy, and *C. H. Van Law*, for appellee.

PER CURIAM.—Plaintiff corporation owned, and, for several years prior to December 30, 1911, operated, a street railway, and also gas and electric light plants, in the city of Marshalltown. On the above-named date, the county auditor of Marshall County assessed the capital stock of said corporation as property omitted from taxation, and fixed the value thereof for that purpose at \$150,000. The corporation and shareholders, after due notice, appeared by attorney and filed written protest against said assessment. Failing, however, in this proceeding, they appealed to the district court, where the action of the county auditor was affirmed, and all parties again appeal.

While plaintiffs contend that the assessment by the auditor was irregular, and not in conformity with the statute, the principal ground argued is that the assessment of \$150,000 against the shareholders is grossly excessive. Without

entering into a detailed discussion of plaintiff's contention that the shares of stock were not legally assessed, it is proper to say that, in our opinion, the requirements of the statute were substantially complied with by the auditor, and that the only question involved upon this appeal, having substantial merit, is that relating to the value of the stock over and above the tangible property of the corporation.

It is conceded that all of the property owned or possessed by the corporation which was taxable thereto under Section 1343 of the Code was properly listed and assessed by the assessor. The valuation placed thereon by him was \$177,000, and all of its taxable property was included in this estimate. The capital stock of corporations engaged in the management and operation of gas or electric light plants and street railways is to be assessed, in accordance with the provisions of Code Section 1323, at its actual value above the property of such corporation referred to in Section 1343, and required to be assessed to the corporation. Within a comparatively short time before the assessment complained of was made by the county auditor, plaintiff corporation procured an expert to estimate the value of all its tangible property. The estimate fixed by him was \$412,792.21, from which he deducted \$82,400.87 for depreciation, leaving a net estimated value of \$320,253.71. The net earnings of the corporation for the year 1910 were \$33,564.53. It is, therefore, manifest that the value placed by the assessor upon the tangible property of the corporation is much too low. Within four months after the shares of stock were assessed by the county auditor, plaintiff's entire plant was sold for \$400,000, the purchaser assuming bonded indebtedness thereon in the sum of \$150,000, and paying \$250,000 cash. As affecting the value of the tangible property of the corporation and the capital stock, counsel for appellant argue that \$20,000 was expended in improvements, after the assessment was made and before the sale was consummated;

that plaintiff's franchise expired in 6½ years, and that it had been denied a renewal or extension thereof; that the sale of its property for \$400,000 was consummated after the above improvements had been made and the purchaser had procured a new franchise for a long term of years, thereby greatly enhancing its value.

The par value of the capital stock was \$300,000, but none of it had ever been sold upon the market, and its true value was difficult to ascertain. The president and secretary of the corporation testified that it was not worth to exceed 25 or 30 cents on the dollar. This estimate is manifestly too low. While the value of the stock was doubtless depreciated somewhat by the fact that the corporate franchise would expire within a comparatively short time, and that it had failed to secure a renewal or extension thereof, yet it may safely be assumed that the property and business of the corporation were, nevertheless, valuable, and that it was not probable that a franchise would ultimately be refused. The officers of the corporation were negotiating for the sale of the corporate property, and a purchaser had agreed to buy it if a franchise was obtained. The early expiration of plaintiff's franchise did not, therefore, probably cause very great depreciation in the value of the capital stock. The earnings of the corporation are shown for but a single year, and counsel for appellant argues that this evidence is of little value in determining the average earning power of the corporation; that its average income for a series of years should control. As this information was peculiarly within the knowledge of the officers of appellant, it is, perhaps, not unfair to assume that they did not believe a showing thereof would aid its contention. The corporation was a going concern, evidently earning and paying reasonable dividends, and sold, within a few months after its tangible property was listed for taxation at \$177,000, at an advance of \$223,000. It is difficult to believe that this ad-

vance was due entirely to the matters urged by counsel for appellant. The value of the tangible property fixed by the assessor is controlling, and should be deducted from the fair value of the capital stock. The result will be the fair value of the stock "over and above" the value of all tangible property of the corporation. *Valley Inv. Co. v. Board of Review*, 152 Iowa 84.

It is urged by counsel for appellee that the indebtedness of the corporation cannot be deducted from the value of the stock for the purpose of taxation. This is undoubtedly true. *Wahkonsa Inv. Co. v. City of Ft. Dodge*, 125 Iowa 148; *Morril v. Bentley*, 150 Iowa 677. But it is also true that, in arriving at the value of its capital stock, where the corporate property consists exclusively of the real estate and other tangible property, the indebtedness must be taken into account in determining same. The market value of shares of stock, ordinarily at least, would be somewhat affected by the amount of indebtedness owing by the corporation, but not necessarily to the full amount thereof. The value of the business, its earning power, the size of its dividends, etc., must always be taken into consideration. *City Council of Marion v. Cedar Rapids & M. R. Co.*, 120 Iowa 259; *Lake City Elec. L. Co. v. McCrary*, 132 Iowa 624. But in this case, the corporate tangible property was all sold, and, after deducting the bonded indebtedness assumed by the purchaser, there was left a net cash value of \$250,000, which would appear to fairly represent the value of the stock. Assuming the stock, therefore, to be worth \$250,000, and deducting therefrom the value of the tangible property, as fixed by the assessor, we have \$73,000, the value of the stock "over and above" the value of the physical property of the corporation. This may not be entirely accurate; but, based upon the evidence before us, it would seem to be a fair, equitable, and just valuation thereof, for the purpose of taxation. All of the facts upon which the assess-

ment was based by the auditor appear in the record. The judgment and decree of the court below should, therefore, be modified, and the assessment in question reduced to the above amount; and the cause is remanded to the district court for decree in harmony herewith.—*Modified and affirmed.*

All the Justices concur.

STATE OF IOWA, Appellant, v. C. F. CLAIBORNE, Appellee.

STATUTES: Judicial Insertion of Words. Construction may not be carried to the extent of so inserting a word in an affirmative statute as to render it a negative statute, even though the court may, *aside the statute*, believe that the latter meaning was the one intended by the legislature. So held where the statute provided that an automobile light, at a point 75 feet in advance of the machine, *should* rise above 42 inches from the level surface upon which the vehicle was standing.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

JANUARY 17, 1919.

DEFENDANT was informed against and accused of the crime of operating a motor vehicle without proper lights. He appealed to the district court. The trial court found defendant not guilty, and the State appeals.—*Affirmed.*

H. M. Havner, Attorney General, and *Ward C. Henry*, County Attorney, for appellant.

Stipp, Perry, Bannister & Starzinger, for appellee.

PRESTON, J.—The information charges, substantially, that defendant operated upon the streets of Des Moines, at a time more than one hour after sunset, a motor vehicle, with a lighting device thereon of over four candle power,

equipped with a reflector so arranged that the directly reflected and undiffused beam of light therefrom, when measured 75 feet ahead of the light, did not rise above 42 inches from the level surface on which the vehicle was standing and being operated, under all conditions of load.

The defendant made the following admission of record:

"Mr. Bannister: This cause coming on for trial, the defendant admits that, on the date and at the time and place in question, he was operating an automobile in the city of Des Moines, Iowa, with the headlight lighted, and so adjusted and arranged that the direct and undiffused beam or ray of light therefrom, when measured 75 feet ahead of the machine, was less than 42 inches above the ground on the level on which the machine was standing and being operated; and that the said headlight was of more than four candle power."

And upon said admission, the State rested. The defendant introduced witnesses, who testified, substantially, to large experience in driving motor cars and in using headlights of different cars; that most headlights have been equipped with reflectors, so as to concentrate the light in one beam, so it will light up one spot, the light being in front of or in a concave reflector; that, where there is a plain glass in front of the light, the ray that comes from the light is called undiffused, or a direct beam; that, if the light is so arranged that it shoots up more than 42 inches from the ground, it will, in nearly every case, blind one who is approaching on the road so that he cannot see the road ahead; if this direct beam of light is down below 42 inches, it would not have as bad an effect on the driver approaching; if it is directed down, it strikes the ground, and does not reflect in one's eyes; the center of headlights on automobiles run from 30 to 36 inches from the ground; there are prism lights made which tend to diffuse the beams from a headlight; the larger portion of them, when prop-

erly installed, diffuse the light so that it is possible to drive against them without bothering one meeting them, to any great extent; this is called a light that has a diffused ray, or a diffused beam. There are corrugated lights in a number of different forms, some colored and frosted, and a glass prism crosses the rays of light,—or breaks them up, as some of the witnesses put it; and, as they cover a large area, rather than a direct beam in front of you, they will not extend or penetrate so far ahead, but do not reach one and blind him in meeting it. There are some lenses on the market made so that, when a light is deflected down, so that it is only 42 inches from the ground, 75 feet ahead of the machine it will throw a light as far down the road as an undeflected beam; quite a number of cars are equipped with dimmers,—that is, two lights in the reflector, a small light and a large one. A headlight of from 16 to 40 candle power, with an ordinary reflector and globe, so arranged as to strike the road a long way ahead, if more than 42 inches above the ground, will practically blind a driver approaching; it is very annoying, and might be very dangerous.

One of the experts was asked:

“Q. Now, what would you say, as a man of experience in the operating and handling of automobiles, of the effect of a statute which apparently required all automobile drivers to shoot a direct ray of light up above 42 inches from the ground? A. I think it would be very dangerous. Q. In your opinion, would anyone who was drafting a statute for the purpose of benefiting the road laws, or making a proper adjustment and operation of automobile lights at night, make or enact such a provision into the law that the lights and direct rays of light should be shot up above 42 inches,—would there be any object and reason for passing such a rule? A. No, sir. Q. State whether or not that is the very evil which is complained of. A. It is. Q. State whether or not that is the very evil which any remedial

statute would be calculated to remedy. A. I think so. More than 42 inches is calculated to strike the eyes of a driver approaching in a car; that is about the average height of a driver's eyes, 3 feet, 6 inches."

Defendant introduced the original House File No. 131 (37 G. A.), as follows:

"House File 131. A bill for an act to amend Section fifteen hundred seventy-one-m-seventeen, Supplement to the Code, 1913.

"Section 1. That Section fifteen hundred seventy-one-m-seventeen, Supplement to the Code, 1913, be and the same is hereby amended by striking out the period at the end of said section, and substituting therefor the following:

"'Provided, however, that it shall be unlawful for any person operating a motor vehicle upon the public highway in this state to use any lighting device of over four candle power, equipped with a reflector, unless the same shall be so designed, deflected or arranged that (no part of the beam of the reflected) light, when measured seventy-five (75) feet or more ahead of the light shall raise above forty-two (42) inches from the level surface on which the vehicle stands under all conditions of load.'"

Also the Senate Amendment thereto, as follows:

"I move to amend H. F. No. 131 by striking out all after the word 'that' in line eleven, down to and including the word 'reflected' in said line of Section one, and inserting the words 'the directly reflected and undiffused beam of such.'"

The statute as it stands (Ch. 148, Acts of the Thirty-seventh General Assembly), and for a violation of which the defendant is accused, reads:

"That section fifteen hundred seventy-one-m-seventeen, Supplement to the Code, 1913, be and the same is hereby amended by striking out the period (.) at the end of said section, and substituting therefor the following:

“; provided, however, that it shall be unlawful for any person operating a motor vehicle upon the public highway in this state to use any lighting device of over four candle power, equipped with a reflector, unless the same shall be so designed, deflected or arranged that the directly reflected and undiffused beam of such light, when measured seventy-five feet or more ahead of the light shall arise above forty-two inches from the level surface on which the vehicle stands under all conditions of load. Spot lights shall not be used so as to throw direct rays in the face of an approaching vehicle.”

The trial court construed this statute so as to read into it the word “not,” so that it would read: “The light shall not rise above forty-two inches,” etc.

It is contended by the State that it is not admissible to speculate on what a statute might mean, beyond the import of the words used, citing *Gardner v. Collins*, 2 Peters (U. S.) 58, 92 (7 L. Ed. 347), from which they quote this:

“What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.”

They say, too, that the justice and policy of statutes enacted by the legislative department of the government are not matters for the consideration of the courts of the state. *Burlington, O. R. & N. R. Co. v. Dey*, 82 Iowa 312, 344, from which they quote as follows:

“Much is said in argument attacking the justice and policy of the statutes. With these things we have nothing to do. They are for the consideration of the legislative department of the government alone.”

They cite, also, *Atlantic Coast Line R. Co. v. Finn*, 195 Fed. 685, 688; from which they quote:

“It is not for the court to inquire or determine whether

a state of facts existed calling for the enactment of the legislation in question. That is for the exclusive consideration of the legislature. If, under any possible state of facts, the act would be constitutional and valid, the court is bound to presume that such condition existed.'"

The State says that the literal construction of a statute may defeat the objects of the act, and quote from another case that it is better to abide by this consequence than to put upon it a construction not warranted by the words of an act, in order to give effect to what we suppose to have been the intention of the legislature. The argument is that the language of the statute is perfectly plain; that it declares certain acts to be a public offense, and as criminal in their character; that the rule is that such statutes should be strictly construed, and not to change the wording by adding to or taking from. They say, too, that, in construing a statute, the rule is that it is necessary to consider the context, or setting, and the presumption is that the words should be given their usual and ordinary meaning and significance. They concede that the object of all interpretation and construction of a statute is to ascertain and carry out the intention of the legislature, and that it is only when the act is of doubtful or ambiguous meaning that the province of a construction or interpretation begins, because it is a maxim of interpretation that it is not permitted to interpret what has no need of interpretation.

These rules are not disputed by appellee, but they rely on other principles as well. It is argued by appellee that the legislature intended to correct the abuse in the use of blinding headlights on automobiles on the public highway, and that defendant was using a proper light, and was complying with the spirit and intent of the statute; and further, that there is a clerical error in the statute, which the court can correct. Numerous cases are cited; but we shall not discuss them all, but state their propositions. They cite

McBride v. McBride, 142 Iowa 169, 179, *City of Cherokee v. Illinois Cent. R. Co.*, 157 Iowa 73, *Engvall v. Des Moines City R. Co.*, 145 Iowa 560, *Flam v. Lee*, 116 Iowa 289, to the point that, in construing instructions to juries, where they are manifestly wrong, and state the opposite of that intended, but the error could mislead no one as to what was intended, they are not held to be erroneous.

They cite *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, and *Commonwealth v. Trent*, 117 Ky. 34 (77 S. W. 390), to the proposition that the object which the legislature sought to obtain by a statute, and the evil which it endeavored to remedy, may always be considered, to ascertain its intent and interpret its act. Other cases are cited, to the proposition that statutes must be so construed as to give effect to the evident legislative intent, though the result seems contrary to rules of construction and the strict letter of the statute, and that surrounding circumstances and the ends intended to be accomplished should be considered. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522 (70 L. R. A. 264), are cited to sustain the proposition that statutes, the principle of which is to protect the lives and limbs of men, are so construed as to prevent the mischief and advance the remedy, so far as the words fairly permit. They concede that the context should be considered in interpreting a statute. *White v. Rio Grande W. R. Co.*, 25 Utah 346 (71 Pac. 593), 2 Lewis' Sutherland on Statutory Construction (1st Ed.), Section 260, 17 Am. & Eng. Encyc. of Law 19, 20, and *Comfort v. Kittle*, 81 Iowa 179, are cases cited on the proposition that it is a rule of statutory construction that, where one word has been erroneously used, if another, or a word omitted, and the context afford the means of correction, the proper word will be deemed substituted or supplied. In the case of *County of Lancaster v. Frey*, 128 Pa. 593 (18 Atl. 478), the word "county" was inserted in a stat-

ute for "city." In *Graham v. Charlotte & S. C. R. Co.*, 64 N. C. 631, the word "venire" in a statute relating to actions against railroads was construed to mean "venue." In *Moody & Perkins v. Stephenson*, 1 Minn. 401, all "penal" judgments construed to mean all "final" judgments. In *Palms v. Shawano County*, 61 Wis. 211, the word "north" was read into a description in a statute, instead of "south." In *Frazier & Delliner v. Gibson*, 7 Mo. 271, where a statute provided that an obligor or maker of a note should be allowed every just set-off and discount against the assignee or assignor before "judgment," it was held that the word "judgment" was evidently inserted by mistake. In *Hutchings v. Commercial Bank*, 91 Va. 68, *Ashby v. State*, 124 Tenn. 684 (139 S. W. 872), and *State v. Louisville & N. R. Co.*, 97 Miss. 55 (53 So. 454, 455), where it appeared that a statute would fail to effectuate the purpose intended, or any purpose, and that it had been omitted by mistake, the word "not" was construed into the statute.

Appellant does not contradict these propositions, except in so far as the cases heretofore cited by them do so.

The trial court, in an opinion filed, conceded that courts could not amend a statute, as they have no power to do so, and conceded, too, that great caution should be exercised by the courts, in construing statutes, not to add to or take anything from the language used; but it held that reading into the statute the word "not" carries out its purpose, and gives it an application intended by the legislature. The decision of the trial court was based on the citation from Lewis' Sutherland on Statutory Construction, *supra*; *Frazier v. Gibson*, *supra*; *County of Lancaster v. Frey*, *supra*; and *Hutchings v. Bank*, *supra*.

But these cases, and some of the others cited,—perhaps all of them,—proceed upon the idea that, where the context of the statute affords the means of correction, it may be done. Under the authorities, it is proper for us to

take into consideration the object which the legislature sought to obtain, and the evil which it endeavored to remedy, and the surrounding circumstances and the ends intended to be accomplished, as well as the context; and statutes should be so construed as to give effect to the evident legislative intent. We may take into consideration the fact that automobiles are in common use, and that certain lights used on automobiles oftentimes blind the driver of a vehicle approaching in the opposite direction, and that the purpose of the legislature, in passing the act in question, was to correct this condition.

We are satisfied, from all these circumstances and from the record, that it was not the intention of the legislature to pass the act as it reads. Conceding this to be so, the question is, May we, under the circumstances and record, read into the statute a word which gives it exactly the opposite effect? We are not disposed to go that far. It seems to us that, to do so, we would be compelled to take into consideration matters not proper for us to consider, such as the evidence or opinions of witnesses testifying in this case, and the like. We could construe the statute as written; but, as said, we are satisfied such was not the intention. In this case, the word "not" was read into the statute, in order to work the acquittal of the accused. Nevertheless, it is a criminal statute. Might this be done in order to secure a conviction, if it were necessary to do so?

We reach the conclusion that, rather than to construe the statute as written, or to read into it the word "not," as was done by the trial court, we ought to, and do, hold that, as to this particular point, there was a failure of legislation, and that the defendant was properly discharged on that ground, there being no statute under which he could be convicted of the charge against him. The legislature is about to meet; and if the matter is brought to their attention, they can readily make the matter plain.

For the reason given, the judgment of the district court is—*Affirmed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

J. W. DAVIS, Appellee, v. MAY A. DAVIS, Appellant.

TENANCY IN COMMON: Contribution for Deficiency Judgment.

1 A cotenant must make contribution to his cotenant, not only for the amount paid by the latter in redeeming from a mortgage foreclosure sale, but also for the amount paid in satisfying a *deficiency* in the foreclosure judgment.

PRINCIPAL AND SURETY: Surety Becoming Principal by Op-

2 eration of Law. A surety, as between himself and his principal, becomes a principal by voluntarily causing himself to be subrogated to all the rights of the principal.

PRINCIPLE APPLIED: A husband and another person bought land, and gave a mortgage on the land for the purchase price. The wife signed the mortgage note, as surety. Later, the wife, in divorce proceeding, was awarded, as alimony, all her husband's interest in the land. *Held* that, as between her husband and herself, she became the principal, and her husband became a surety.

EXECUTION: Redemption by Execution Debtor. Principle recog-

3 nized that a redemption of land from execution sale, by the execution debtor, exposes the land to a lien for any deficiency in the judgment.

Appeal from Jasper District Court.—HENRY SILWOLD,
Judge.

OCTOBER 25, 1918.

REHEARING DENIED JANUARY 20, 1919.

SUIT in partition of lands. The plaintiff averred that he was the owner of an undivided one half thereof, and that defendant was the owner of the other undivided one half. He averred, also, that he had discharged incumbrances up-

on the property, amounting to about \$25,000, and he prayed that he have contribution from the defendant of one half thereof, and that he have a lien upon her undivided one half for the payment of the same. The defendant contested the right of the plaintiff to contribution. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed.*

Cullison & Cullison, for appellant.

Preston & Dillinger, for appellee.

EVANS, J.—The land in question was acquired jointly, in March, 1912, by J. W. Davis and J. V. Davis, the former husband of the defendant May Davis. The land was conveyed to the grantees, subject to a mortgage for \$7,500, which was assumed by the grantees. The further sum of \$20,000 of the purchase price was represented by a promissory note, signed by the grantees and by the defendant May Davis, then the wife of J. V. Davis. This note was secured by a mortgage upon the land. Such was the status of the parties with reference to the land, until September 14, 1914, upon which date the defendant obtained a divorce from her husband, and was awarded as alimony all the interest of her husband in such land. It is conceded that she thereby succeeded to the title of her husband, and became cotenant with the plaintiff in the ownership of the land. Subsequent to the decree of divorce, a decree of foreclosure of the \$20,000 mortgage was obtained by the holder thereof. Special execution was issued, and the property was sold thereunder, and was bid in by the holder of the execution judgment for approximately one half the amount of the judgment. On the last day of the year of redemption, the plaintiff redeemed the same, by the payment of the full amount of the bid, with interest and costs. A few days later, he paid the deficiency judgment in full. These are the payments for which he asks contribution.

1. TENANCY IN
COMMON: con-
tribution for de-
ficiency judg-
ment.

The defendant concedes that she is liable to contribution for the amount paid in redemption from the execution sale, but she denies her liability for contribution for the amount paid in discharging the deficiency judgment.

I. The argument in her behalf is that she was a surety only upon the note, and that, as between her and the plaintiff, who was a principal, she was only secondarily liable for any part of the debt. If this argument were decisive, it would have been quite unnecessary for the defendant to concede her liability for a contribution to any extent. The original relation of the defendant to the debt has become quite immaterial, by reason of the subsequent status acquired by her. Even if she were a surety only in the original transaction, her subrogation to the rights of her husband, as cotenant with the plaintiff, changed her status. Thereafter, as between her and her former husband, she became the principal, and he the surety. *Wood v. Smith*, 51 Iowa 156; *Northwestern Nat. Bank v. Sloan*, 97 Iowa 188; *Barr v. Patrick*, 52 Iowa 704; *Lanka v. Donnelly*, 163 Iowa 255. But even this is not a strategic-feature of the case. The decisive fact in the case is that the defendant became cotenant with the plaintiff, and that the land owned in common by them as cotenants was incumbered for its purchase money by the mortgage in question. It is well settled that cotenants are liable for their proportionate part of the purchase price of the common property, and for the liens and incumbrances against the same. Payment by one operates to the benefit of all, and entitles the payor to contribution pro rata, and to a lien upon the share of each for the proportionate amount due from him. *Sears v. Sellew*, 28 Iowa 501; *Leach v. Hall*, 95 Iowa 611; *Koboliska v. Swehla*, 107 Iowa 124; *Rippe v. Badger*, 125 Iowa 725; *McNamara v. McNamara*, 167 Iowa 479; *Funk v. Seehorn*, 99 Mo. App. 587 (74 S. W. 445). If

2. **PRINCIPAL
AND SURETY:**
surety becoming
principal
by operation
of law.

the plaintiff had paid the mortgage, or discharged the foreclosure decree entered thereon, at any time prior to the execution sale, it is manifest that he could have demanded contribution from the defendant. This much her counsel concedes in argument. But it is argued that, when the execution plaintiff bid off the property for less than the amount of the judgment, the bid, nevertheless, satisfied the judgment, and discharged the lien thereof, and that the execution plaintiff had no further claim thereto than was represented by his sheriff's certificate: that is to say, that the deficiency judgment ceased to be a lien upon the land. Upon this premise, it is argued that the later payment by the plaintiff of the deficiency judgment did not operate to discharge any lien upon the land, and that, therefore, the defendant was not liable.

There is a qualified sense in which it is true that the deficiency judgment was not a lien upon the land. A subsequent junior lienholder could have redeemed from the ex-

ecution sale, and could have ignored the deficiency judgment. Likewise, a grantee of the execution debtor could have done the same thing. But a redemption of the land

3. EXECUTION:
redemption
by execution
debtor.

by the execution debtor only saved it to him from the execution sale. In his hands, it became again subject to the lien of the deficiency judgment. *Peckenbaugh v. Cook*, 61 Iowa 477; *People's Savings Bank v. McCarthy*, 119 Iowa 586. It necessarily follows that the payment of the deficiency judgment by the plaintiff did operate to discharge a lien upon the common property. The defendant thereby became subject to a call for contribution, for precisely the same reason as rendered her liable to contribution for the amount paid in redemption from the sheriff's sale. The decree of the trial court gave to the plaintiff a lien upon the defendant's undivided one half for the proportionate amount which she should contribute, but awarded no per-

sonal judgment against her. Such decree affords her no ground of complaint, and it is, accordingly,—*Affirmed*.

LADD, GAYNOR, and SALINGER, JJ., concur.

PRESTON, C. J., took no part.

CHRISTIAN FEDDERSEN et al., Appellants, v. E. C. MATTHIESEN, Administrator, et al., Appellees.

APPEAL AND ERROR: What Notice Brings Up. An appeal

- 1 "from the judgment and decree entered in said cause against the plaintiffs," leaves no part of said judgment as the law of the case on appeal—brings up the decree in its entirety.

WILLS: Life Estate (?) or Naked Use (?) A devise which provides that devisee

- (a) shall live upon the real estate,
(b) shall have the right to make any use of it which he may desire,
(c) shall have all proceeds therefrom.
(d) shall pay all taxes and insurance and make all repairs,
(e) shall pay interest on a specified indebtedness,
(f) shall support a sister so long as she does his housework,
(g) may sell, on a price consented to by other heirs, and
(h) shall, "*after the property is sold,*" have \$1,000 out of the proceeds, the balance to be divided among other heirs, does not grant a life estate,—grants nothing but a use for a specified compensation,—but does grant the \$1,000 to devisee after any authorized sale, howsoever made.

WILLS: Unreasonableness. The claim of unreasonableness necessarily falls, unless the will and the proper extraneous matters reveal the facts from which unreasonableness may be deduced.

WILLS: Construction Leading to Intestacy. The law is abhorrent of any construction of a will which will lead to even partial intestacy.

Appeal from Clinton District Court.—A. P. BARKER, Judge.

JANUARY 20, 1919.

APPEAL from construction given by the district court to the will of August D. Feddersen.—*Affirmed.*

Chas. W. Kepler & Son, for appellants.

Skinner & Co., for appellees.

SALINGER, J.—I. Appellants contend that so much of the decree below as declares that August E. Feddersen, son of the testator, took a life estate in some of the realty owned by the testator, has become the law of the case. They base this contention upon the claim that neither party has appealed from that holding. As true as it is that failure to appeal from part of a decree may make that part unsailable, is it that nothing can become the law of the case unless there be no appeal. True, appellees have perfected no cross appeal. But, since one party did appeal, the question remains whether said holding is the law of this case. It is material what that appeal was. The abstract recites that an appeal was perfected by the appellants by means of serving a notice of appeal "from the judgment and decree entered in said cause against the plaintiffs." Section 4114, Supplement to the Code, 1913, permits an appeal either *in toto* or one "from some specific part thereof, defining such part." Appellants did not proceed under this permission. They brought up the decree in its entirety, which included the holding that this son took a life estate. Appellants meet this situation by the statement that, if appellees were dissatisfied with so much of the decree as found that the son had a life estate, they should have appealed. We may assume they had the right to do this, but, notwithstanding, are of opinion that said holding is not the law of the case, because appellants by general appeal removed that part of the decree to this court for review. That appellants now see an advantage in agreeing with the trial court upon that holding has no bearing on whether such

1. APPEAL AND
ERROR: what
notice brings
up.

holding has become the law of the case. For the purposes of determining whether it is the law of the case, the controlling question is whether such holding was reviewable after appellants had taken their appeal. When that holding was by them removed to this court, it could not become unassailable until after affirmance here; and we think that, though appellees have not appealed, it is open to them to meet any claim on part of the appellants which they urge for their advantage, and which is based upon the assertion that the will at bar granted a life estate.

This brings us to whether the will did grant a life estate. It is and must be conceded it does not do so in terms. The exact language is that the son August "has the exclusive right and use" of certain real estate;

2. WILLS: Life
estate (?) or
naked use (?)

that "he is to live there and make any use of it that he desires, and to keep all proceeds from any business that he may run in above mentioned real estate, but he must pay all taxes, insurance and repairs on the place, and the interest on all money owing by me, and he must support my daughter, Amanda Feddersen, so long as she stays with him and does his house work." Next comes a provision that the son may sell, upon a price consented to by the other heirs, and that, "after the property is sold," he is to have \$1,000 out of the proceeds thereof. While the son survived the father, he has since deceased, and in his lifetime, evinced no intention to sell; and the property has since been sold to pay debts, on application by the administrator of the estate of the father. We are of opinion that no life estate was created, though the son took possession of and used the property, and that what was devised was the right to use the property upon the payment exacted by the will for the use of the right. The provision does not, in essence, differ from giving the right to lease upon the payment of stipulated rent. Granting, for the sake of argument, that, though the life-

time of the son is not mentioned, the testator intended the use might continue during the life of the son, it still remains true that what was devised is not, in truth, a life estate, because the son might have been ousted from the use in his lifetime, upon failure to make the payments exacted by the will; or the lands might be sold to pay debts. We find nothing in *Webb v. Webb*, 130 Iowa 457, 460, that aids appellants.

It may not be amiss to add that, if it were assumed the will did create a life estate, such assumption would profit the appellants nothing. They use the claim that a life estate was created, for the purpose of arguing that the grant was so valuable as that it is an unreasonable construction of the will to hold that the testator gave not only the life estate, but \$1,000 additional from the proceeds of selling the property. While it would not follow that the will must be construed as appellants contend, even if it were proved that allowing this son the additional \$1,000 was over-liberality, it is certainly true that the devise of the \$1,000 does not give support to the argument of the appellants, where, as here, they have failed to adduce any evidence of the value of the use granted. The only thing that appears on that point is the inference that may be drawn from the fact that, during the year in which the son survived the father, the son continued to use the property. That may be evidence that he thought the use had *some* value, but it is no evidence that its value was so much greater than the price paid for the use as to prove the testator could not have intended to give more than the use. If the intention to allow the additional \$1,000 is clear, then, in the absence of a challenge of the competency of the testator, the courts could not interfere because the allowance might, in fairness to the claims of others, have been smaller. Be that as it may, whatever effect upon the question before us an unreasonable allowance

3. WILLS: unreasonable-
sonableness.

might have, we have no such question where, as seen, there is no evidence that the provision complained of is unreasonable. We conclude that the provision of the will granting this son \$1,000 from the proceeds of selling the property may not be disregarded on the ground either that the son August was given a life estate, or, if given one, it had such value as that we must hold the testator intended to give the son nothing but the alleged life estate.

II. The will, after giving to the son August the right to use said real estate, provided further that, if the son at any time desired to sell said property, he might do so by first getting the consent of the "rest of my children," and could sell only at a price satisfactory to those children; and that, "after the property is sold, \$1,000 is to be given to my son August." Then follow provisions allotting the proceeds (presumably above this \$1,000) to other heirs. It will be observed that, if the provision to give the son August \$1,000 is held to be operative only upon a sale made by him in his lifetime, on consent of and at a price satisfactory to his brothers and sisters, then the will has no provision as to what shall be done with the proceeds of a sale other than one upon consent of the co-heirs. All agree that, where a testament is made, the court will, if it may in reason be done, avoid a construction of the will which results in either total or partial intestacy. The least that must result if the appellants be sustained is that, though the testator attempted to provide what should be done with the proceeds of a sale of his property, he failed to make any disposition of proceeds unless they came from a sale by the son August, on consent of the other children. It will not meet the necessities of the appellants' case to say there was no intention to give August anything because the use of the lands granted him was so valuable as to exclude the idea that the father intended to make further provision for him

4. WILLS: construction leading to intestacy.

in case the land was sold, because this argument is met by the fact that, although the use of the land was granted, the father still thought the son ought to have \$1,000 if a sale on consent was made. Such sale might not be made though the son had survived the father for 20 years, and it is difficult to understand why the testator should have granted the son this additional \$1,000, despite the use of the land granted, if the sale was a consent sale,—difficult to understand why, if the use were deemed a bar to the additional allowance, such allowance was not withheld, no matter what the nature of the sale was. It is difficult to understand why the father should feel more liberal to this son as to the proceeds of one kind of sale rather than another. Starting, then, with the fact that, notwithstanding the grant of the use of the lands, the father was minded to give August an additional \$1,000 on some sale, and applying the doctrine that intestacy is not favored, we have little difficulty in reaching the conclusion that this son was to have \$1,000 from the proceeds of any sale, provided such sale was an authorized one. A sale on consent of the co-heirs was one that was authorized. A sale sanctioned by the law of the land for the purpose of paying debts is also an authorized sale. As said, we are unable to reason out why the testator should have devised \$1,000 to this son in the proceeds of a sale authorized by consent, and yet have intended that, if the law sold the same land, and, for the sake of argument, as much was realized from that sale as from one authorized by all the heirs, that the \$1,000 should not go to the son. Nothing indicates that the testator based his bounty upon a preference for one authorized sale over another authorized sale. It follows that, in our opinion, the trial court correctly construed the will, in so far as it decreed that the estate of August E. was entitled to \$1,000 from the proceeds of the sale had on the application of the father's administrator. We reach this conclusion the more

readily because of the position taken by the appellants, which is, not that the will does not authorize this particular payment unless it be from the proceeds of the particular sale described in the will, but that, by reason of the will and the use of said property by the son August, he and his estate are barred from participating in the proceeds of the administrator sale at all.

The appellants expressly plant themselves upon the proposition that the trial court should have ruled that, by taking possession and use on the terms prescribed by the will, and by failing to exercise his right to sell with the consent of the other heirs, the son is in the position of the holder of a life estate, and no more, and that this life estate has been terminated by his death; and that therefrom it follows, not only that the devise of \$1,000 is of no effect, but that the proceeds should be divided equally between the heirs at law other than August; that, in some way, the son made an election that bars him from participating as an heir. We have already pointed out that such a position assumes, without warrant, the very question in issue: whether the testator intended that giving the use upon payment should exclude not only the payment of the additional \$1,000, but bar the right to participate as an heir. Without going into the question whether or not the son could not make an election because the right to sell the land for debt existed, we have to repeat that using the land on the terms of payment exacted by the will, and failing to initiate any sale upon consent of the co-heirs, could in no view destroy the standing of the son as an heir. What we might hold if it were claimed here that, though the estate of August could participate as the representative of the heir August, but could not have the specific legacy of \$1,000 because the conditions fixed by the will for vesting that have not arisen, it is unnecessary to discuss. Such a contention, as said, is not made. No modification of the decree below

is asked. We are compelled to choose between the decree which applies the provision of \$1,000 out of the proceeds of sale to the administrator's sale, and the contention of the appellants that, because August E. took the use of the land under the will, on the terms of payment provided by the will, he ceased to be an heir. We have sufficiently indicated why we think the position taken by the trial court is much more tenable than the one advanced for reversal. We think that, in affirming, we do not overlook, but, on the contrary, apply, well-settled rules of law, which are: First, that intestacy shall be avoided, if avoidance is in reason possible; and, next, that the intent controls, and must be arrived at by doing all that reason will permit to give effect to every line of the will. See *Scott v. Scott*, 132 Iowa 35, 36; *Moran v. Moran*, 104 Iowa 216, 222; *Gilmore v. Jenkins*, 129 Iowa 686, 691; *Boekemeier v. Boekemeier*, 157 Iowa 372; *Wheeler v. Long*, 128 Iowa 643.

The dispute over whether the review here is *de novo* need not be settled, because it is an immaterial one. The sole question on the appeal is one of law; and such a question is determined by the same rule, whether it arise on the law or the equity side.

Other contentions and arguments are subsidiary, and are, in effect, disposed of by what we have said. In our judgment, the decree below should be—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

GARLAND CORPORATION, Appellant, v. WATERLOO LOAN & TRUST Co. et al., Appellees.

TRIAL: Jury Question as Preventing Directed Verdict. Plaintiff
1 may not have a directed verdict if the record reveals a jury question on any one of numerous defenses pleaded.

APPEAL AND ERROR: Failure to Question Defense. Failure to
2 challenge in the trial court the sufficiency of the facts pleaded
as a defense in a matter of private right, is an irrevocable
concession that such alleged facts, if established, constitutes
a valid defense.

CORPORATIONS: Authority of Bookkeepers, Etc. There is no
3 presumption that bookkeepers, assistant treasurers, or cash-
iers have authority, through any act of their own, and merely
because they know that the rights of the corporation have been
invaded, to release the wrongdoer from liability created by
such invasion.

PLEADING: Conversion Plus Unnecessary Allegation. A plain-
4 tiff who pleads that his discount notes were sold by his agent
to defendant, and that defendant converted said notes, in part,
to his own use, by paying said agent in property other than
money, without authority from plaintiff so to do, and that de-
fendant now refuses to pay plaintiff the amount of such un-
authorized payment, need not prove a further allegation that
said sale was made under a prior general agreement therefor
with defendant.

Appeal from Black Hawk District Court.—FRANKLIN C.
PLATT, Judge.

JANUARY 20, 1919.

THE petition of the plaintiff, appellant, alleges, in ef-
fect, that defendants bought of Collins eleven promissory
notes, which were the property of plaintiff, and made by it to
its own order, and endorsed by it in blank; that but a small
part of the purchase price was paid in cash, and the balance
in property; that, so, defendants have wrongfully converted
so much of the purchase price as was paid other than in
cash: and judgment is prayed for the difference between
the value of the notes and the lesser sum paid for them in
cash. Defendants, in effect, make general denial, and plead
certain affirmative defenses as constituting a waiver of
whatsoever rights plaintiff might otherwise have had, and as
an estoppel to complain that other than cash was paid.

By stipulation, the defendant and appellee Citizens Savings Bank has been eliminated from the suit.—*Reversed and remanded.*

Harry O. Evans and J. T. Sullivan, for appellant.

Courtright & Arbuckle and Edwards & Longley, for appellees.

SALINGER, J.—I. The defendant Trust Company admits it bought said eleven notes of Collins, and that something like \$18,000 of the purchase price was paid for in property. Its general denial amounts to a claim that plaintiff, by its past conduct, led defendant to believe either that the eleven notes were the property of Collins, or that, though Collins were but the agent of plaintiff, he had authority to take payment in such property as he was, in large part, paid in. As said, defendant adds to this several pleas asserting waiver and estoppel. The appellant moved that a verdict be directed in its favor, and now complains because this motion was denied.

If any one of the estoppels pleaded by defendant was supported by sufficient evidence to send that plea to the jury, we have no occasion to determine whether, in the absence of such estoppel, plaintiff would have been entitled to a directed verdict, nor to consider whether other pleas in the nature of estoppels were sufficiently supported to carry them to the jury. One plea in estoppel interposed was that plaintiff knew, when it delivered the eleven notes to Collins, that, at another and earlier time, it had delivered to him notes aggregating \$33,500; knew that defendant purchased these, and, after deducting a brokerage charge of two per cent, paid for them by delivering to Collins its certificates of deposit at four per cent interest and due in six months; and knew, also, that Collins had exercised his own judgment as to accounting to the plaintiff for the proceeds there-

1. TRIAL: jury
question as
preventing di-
rected verdict.

of. Upon this, defendant pleads that plaintiff "thereby waived any claim which it might otherwise have had against these defendants," on account of the purchase of the eleven notes, "and is estopped from complaining of these defendants on account of the purchase" of said notes. Appellant

2. **APPEAL AND
ERROR:** failure
to question de-
fense.

contends that the plea fails to state a basis for the waiver or estoppel claimed. Be that as it may, this plea was in no manner assailed below. We said, in *First Nat. Bank*

v. Zeims, 93 Iowa 140:

"Under familiar rules, if matter pleaded as a defense is not attacked by motion or demurrer, and there is testimony to sustain it, it will defeat the action, although it may not have amounted to a legal defense."

In support, the *Zeims* case cites *Conger v. Crabtree*, 88 Iowa 536; *Linden v. Green*, 81 Iowa 365; and *Benjamin v. Vieth*, 80 Iowa 149. We have upheld this rule of practice since the so-called Blanchard Act was passed. See *Lacy v. County of Kossuth*, 106 Iowa 16; *Boyd v. J. J. Watson & Co.*, 101 Iowa 214, at 222; *Enix v. Iowa Cent. R. Co.*, 114 Iowa 508, at 510; *Ormsby v. Graham*, 123 Iowa 202, at 211; *Heiman v. Felder*, 178 Iowa 740, at 751; *Citizens Bank v. Hickman*, 179 Iowa 1178, at 1184. In the last-named case we said:

"The answer stated no defense. But the answer was not challenged by demurrer or motion. In those circumstances, defendant, having prevailed below, can maintain what she there got, if she proved all that she pleaded."

It follows the motion of plaintiff that verdict be directed in its favor was rightly denied, if there was evidence from which the jury might, in reason, find that, at said earlier time, notes sold through Collins were paid for by certificates of deposit issued by the defendant; that plaintiff knew this fact when it enabled Collins to sell the eleven notes, and then knew, also, that Collins had exercised his own judg-

ment as to accounting to plaintiff for the proceeds of the notes sold earlier, or of said certificates of deposit. Beyond all question, the plaintiff knew, when it delivered the eleven notes to Collins to be sold to defendant, that, at an earlier time, it had through him sold to defendant a set of notes aggregating \$33,500; and the jury could find, both on the testimony of the president of the plaintiff and on the correspondence between the parties, that, when plaintiff delivered the eleven notes to be negotiated, it knew that the notes sold earlier had been paid for by said certificates of deposit, and knew, also, that Collins had exercised his own judgment as to accounting to plaintiff for the certificates of deposit. Whatever right, then, plaintiff might have had to have a verdict directed in its favor, were it not for this plea of estoppel, the overruling of this motion cannot be interfered with, because appellant has waived the right to challenge the sufficiency of the plea, and because there was enough evidence to make the claim of this plea a jury question. Indeed, we are constrained to hold, in answer to a complaint that the court erred in charging that the evidence upon the point is not in dispute, that the record justified giving this instruction.

II. Instruction 5 charged that the evidence shows, beyond dispute, that, prior to October 12, 1909, the plaintiffs and defendant had a business transaction under which the trust company either purchased the promissory notes of the corporation, or took the same and sold them for the account of the corporation at six per cent discount and a two per cent commission; and that it is undisputed that, in April, 1909, in one transaction that took place between the parties, a certificate of deposit for \$1,000 was issued; that plaintiff received the same through Collins; and that thereafter, they sent the certificate to Collins, with a request that he send the proceeds of same to plaintiff.

The complaint is that the charge is not justified by the evidence. We are of opinion the complaint is not tenable.

2-a

Instruction 13 charged that, if the jury find that, when John W. Garland directed the eleven notes to be sent to Collins, Garland intended or had reason to believe that the notes would be disposed of by Collins, and that the proceeds thereof, whether in money or property, would be received by Collins, and that Collins would account therefor to the corporation or to Garland, the verdict must be for defendants. We think there was enough evidence so that the jury might find, contrary to the claim of appellant, that Garland and the corporation did not intend Collins should account with money only, but were willing to receive either money or property. Of course, if the jury could find that this is so, then it amounted to advance authority to take something other than money,—in fact, to take any kind of property; and if that be so, plaintiff could not have a verdict for conversion because property was paid. The restriction was not error.

III. Defendant answers that, by charging Collins on its books of account with the difference between the face value of the eleven notes, less what was paid therefor in the equivalent of cash, and making such charge with full knowledge that the notes had been paid for with personal property, in large part, plaintiff "waived any claim which it might have against these defendants or either of them, and is estopped thereby to complain in this or any action on account of the facts complained of." This affirmative allegation stands denied by operation of law, and filing reply thereto affects such denial only in so far as such reply may constitute an admission, in whole or in part. The reply filed in terms denies that plaintiff made a charge on its books with knowledge such as is alleged, and asserts affirma-

2. CORPORATIONS:
authority of
bookkeepers,
etc.

tively not more than that it had tried to get knowledge, but had been unable to do so. By operation of law, then, and by what is affirmatively pleaded in the reply, there are two denials: First, that the plaintiff made such a charge on its books at all; second, that, at all events, plaintiff took no action in the premises with such knowledge as the defendant asserts it to have had. In our opinion, there is no evidence that, when a charge against Collins with reference to these eleven notes was put on the books of the plaintiff, on January 3, 1910, by one Short, acting under the direction of one Glaser, that either the corporation or these men had the knowledge which the answer asserts. On the other hand, when this charge was remade, in July, 1910, Short did know how Collins had been paid. Now, Instruction 15 charges that it was for the jury to say whether, under all the surrounding circumstances, as shown by the credible evidence, said charge on the books indicated an intention on part of *plaintiff* to look to Collins for payment, or whether the charge was merely a memorandum for the purpose of keeping track of the notes, and to show the channel through which they were sent to defendants. It is now complained there is no evidence upon which this instruction may rightfully be based. Such a charge was made on the books; and we have already pointed out that Short, who, under Glaser, made the charge, knew, when he made the second one, that Collins had been largely paid in property. So far, then, as the making of the charge on the books is concerned, there was evidence that justified an instruction which assumed such charge to have been made, or at least dealt with such a charge as having been made. But, as said, there was not merely a denial that whatsoever charge was made was with knowledge of what had been done with Collins, but a denial that the plaintiff made such a charge. This puts in issue whether those who did charge Collins upon the books of plaintiff had authority thereby to ratify on behalf of plain-

tiff the payment in property made to Collins. There is no evidence of the authority possessed by either Short or Glaser, except that Short was an officer inferior to Glaser, who seems to have been the assistant treasurer of the corporation, and that Short had been bookkeeper, cashier, and possibly, also, an assistant treasurer. If a mere bookkeeper had attempted the ratification claimed here, it would have to be held that, while he may have had authority to put charges on the books, he could not, by exercising that authority, take from his employer a claim against a solvent bank and substitute therefor a claim against a defaulting and possibly insolvent agent. That he put an entry on the books, knowing the dereliction of the agent, would add nothing to his authority. As well say that, if a janitor employed by the corporation knew how Collins had been paid, the janitor could ratify such payment for the corporation. There is no presumption that bookkeepers or assistant treasurers or cashiers may, by any act of their own, and merely because they know the rights of the employer have been invaded, release the wrongdoer from the liability created by such invasion. We find no evidence of any authority by which such book entries as Short made under the direction of Glaser could work a ratification or release by the plaintiff; and, therefore, hold it was error to submit to the jury whether the book entry in question indicated an intention on part of plaintiff to look to Collins for satisfaction.

IV. The petition alleges that, prior to the 1st day of September, 1909, plaintiff perfected an agreement with defendant through one Collins, whereby defendant was to purchase of or discount for plaintiff promissory notes made by plaintiff, at stated discounts, proceeds to be placed to the credit of plaintiff in the bank of defendant, and that Collins arranged to discount the eleven notes and delivered the same to defendant, and did so in

4. PLEADING:
conversion
plus unnecessary allegation.

pursuance of said general agreement, as well as under an express arrangement for the purchase of the eleven notes. The answer denies there was such agreement. While the petition charges the defendant was one party to the agreement and Collins the other, evidence was admitted without objection which tended to prove that substantially such an agreement was made, not between Collins and the defendant, but between John Garland, the president of the corporation, and the defendant. In Instructions 6, 9, 10, 11, and 15, it is charged, in effect, that plaintiff cannot recover unless the jury finds the sale and purchase of the eleven notes was made under said antecedent agreement. This amounts to taking the position that the petition states no cause of action if its allegation that the sale of the notes was had under said agreement be eliminated. We are of opinion that the plea that the sale was made under said agreement, is far from being vital,—merely a plea of more than is necessary to obtain a recovery. With the allegation as to sale under agreement stricken out, the petition charges a complete case of conversion. It alleges that Collins sold notes which were the property of the plaintiff to the defendant, and without authority for so doing, and received payment in something other than money. This allegation, if proved, invokes against defendant the presumption that an agent authorized to sell is not thereby authorized to receive payment in something other than cash. And proof of the additional allegation of the petition that demand has been made for so much of the purchase price as was not paid for in cash, and this demand refused, states, as said, a good cause of action, without reference to the plea that the sale was under a claimed agreement.

It may be assumed, for the sake of argument, the jury could find, on the evidence, that plaintiff had given Collins authority to receive payment in property, or had held him out as having such authority, or had misled the defendant

into believing it would accept payment in property. To say the least, the jury could also find that, although the plaintiff had ratified a former payment in certificates of deposit by a solvent bank, it had never authorized payment in the overdue notes of Collins, Corn Belt Telephone stock, paving certificates, and the like,—could find that Collins was never authorized to receive payment in such things as that; that nothing had been done to lead defendant to believe that Collins had authority to receive payment in that form, or that his receiving it would be ratified,—could even find defendant knew Collins had no right to take payment in what was given him. If the jury found what it could find for plaintiff, then plaintiff was entitled to its verdict. The court charged, in manifest effect, that, whatever else the proof showed, that, though that were demonstrated what we now hold would make a cause of action, yet defendant must have the verdict, unless the unnecessary plea of sale under antecedent contract was found to be established. It is not necessary for us to hold that the plea of sale under contract was pure surplusage, and that the court should not have submitted it at all. It suffices to say it was error, in addition to submitting it, to tell the jury plaintiff must fail unless it proved that plea.

For the errors pointed out in Divisions 3 and 4 of this opinion, there must be a reversal.—*Reversed and remanded.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

G. E. HEAD, Appellant, v. JOHN HALE et al., Appellees.

REPLEVIN: Converting Action of Replevin into Action for Conversion. Plaintiff in an action of replevin or detinue may dismiss as to the only defendant who is charged with the possession or detention of the property, and, by proper amendment, proceed against a sole remaining defendant *for con-*

version only. So held where such amendment was inaptly denominated a "reply." (See Sec. 4164, Code, 1897.)

Appeal from Taylor District Court.—THOMAS L. MAXWELL,
Judge.

JANUARY 20, 1919.

ACTION in detinue resulted in its dismissal. The plaintiff appeals.—*Reversed.*

Frank Wisdom, for appellant.

Flick & Flick, for appellees.

LADD, C. J.—An opinion was filed herein, October 18, 1916, and subsequently a rehearing was granted. Through some mistake, the opinion was published in the official reports. 178 Iowa 69. The cause has been submitted again; and, upon re-examination of the record, we reach a different conclusion.

The petition stated a cause of action in detinue for a span of mules, and alleged that the cause of detention by the defendant Hale was that he claimed to have sold the mules to collect an indebtedness of \$30, and that defendant Dugan claimed to have bought them of Hale. The prayer was for possession or value, as is usual in such cases. Hale answered that he agreed to trade the mules to plaintiff for a mare and \$25; that, in pursuance thereof, he took the mare; but, as plaintiff failed to pay the \$25, he rescinded the agreement and returned the mare, and subsequently sold the mules to Dugan, who, in his separate answer, denied knowledge of the alleged trade, and averred that he had purchased the team from Hale, and was in possession. A jury was impaneled, and, after the opening statements, counsel for plaintiff dismissed the action as to Dugan, and, on motion of the latter, the court rendered judgment in his favor for the mules. The counsel for the plaintiff then formally dismissed

the action as to Dugan, and filed a paper, denominated a reply, in which it was alleged that, "at the time the defendant Hale sold said mules to Dugan, the plaintiff was entitled to and was the owner thereof, as against Hale, and entitled to the immediate possession thereof; and that, by such sale, the defendant Hale appropriated the plaintiff's property to his own use, and converted it to his own use and benefit, and deprived the plaintiff thereof; and that, at the time of said sale and conversion, said mules were of the actual value of \$250; and that, by such appropriation and sale and such conversion, the plaintiff has been damaged in the amount of \$100, no part of which has been paid."

Counsel for defendant Hale moved "to strike from the record the above reply, for the reason that the same sets up a separate and different cause of action and claim for the conversion of the property, and the same cannot be joined in an action of replevin or detinue." This motion was submitted, and the court ruled that "the motion to strike the reply from the files will be sustained; and the court treats it, as he thinks the legal effect of it will be, as an amendment really to the petition. But, however it may be treated, either as a reply or an amendment to the petition, the court thinks it should be stricken from the files, for the reason that it is an amendment or claim bringing into the case, at this time an action in detinue, in substance a claim for damages for conversion of the property." Judgment of dismissal was thereupon entered.

It will be noted that the only ground stated in the motion to strike, and on which the ruling of the court rests, is that an action for conversion was joined with an action of replevin or detinue. No objection was raised to pleading such matter in the reply, nor did the court rest its ruling thereon, but treated it as an amendment to the petition, and it should be so regarded here. The question to be passed on is whether, by filing the reply, the plaintiff asserted a new

cause of action, and undertook to join the same with an action in detinue. That this may not be done appears from Section 4164 of the Code, declaring, with reference to replevin, that "there shall be no joinder of any cause of action not of the same kind." The record indicates very plainly that this was not attempted to be done. The petition alleged that the mules were in the possession of Dugan, and asserted at no time that Hale had possession thereof. By dismissing the action as against Dugan, and the entry of judgment awarding him the possession of the property, the issues as to the wrongful detention and right of possession were taken out of the case, and it ceased to be an action for the recovery of the property. There remained, however, the allegation that plaintiff was, in fact, owner thereof, and the manner in which Hale had, at one time, obtained possession of the property; and the amendment, reiterating this, alleged that, as between plaintiff and Hale, plaintiff would be entitled to possession, but that Hale had sold the property, and thereby converted it to his own use, and prayed judgment for consequent damages. This left no cause of action save that for the conversion of the property, and there was no ground on which to base a contention that, by the amendment, a different cause of action was joined with that of replevin or detinue. That such an amendment was permissible, sufficiently appears from *Cox Shoe Co. v. Adams*, 105 Iowa 402. The matters pleaded related to the same subject-matter, and we know of no reason why a petition in replevin may not be so amended as to change it into one alleging the conversion of the property, and praying for consequent damages, instead of the possession of the property. The effect of the amendment (dominated reply) was to do this, and the court erred in sustaining the motion to strike and dismiss the petition as amended; for an action for conversion only was then pleaded.—*Reversed*.

EVANS, GAYNOR, SALINGER, and STEVENS, JJ., concur.

INCORPORATED TOWN OF DECATUR, Appellee, v. J. C. GOULD,
Appellant.

MUNICIPAL CORPORATIONS: Speed of Automobiles. Municipalities may not validly regulate, by penal ordinances, the speed of automobiles on the public streets, unless warning signs are first erected at points where the corporate line crosses public highways, *with an arrow on, or in connection with, such signs*, pointing in the direction where the speed is to be reduced or changed. (Sec. 1571-m20, Code Supp., 1913.)

WEAVER, EVANS, and PRESTON, JJ., dissent.

Appeal from Decatur District Court.—H. K. EVANS, Judge.

JANUARY 20, 1919.

DEFENDANT was convicted of violating an ordinance of the town of Decatur, and appeals.—*Reversed.*

Murion Woodard and *C. W. Hoffman*, for appellant.

Baker & Parrish, for appellee.

STEVENS, J.—The defendant was convicted, in the mayor's court of the incorporated town of Decatur, of violating an ordinance of said town, limiting the speed of automobiles upon its streets to 10 miles per hour. Upon appeal to the district court, he was again convicted, and now appeals to this court from a judgment thereon, imposing a fine of \$25 and costs. The principal contention of counsel for appellant is that the ordinance, the violation of which is charged, is invalid. The ground upon which the legality of the ordinance is challenged is that the town council did not comply with the provisions and requirements of Section 1571-m20 of the Supplement to the Code, 1913, the material portion of which is as follows:

"Except as herein otherwise provided, local authorities shall have no power to pass, enforce or maintain any ordi-

nance, rule or regulation requiring from any owner to whom this act is applicable any fee license or permit for the use of the public highways, or excluding any such owner from the free use of such public highways, excepting such driveways, speedways or roads as have been expressly set apart by law for the exclusive use of horses and light carriages or in any other way regulating motor vehicles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary or in any wise inconsistent with the provisions of this act, now in force or hereafter enacted, shall have any effect; * * * provided further, that the local authorities of cities and towns may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitations not to be in any case less than one mile in six minutes, and the maintenance of a greater rate of speed for one eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent; and on further condition that each city or town shall have placed conspicuously on each main public highway where the city or town line crosses the same, and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words 'City of ——,' 'Town of ——': 'Slow down to —— miles' (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of such ordinance, rule or regulation, supersede those specified in Section twenty-three [Sec. 1571-m22]."

A sign, bearing the inscription, "Decatur City, automobiles and motor vehicles slow down to 10 miles per hour," of sufficient size and easily readable, was located at the proper place on all highways entering the town. The sign

did not, however, display an arrow pointing in the direction towards which the speed was to be reduced.

It is the contention of counsel for appellant that the requirement of the statute that an arrow "pointing in the direction where the speed is to be reduced or changed" be placed upon the required signs is mandatory, and a condition which must be complied with before the power conferred by the legislature upon municipal corporations to place certain limitations upon the speed of motor vehicles within the corporate limits thereof can be exercised. It is, of course, fundamental that such corporations can exercise only such powers, and in the manner, as are delegated thereto by the legislature. Mr. Justice Dillon, in *Merriam v. Moody's Ears.*, 25 Iowa 163, speaking for the court, said:

"In determining the question now made, it must be taken for settled law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power."

See, also, *Logan & Sona v. Pyne*, 43 Iowa 524; *Brooks v. Incorporated Town of Brooklyn*, 146 Iowa 136; *Farmers Tel. Co. v. Town of Washta*, 157 Iowa 447; *Town of Hedrick v. Lanz*, 170 Iowa 437; *Huston v. City of Des Moines*, 176 Iowa 455.

The legislature of this state has, by proper statutory enactment, prescribed and limited the duties and privileges of drivers of motor vehicles upon the public highways thereof. In addition thereto, it has conferred certain limited

authority upon cities and incorporated towns. The authority thus conferred is strictly defined and limited by the statute, and can be exercised only in strict conformity to legislative requirements. It will be observed that, in the opening sentence of Section 1571-m20, *supra*, the power of local authorities "to pass, enforce or maintain any ordinance, rule or regulation * * * or in any other way regulating motor vehicles or their speed upon or use of the public highways" is denied, except upon certain prescribed conditions. The power conferred, in the language of the statute, is:

"Provided further, that the local authorities of cities and towns may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitations not to be in any case less than one mile in six minutes, * * * and on further condition that each city or town shall have placed conspicuously on each main public highway where the city or town line crosses the same, and on every main highway where the rate of speed changes, signs * * * and also an arrow pointing in the direction where the speed is to be reduced or changed. * * *"

The requirement of the legislature that local authorities place an arrow upon signs at highways entering cities and towns, and at points therein where the speed changes, is not a mere captious one, but is intended to serve a perfectly reasonable and legitimate purpose. It is a matter of common knowledge that the possibility of injury to persons upon public streets from motor vehicles driven at a rapid rate of speed is much greater in certain congested portions of towns and cities than upon public highways, or generally upon other streets less frequented by the public. Greater care should be required of drivers of motor vehicles when passing, or in the vicinity of, public school buildings, churches, market places, and congested business districts, than in many other parts of the city. The legislature has, there-

fore, conferred authority upon cities and towns to limit the speed of motor vehicles entering the same, and upon the streets thereof. The purpose of the arrow upon the sign is to indicate to the driver of such vehicle the street, or portion thereof, upon which the speed is to be changed. The arrow placed upon the sign is designated to indicate the direction in which such reduction of speed is required. It may be that the defendant was in no wise misled by the failure of the officers of plaintiff to cause an arrow to be placed upon the sign in question, but the law must be given general application. The placing of an arrow upon signs displayed at highways entering cities and towns, and at points therein where a change is required in the speed of motor vehicles, is as much a part of the legislative requirement as that same shall have certain words, of sufficient size to be easily readable, inscribed thereon. The validity of ordinances enacted by municipal corporations, in exercise of the power conferred by the statute, depends upon a strict compliance with its requirements. The power which such bodies can exercise is only that which is delegated thereto by the legislature, and conditions imposed thereby are mandatory, and must be strictly followed. Local authorities have no discretion in the matter, and cannot say with what part of the statute they will comply, or what they will ignore.

It follows that, as the incorporated town of Decatur failed to comply with the terms and conditions imposed by the legislature as a condition precedent to the exercise of the authority delegated by Section 1571-m20, its ordinance is invalid, and cannot be enforced. The motion of defendant's counsel for a directed verdict based upon this ground should, therefore, have been sustained. The judgment of the court below must be, and is, therefore,—*Reversed*.

LADD, C. J., GAYNOR and SALINGER, JJ., concur.

PRESTON, J. (dissenting). I cannot agree to the conclusion reached by the majority. Conceding that the statute is mandatory, I think a substantial compliance with the statute is all that is required. We so held in *Pilgrim v. Brown*, 168 Iowa 177, construing this same section, and as to the location of the signs where the city or town line crosses the highway. In that case, the sign was located 500 feet from the line, and within the city. The same claim was made there as here: that the ordinance was void. It is true that was a negligence case, but we said:

"It is not altogether clear from the statute whether the legislature intended to make the validity of the ordinance depend upon the city's compliance with the requirement for signboards, or to relieve from the penalties of the ordinance such persons as might be misled or deceived by the absence of the prescribed warnings, or that the presumption of negligence attached to the driving of a motor car at a greater speed than the regulation allows should be applicable only in cases where the city has performed its duty in this respect. But if either of these several constructions be adopted, the result of the case in hand must be the same. The evident purpose of the provision for the display of signs at the entrance to the cities is to give warning to car drivers, that they may not unwittingly violate municipal regulations. They also, to some extent, tend to protect the general public in the use of the city streets, against the perils caused by the reckless or thoughtless operation of such vehicles. It cannot be supposed there was any legislative intent to make the validity of a municipal regulation of this character depend on the question whether a nice or accurate survey shall find all the several sign posts surrounding the city planted squarely upon the boundary line."

It seems to me the majority opinion requires too strict compliance, and is technical. The evidence shows that defendant was within the town, at the time he was speeding

his automobile. The signs in question informed the defendant, as he approached the town, that he was to slow down to 10 miles per hour, and that in that vicinity, in front of him or behind him, was a town, by the name of Decatur City. He knew it was not behind him, because he had just passed that way. It would not require any great stretch of imagination for him to know that he was approaching the town of Decatur City, and that he was required to slow down his speed. Furthermore, defendant is presumed to know the law, and to know that the law required the city or town to place signs at the city limits. When he saw the sign in question, he knew it was at, or near, the corporate line, and that he was either leaving or approaching the town. I think the sign informed him that he was approaching the town. It seems to me that there was a substantial compliance with the statute, that the signs were a compliance with the statute, and authorized the town to pass the ordinance in question. The trial court, in the instructions, after quoting the statute, said, among other things:

"The plaintiff has offered evidence to show that there were signs on the main highways, at or near the corporate line, with the words, 'Decatur City. Automobiles and Motorcycles slow down to 10 miles per hour.' If the plaintiff has proven beyond a reasonable doubt that there were signs on the main highways, at or near the corporation line, which could be readily read, containing the words, 'Decatur City. Automobiles and Motorcycles slow down to 10 miles per hour,' this would be a substantial compliance with the law, and sufficiently so as to this requirement."

There is some suggestion in the majority opinion in regard to the arrows and signs within the city or town, giving notice of public schools and congested districts, where a further change of speed may be required. Whether or not this rule would apply where a person was approaching a schoolhouse or the like, within a city or town where such

schoolhouse might not be so readily seen, we do not determine, because there is no such question in the case, nor even a suggestion of it. The only question in the case is whether the signs placed at the corporate line by the town constitute a substantial compliance with the statute. Questions might arise where a proper sign had been placed in the first instance, and blown down or destroyed, or where a sign within the city had been placed there after the passage of the ordinance; but it will be time enough to pass upon such questions when we come to them. I would affirm.

WEAVER, J., concurs in this dissent.

EVANS, J. I think that the statutory provision pertaining to the "arrow" indicating direction should be construed to apply only to signs erected within the city at points where the ordinances require a reduced speed. This is the only rational construction of the statute. No reason is conceivable why an arrow indicating direction should be posted at the outer limits of the city. I therefore join in the dissent.

MERKLE-HINES MACHINERY COMPANY, Appellee, v. K. C. GAYNOR, Appellant.

SALES: Secondhand Article Sold as New. The statement, duly relied on, that a secondhand machine, purchased without opportunity for inspection, (a) is in first-class condition, (b) has not been used more than six months, and (c) will carry the same guaranty as a new machine, which latter guaranty calls for full capacity and efficiency, constitutes a warranty, not only as to its first-class condition and length of prior use, but that it was equal in capacity and efficiency to a new machine. This is true even though the seller did not know the precise use to which the machine would be put.

SALES: Reliance on Warranty. The presumption will be indulged that a warranty was relied on, when it was an interwoven part of the contract of purchase and the consideration paid.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

JANUARY 20, 1919.

ACTION for purchase price of a steam turbine, sold by plaintiff to defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion.—*Reversed.*

Sears, Snyder & Boughn, for appellant.

W. W. Hoyer and Carter, Brackney & Carter, for appellee.

STEVENS, J.—I. This is an action to recover the purchase price of a steam turbine generator, with counterclaim for damages on account of the breach of alleged warranties in the sale thereof. The purchase price agreed upon, and the delivery of a turbine was admitted by defendant, and a trial was had to a jury upon the counterclaim, resulting in a verdict for plaintiff by direction of the court. Something is said in the pleadings and in the evidence touching rescission; but we give no attention to this question, for the reason that defendant's counterclaim is not bottomed upon rescission, but is an action at law, to recover damages for an alleged breach of a contract of warranty, and not based upon the thought of rescission, which would be an action to recover the purchase price.

Prior to October 28, 1914, defendant had a conversation with F. M. Beeson, plaintiff's manager at Omaha, Nebraska, regarding the purchase of a secondhand steam turbine, as the result of which, plaintiff, on October 28,

1. *SALAS*: second-hand article sold as new.

1914, wrote defendant as follows:

"Regarding our conversation of recent date, in which you asked the writer to get you prices on a secondhand 100 KW turbine, wish to say that we have taken this matter up with our factory, and find that they have a 100 KW., 125 and 250 volts, 3-wire ma-

chine, which is now loaned to a New York Company for temporary use, which they will sell for \$2,500.00 f. o. b. factory.

"They also state that they have a 50 KW., 250 volt machine, which they could ship within two weeks, for \$900.00 f. o. b. factory. Both of the above machines are in first-class condition, and would carry the same guarantee as a new machine, as neither of them have been run to exceed six months."

On November 2d, defendant replied to the above letter as follows:

"Please ship me at once the 50 KW. turbo generator set, described in your letter of last week. The price to be nine hundred dollars (\$900.00); terms 90 days.

"Ship the above as soon as possible to Sioux Rapids, Iowa, via the Northwestern."

The turbine delivered was a secondhand machine, and was shipped to defendant from an eastern point, without opportunity for defendant's inspection. Defendant desired the machine for use in his printing office at Sioux Rapids, Iowa. The language of plaintiff's letter, relied upon as constituting the warranties, the breach of which is alleged by defendant in his counterclaim, is the following:

"Both of the above machines are in first-class condition, and would carry the same guarantee as a new machine, as neither of them have been run to exceed six months."

It is conceded that the guaranties of a new machine are contained in the catalogue of the Kerr Turbine people, a copy of which was, at the time he purchased the machine in question, in defendant's possession, and with which he was familiar. The meaning and extent of the guaranty therein contained is, however, a matter of dispute. The following paragraph is quoted therefrom by counsel for appellee, as comprising the sole guaranty carried by a new machine:

"The company guarantees the apparatus and equipment described herein to be of the full capacity, efficiency, and other qualifications stated in the attached specifications, and agrees to correct any defects which may develop in same within one year from date of shipment, and supply parts therefor f. o. b. Wellsville, N. Y., if said defects are traceable to faulty material or workmanship, provided the purchaser gives the company immediate written notice of such defects."

Based upon the letter of October 28th, and the following extracts from the catalogue of the Kerr Turbine Company, counsel for appellant contend that plaintiff warranted the turbine to be in "first-class condition;" that same had not been used to exceed six months; and that same was, in efficiency and capacity, the equivalent of a new machine. On the other hand, counsel for plaintiff interpret the reference in the letter to the condition of the machine as "dealer's talk," or the mere expression of an opinion, and the statement that it had not been used to exceed six months, as mere description, and not a warranty.

Counsel for appellee further contend that the warranty of a new machine was intended only to assure the purchaser against defects of material and workmanship for one year, with the right to have defective parts replaced upon notice. Defendant, called as a witness in his own behalf, testified that it was orally understood, in the conversation between himself and Beeson at Omaha, that the machine was to be of an improved type, known as an "Economy" steam turbine; that the machine delivered was, in fact, an old type, which had been in use for a much longer period than six months, and was not in first-class condition. Concerning the condition and efficiency of the turbine delivered to him, defendant testified as follows:

"On the electrical end of the machine, the brushes were worn clear down, and the ends of the commutator showed

where it had been machined down; been put in a lathe, and marks of the brushes cut off to the extent of about three quarters of an inch in diameter; on the same end, the packing gland around the governor rod was gone, or worn out, and the pin on which the governor operated was worn down, so that the oil grooves were worn completely off of it. Basing my opinion on my experience as an engineer and an electrical engineer, it would take a machine, ordinarily, a year, with continuous service, to wear out the brushes on the commutator such as were worn out on this machine. Basing my opinion upon my experience as an engineer, the packing gland might go out under comparative short use, but the governor pin would not wear off that way; should not wear off that way in the whole life of a machine. We never operated this machine at its rated capacity; we could not get that much on it; when we attempted to operate it at its rated capacity, and started to put the load on and pull it up, after we reached about 150 amperes, as we put on more load, the machine began to lose speed and voltage.

* * * The machine that I received from the Merkle-Hines Machinery Company did not measure up to the guaranties on new machines; the machine which I purchased from the Merkle-Hines Company failed to measure up to the guaranties I have testified to, in that it would not carry its rated load; it was rated to carry 50 K. W., and it would not do it; the amount of water consumed by the turbine, the steam was more than the guaranties on a new machine; that was where the steam end fell out; it would not carry its rated load, and took more steam to carry any load than the guaranty said it should,—that is, both condensing and noncondensing; on the electrical end, the generator fell down, in that the commutator would run hot and the machine would spark; it would run a ribbon of fire all around the commutator; the governor would not operate proper-

ly without having a special oiling device arranged for it: it would get hot and stick."

We are unable to concur in appellee's interpretation of its contract. The machine is shown by the evidence to have been in possession of a purchaser for nearly two years before it was delivered to defendant. A witness called by plaintiff testified, in rebuttal, that the machine had not been operated to exceed five months; but the jury, under the testimony quoted above, which was corroborated to some extent by other witnesses, might have found that the machine had been used for a much longer period. Whether plaintiff's representation that the machine had not been used to exceed six months is treated as a separate warranty or not, when taken in connection with the further representation that it was in first-class condition, and would carry the same warranty as a new machine, it must be given some controlling importance. The character of the turbine as a secondhand machine would naturally suggest to a prospective purchaser an inquiry as to its condition. Without an opportunity for inspection, plaintiff could hardly have expected defendant to have understood its representations that the machine had not been used to exceed six months, and was in first-class condition, as the mere expression of an opinion. It is much more probable that plaintiff intended thereby to assure the defendant that it was not an old, worn-out turbine, in a bad state of repair, without substantial value, but that it was, in truth, in good repair and, in fact, in "first-class condition,"—and not mere "dealer's talk." This is further emphasized by the statement in the letter that it would carry the same guaranty as a new machine.

Counsel for appellee practically concede, in argument, that it was the intention of plaintiff to sell the machine with the same guaranty as a new one. The restricted meaning sought to be placed upon the guaranty quoted, by counsel

for appellee, does not meet with our approval. By express language therein, "the company guarantees the apparatus and equipment described herein to be of full capacity, efficiency, and other qualifications stated in the attached specifications." The option extended to defendant to return defective parts and have the same replaced with new must have related to minor parts of the machine, and not to its capacity and efficiency. It is conceded that defendant did not report defects in workmanship and material, nor are these the principal matters complained of. As indicated, defendant testified that the machine could not be operated at its rated capacity; that the machine became hot, and ran a ribbon of fire around the commutator; that the governor would get hot and stick. This was directly contrary to the following specification, referred to in the guaranty quoted above:

"Operation.—The generator will operate without appreciable sparking at any load from no load to 25 per cent overload without shifting the brushes. Special regulating poles and winding will be used to insure reliable operation and good commutation under varying loads at the high speed specified. It will carry its full rated load continuously for 24 hours, with temperature rise not to exceed 40 degrees centigrade on any part except commutator, and 45 degrees centigrade on the commutator. Immediately following full load test, it will carry an overload of 25 per cent for 2 hours with a rise in temperature not to exceed 50 degrees centigrade on any part except commutator, and 55 degrees centigrade on the commutator; and an overload of 50 per cent momentarily without injurious heating, or flashing over at the commutator."

Beeson testified, with reference to the specifications set out in the catalogue, as follows:

"The machine we sold him would carry the same general warranty shown in the specifications, irrespective as to

whether or not it was an economy type or the standard or old type. I do not know whether or not the machine I sold and delivered to Mr. Gaynor measures up to these specifications or guaranties; we have never made any investigation or tried to find out, except through correspondence with the engineer who formerly operated the machine, and whose deposition was taken in this case."

We therefore assume that the specifications set out in the catalogue are to be treated as a part of the guaranties accompanying the sale of a new machine. It is, therefore, our conclusion that plaintiff warranted the machine in question to be in first-class condition for use; that same had not been used longer than stated in plaintiff's letter of October 28th; and that it was equal in capacity and efficiency to a new machine, in that it was as good in all practical respects as a new machine; and that, in so far as plaintiff warranted a new machine, the one in question was equal thereto.

Counsel for appellee lay some stress upon their claim that plaintiff did not know the use or purpose for which defendant desired the machine, and, therefore, the specifications contained in the catalogue are not applicable, and the machine was not warranted to carry any particular load, or to do the specific work for which the same was purchased. The machine was, however, of a particular type described in the catalogue, guaranteed to possess certain capacity and efficiency; and, while the successful operation of the machine may depend, to some extent, upon the manner of its installation, the use made of it, and the skill with which it is handled, it is obvious that plaintiff meant more by the statement in its letter that it would carry the same guaranty as a new machine, than that defective parts would, upon notice, be replaced. We are, therefore, of the opinion that the evidence established a warranty, and such a breach thereof as entitled defendant to have his counterclaim submitted to the jury.

II. But it is contended that the evidence fails to show that defendant relied upon the alleged warranty, or that same constituted any part of the consideration of the contract. It was not necessary for plaintiff to show by direct evidence that he relied thereon. It is sufficient if, from all the facts and circumstances shown, reliance thereon fairly appears. Where the warranty is a part of the contract of sale and a part of the consideration of the purchase price, reliance upon the warranty will be presumed. *Mitchell v. Pinckney*, 127 Iowa 696.

III. The evidence, without conflict, shows that the machine in question is not an Economy type machine; but the same guaranty accompanied both types of new machines. It is claimed that the evidence wholly fails to show damages upon the part of the defendant. Evidence was offered, tending to show that the machine was of little value. One witness testified that its value would not exceed \$125. The question was one of fact for the jury; and it cannot be said, as a matter of law, that no damages were shown.

From what is said above, it follows that the motion to direct a verdict in favor of the plaintiff should have been overruled, and the issues tendered by defendant's counterclaim, except that of rescission, submitted to the jury. The judgment of the court below is, therefore,—*Reversed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

MINNIE MILLER et al., Appellees, v. CATHERINE PAULSON, Appellant.

GUARDIAN AND WARD: Former Incompetency as Bearing on
 1 Present Incompetency. On the issue whether a guardian should be appointed, the real test is incompetency *at time of trial*; but evidence of incompetency prior thereto may carry a presump-

tion of incompetency down to and at the time of trial. Evidence reviewed, and held to fully overthrow the presumption.

INSANE PERSONS: Explaining Unequal Distribution of Property.

- 2 Inferences of incompetency, arising from the fact that the one sought to be placed under guardianship had made a very unequal distribution of her property among her children, may be explained by evidence showing that the distribution was, under the circumstances, eminently fit, reasonable, and proper.

GUARDIAN AND WARD: Defendant as a Testifying Exhibit. A

- 3 jury, finding of incompetency is not necessarily conclusive on the appellate court by reason of the fact that the jury had the advantage of personally observing the alleged incompetent while she was a witness.

Appeal from Harrison District Court.—A. B. THORNELL, Judge.

OCTOBER 25, 1918.

REHEARING DENIED JANUARY 20, 1919.

THE appellees are the daughters of the appellant. They succeeded below in having their mother found to be of unsound mind. A motion attacking the verdict was denied. A guardian of the property of Mrs. Paulson has been appointed, and has qualified. Mrs. Paulson appeals.—*Reversed and remanded.*

Turner & Cullison, for appellant.

Roadifer & Roadifer and *H. I. Robertson*, for appellees.

SALINGER, J.—I. For testimony which discloses the conduct and mental condition of the appellant in the past, we will assume that, unless it has been overwhelmingly met, it is sufficient to sustain the verdict. This

1. GUARDIAN AND WARD: former incompetency as bearing on present incompetency.

concession *pro arguendo* makes it needless to particularize, even if it were practicable. But to illustrate what ultimate effect said testimony of the past condition and conduct should have on this trial, we point out one item which ap-

pellees will concede is as much of an aid to their case as anything that was adduced on their behalf. The item in question is evidence that appellant conveyed large tracts of land, perhaps all the land she had, to her two sons at much less than its value, and offered a comparatively trifling provision for the daughters, and, upon the rejection of this offer, gave these daughters little, if anything. We understand it to be claimed, and will assume it to be the fact, that this transfer left appellant with much less of a provision for her maintenance than she might and should have had. What is the effect of all this, and of other testimony bearing on past conduct? Assume, for the sake of argument, that this transfer proves that, at the time it was made, it was proper to appoint a guardian for the property of the appellant: that being assumed, the presumption of continuity establishes *prima facie* that, at the time of the trial, the time to which the statute confines the inquiry, she still needed such guardian. But at no time was the validity of these transfers for trial, and the mental condition when the deeds were made is material only as *prima-facie* evidence that a guardian for her property was needed at the time of the trial.

The ultimate inquiry remains, whether the allegation that defendant is a person of unsound mind has been "satisfactorily proved upon the trial." Code Section 3219. Since the mental condition at the time of the trial is controlling, were it conceded that, at that time, the defendant was of sound mind, and capable of protecting her property rights, it would become utterly immaterial if it were further conceded that, at some time in the past, the defendant had made a transfer of her property in such manner as to show that, at that time, she was not capable of protecting her property rights. If fully recovered at the time of the trial, the making of such improvident deed in the past would not justify the appointment of a guardian for her, and her past mental incapacity would afford no remedy, except that she

herself might, after having recovered, make successful attack upon such deeds by proving her past mental incapacity. Therefore, it all resolves itself into an inquiry whether it was so strongly proved on the trial that defendant then had average mental capacity to protect her property rights, though she did not have it in the past, as that a motion for new trial, asserting failure to make satisfactory proof of incompetency, should have been sustained.

On the one side, we have testimony that tends to show lack of average mental capacity. There is testimony on the other hand disputing the first. This conflict we shall not attempt to settle. We shall first consider some matters which, on final analysis, exhibit no conflict.

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Before going into this, it is not amiss to point out that, as is not unusual in such contests, natural affection seems to be supplanted by a malicious desire to exaggerate and color. For illustration, throughout the testimony of all of the daughters and their husbands runs an utterly unjustified assertion that the old mother was filthy in habit and unnaturally indifferent to at least the physical well-being of her little children. The "expert" testimony runs true to form. It bases an edict of insanity upon assumed things that have, in reason, no relation whatever to establishing lack of mental balance. It is the kind of testimony which, in type, gives an opinion that death ensued from a bullet wound because the deceased at one time raised Holstein cattle. The testimony given is not much less absurd. Dr. Kennedy testified, on cross-examination, that, on the assumption that the father had shown a discrimination between the children, the fact that the mother carried this out shows she is of unsound mind, and that the witness had always thought people who discriminated between children were of unsound mind.

With this digression out of the way, we turn to some

of the matters concerning which, as said, there was no substantial, if any, conflict, and which, upon analysis disprove, rather than prove, the case of the plaintiffs.

An argument of lack of business capacity is builded upon the purchase of a house in Persia. It appears that the initial negotiations were not made by the defendant, but by one of her sons; and there is a claim that she forebore at all times to make such examination and inquiry as an ordinarily prudent person would make, before purchasing. It is a sufficient answer that it fairly appears the house was in good condition; that, before finally closing, she did make reasonable investigation; and that whatsoever part her son Henry took in the matter was at her instance. It appears without dispute she asked the seller what shape it was in, and he told her it was in good shape. It all sums up merely to the claim that the son talked to the seller first, and wrote out the check in payment,—at which time, however, the defendant was present; that the buyer talked with her when she was alone, and asked her if she didn't want to go up and look at the property, and she answered she would be up there sometime to see it. He admits he had a talk with her, the day she came in to have the papers made out; and it is the undisputed testimony of Henry that the mother talked with the seller about the property on the day she bought it, and told him she wanted him to furnish her an abstract of title down to her name, move the outbuildings onto the lot and shingle them, and pay all the unpaid taxes, and that the seller agreed to do so.

Naturally enough, the appellees attach importance to the fact that the mother has endowed the two sons much more liberally than the daughters. It will be conceded, of course, that, assuming her to be mentally capable, she had a right to make even an unreasonable discrimination. It is equally manifest that the theory of the appellees is unfavorably affected if it be true that the

2. **INSANE PERSONS:** explaining unequal distribution of property.

differentiation was a natural one. Of itself, it counts for little; but it is still to be noted as a circumstance that the son Harry is older than two of the sisters. It appears, without any dispute, that both boys worked faithfully on the farm, without wages, until the death of their father, at which time the son Harry was 20 years old, and the son Henry, 22. It is undisputed that they began working on this farm practically when they were little children, and, as one of them puts it, as soon as he was able to drive a team and hold a cultivator. This continued, as said, until the father died. His health was in such condition that, for a long time prior to his death, he was incapacitated from working. There were lots of cattle and hogs and general farm work; and, for all of five years before the death of the father, the two brothers farmed all of the 250 acres that belonged to the father. They were faithful; they knew no such thing as a vacation or going to a state fair or the like; they had no opportunity to visit any cities, except that it seems the two brothers were just once in Omaha and in Council Bluffs. Before the mother attempted any recognition of this service, the father recognized it. It is without dispute that, before the father died, he told the mother that he would like to have each of the boys have a home on the two places they had; that thereupon, the mother said, "The boys worked hard for you, and now is a good time to give them a home;" that he then said to the boys, "This is going to be your home,—I want you to stay right home here, you are getting of age, and I thought I would tell you this, so you would be working for your own interest." Just before he died, the father wrote the mother a letter. It is not stated, but is fairly to be inferred, that this letter was in line with these previous expressions. It appears that the father appointed Henry executor, without bonds. He seems to have done nothing for the boys until he died, and at that time, he merely noted on a slip of paper what amounted to

giving Harry a team, and he left \$400 in a bank in Henry's name; but this was not known until a note left by him advised the mother of it. In this letter, no one but Harry was remembered. While the mother finally acted somewhat in line with this direction by her deceased husband, personal recognition of her own part was slight, and seems to have consisted of giving Harry a present of \$5.00 when he married, and later, a top buggy and a set of harness. It is true that, of the father's estate, the girls had distributed to them \$952, and that the sons got as much. And it is true also that, when the father died, all the girls except Mrs. Putman were at home, and that the daughter Marie lived at home all the time until she married, except one fall. Since her marriage, she has lived on a farm operated by her husband. The oldest daughter, Mrs. Putman, has lived in Woodbury County for many years, and was married 21 years before the trial. There is no evidence that either of the daughters are in need, nor that, though they remained at home, they did such work as it has been seen the brothers did, and thereby entitled themselves to equal financial consideration.

If she acted from resentment towards some of her daughters, it was justifiable, from her viewpoint, and at least sufficiently so as that the entertaining of the feeling is no evidence of delusion or want of mental capacity. These children tried in every way to emphasize upon the trial that the mother had always been practically a lunatic; that she was harsh and neglectful, and raised them in filth and dirt. The evidence discloses that there is no justification for either claim, and they admitted she was sane enough to become surety for some of them. It appears further that, during all the days of this trial, these daughters had nothing to do with this poor old mother on trial, and failed and neglected, if they did not absolutely refuse, to say one word of greeting or kindness to her.

II. But there was one piece of testimony for the defendant as to which there can be no conflict, and that was the proffer of the defendant as an exhibit to the jury, by means of her becoming a witness. This piece of testimony merely calls upon the impartial reader to say what it does for establishing that defendant needed no guardian at the time of this trial. In a sense, it is triable on demurrer. Defendant's examination lasted a long time, and its abstracting fills some 40 pages of print. The witness is old, is German, has comparatively little education, and has had very little business experience. Yet, the ordeal to which she was thus subjected seems to us to demonstrate absolutely that, at the time of the trial, she had at least average ability to take care of her property. Here, too, it would be utterly impracticable and without value to go into much detail. It must suffice that we deal with ultimate deductions, based upon a most careful reading of the voluminous record, and with certain items that are outstanding. The witness was able to give exhaustive detail of the ramifications of her family, both direct and collateral. She was able to remember that the family sailed from Hamburg to America on the 12th of June, 1869, stopped in England on the way out, and landed in New York; that from there they went to Davenport; that, when she married, neither she nor her husband had any property; that they rented a farm some 12 miles from Davenport, and "started up with farming" in Scott County; and that the husband borrowed the money wherewith to buy the implements. She is able to tell the long line of their gradual acquisition of property, and to describe essential conditions surrounding the acquisition and the condition of these properties. She says they made up their minds they wanted to go west, and went to a place about three miles south of Minden, Pottawattamie County, on the Bloomer farm; that they rented one year, and bought, right afterwards, 80 acres of prairie, which

joined the farm they were living on, and bought it from the Rock Island railroad, and remembers they paid \$12.50 an acre; that this farm was not improved, and had neither house nor fences; that they improved and broke it up the same year in which they bought; that they lived on this farm six years; and that Annie, Herman, and Marie were born there; that, at the time of purchase, they had five children, and no help in the house; that they had only two cows, but raised calves right along, and kept them, and raised hogs and chickens, she taking care of the chickens; that she did the milking, and helped shock and stack, and husked corn; that they fenced this 80, and put on a barn and henhouse, with concrete, and dug a well. She continues that, when they sold this 80, they went to Harrison County, and bought the 200 acres that were being "talked about in this case." She says it was bought from L. H. Straw; that they paid \$27.50 an acre; that they got the money from the first 80 that they had and sold; that they sold to Pete Cadle, who now lives in town, while his children make this 80 their home; that they raised the balance by mortgage. She states that the mortgage money was raised by mortgage to Clapp and Davis, at Shelby, and that they paid it off some 12 or 13 years ago. She describes the improvements on the 200-acre farm in full detail,—among other things, saying that it was fenced with barbed wire, and not woven wire. She describes the buying of another 80 from one Herman Alberts; says they paid \$32 an acre for it; and, while she doesn't know how long ago the purchase was made, she knows it was bought before they got the other farm paid for. She says the Alberts 80 was paid for "all cash," and that Alberts has gone to Nebraska. She testifies that this 80 had a house and a little barn; that Alberts lived on it just one winter after they bought it, they buying in the fall, and he going to Nebraska in March; that then they rented the land to a man named Honeyman, who lived on it

about three years; and that the house was so old that Honeyman couldn't live any more in it; and so, after he went away, they farmed it themselves.

She was able to state that her parents, during their life, had 40 acres, near Minden; that her son-in-law Putman has 160 acres, and her daughter Nancy, an 80-acre farm.

She remembers all the details connected with the marriages of her daughters, and gives the items of many small presents she made them. Speaking to the last visit she made one daughter, she says they went to Kingsley, 5 miles northwest; that it was kind of misting when they left; that her daughter objected that she might stay a few days longer, or at least another day. But she had set her mind, and wanted to go, and was all ready. And she said she had made up her mind, and that she guessed her husband wanted to go to town anyway, as it was Saturday, and he would be busy on Monday, and she didn't want to bother him. She says she didn't blame Marie's husband for bringing this lawsuit; that the girls sued her just as much as "him;" and she has the same feeling now towards them that she has against him; but she didn't have that feeling against Marie before that. When confronted with an inquiry suggesting that she was abnormally angry with her husband at times, she responded they sometimes in the family, long years ago, had what she guesses happens in every family sometimes, but that she never had had any trouble with her husband.

She is able to say that her daughter Minnie married, five years after the death of the defendant's husband, and that Minnie got her share of the property in February after the death of the husband; that Henry wound up the estate of his father, and divided the personal property by giving each of the children \$950.

Speaking to a will she had made, she states that she went, herself, to have it drawn, and drove her husband's old

team. At first, she said she named her brother-in-law to act as executor, and corrected it by saying she named nobody, because the law did that. She states who was present when she made her will, and names the witnesses to it; says there is a clause giving to her oldest boy the 160 acres, and to the youngest the 120 acres, and that the girls should have \$1,500 after her death, which the boys should pay to them after her death.

Speaking to sending one of the boys to offer each of the daughters \$1,500, she goes on to say that some of the daughters "kicked." Thereupon, she said, "nobody can have any," and that they let it alone; that they should wait until she was dead, and that there might be more money; and if there was more, that they could divide it equally when she was gone.

At one time, her husband made her a deed. She states who the conveyancer was; that both she and her husband went to his office; that they got the descriptions from an old deed which they took along; that the deed was sent for record, and was returned to her.

She testifies that, the first year after the death of her husband, she rented the farm to the boys, and told them to improve it as they wanted to, and she would deed it over to them before she died; that they replied that this was all right, and they would take her word for it (and it appears that costly permanent improvements were put on by the sons). When asked if it were not the fact she had never done anything about managing the lands herself, and that Henry had always managed the property in every way, she answered, "Yes," except that, during the first year after the death of her husband, she sat right there and helped them a little, and then told the son she would never do it again,—she couldn't stand it any more; that, while she felt able to do it, she couldn't talk good enough American. and that he could do it; that she lived on the farm two

years after her husband died, and the boys farmed the land the first year on her own account; that then they settled up the personal property, and she rented to the boys; that, since then, the land has been assessed in the name of the son, and he has paid the taxes.

Speaking to whether the disposition of her lands was a natural one, she testifies that, while her late husband did not say he wanted the boys to have more of the land than the girls, he did say the boys should have the land and the girls the money; that she and her husband had talked the matter over a long time, and he said the boys had had to work so hard, since their oldest boy got killed, and from the time they wore short pants; that they should have more than the girls, because he thought they had worked the hardest for the land; that she left the land to the boys because she wanted her husband's will "done like he liked to have it," and she understood, when she took the notes and made the deeds, that she was carrying out the request her husband had made before he died. When asked whether, in making her will, she was not following her own opinion and judgment, and that of no one else, she answered:

"No, sir, I was following my husband's,—he told me the boys should have more. The rest of the will was my judgment, and I thought it was right to give Henry the 160 and Harry the 120, but they to pay the cash to the girls out of that."

She is able to say that Mr. Eshelman, a banker, of Persia, drew the deeds, and that they were dated about March 10, 1914. She gives in detail when the notes for the lands were signed, and at what relative times signed by the sons and by their wives. She is able to state what rate of interest the notes draw, and that the notes were at home, and that they were not yet paid. She phrases what occurred as the beginning of a quarrel, and says the banker, Eshelman, first put the notes among her papers, but, when

this quarrel began, she took them out, and told this banker she would return them as soon as this was over. She testifies she said nothing about a mortgage, because she didn't want any mortgage.

Much is made in argument of the fact that, as a witness, she first gave an account of the transaction of conveying the lands to her sons which is much more favorable to her than her account later given. This may tend to show lack of appreciation of the sanctity of an oath; but certainly, an attempt to bolster up one's case is not evidence of want of mental capacity, or of inability to care for one's property.

There is testimony which conclusively indicates that, though the daughters and their husbands now testify that the mother was always incompetent, they did not always entertain that opinion; and that there were some occasions in the past on which these parties did not doubt the sanity and business capacity of this defendant, though they now maintain she was never of sound mind. This testimony does not merely prove this substantive impeachment of the opinion evidence, but the narration by the defendant of what occurred suggests anything rather than incapacity to understand and guard property rights. She testifies that her son-in-law Warner Doyle felt he could not buy his farm, if someone didn't sign a note with him; that he applied to his father, who told him he had some debts of his own, and was afraid he would have to pay the note, if he signed as surety, and, therefore, did not like to sign. It appears at this point, by inference, that the father finally did sign, because defendant says that Warner's mother cried all night because she was afraid that her son would not pay the note and the father would have to pay it. She testifies her daughter, the wife of Warner, appealed to her, the defendant, to sign, because they wanted to buy the 220 acres where they now are; that they talked all the time he

couldn't make the payment right up, and the daughter asked her if she wouldn't sign her note; that defendant replied, "No," she wouldn't sign it alone, if his father wouldn't go on the note; but finally, they went to the father, one evening, and defendant asked him if he wanted to go on, and said that she would if he would; that Warner's mother cried and protested; but at last, the father did sign it, and so did the defendant. She says this note was one for \$2,000, and that it was given to the Avoca Bank, and she has not been obliged to pay it. She testifies that she loaned the husband of another of her daughters \$950, for which he gave her a note, which is not yet paid.

Again, the witness remembers that her daughter Minnie had \$950 out of the estate of the father as her share of the personal property, which was divided equally among the children; that she, the defendant, did not have this money belonging to Minnie, the first year; that, that year, it was in the bank, and she (witness) had charge of it. She testifies that she was appointed guardian by the court, and bought property with Minnie's money, paying \$1,400 therefor, using Minnie's money, as far as it went, the witness putting in \$450; that, on the marriage of Minnie, defendant said she guessed she would have to give her her money again, and offered the property that had been bought with the \$1,400 instead, and Minnie agreed; that, thereupon, deed was made to Minnie by a named banker at Persia; that, on the marriage, she not only aided the daughter by buying comforts and sheets, but gave her the \$450 which had been put in by witness in making the purchase of said property. She testifies she had had Minnie's money two years, and felt she should pay some interest; that, when she turned the property over, she told her daughter she wanted to count interest on the money for the time she had it, and that the balance of the property above interest should be Minnie's; that they didn't figure the interest, but

Minnie said she would take the property in settlement, and witness said, "All right." She continues by stating that Minnie sold the same property to Herman Moss, the mayor of Persia, whom she identifies further as "the man who was on the stand the other day."

We are not overlooking the holding of *Ferguson v. Ferguson*, 181 Iowa 1076, to the effect that the appearance of the

defendant as a witness in such a case as this gives the jury an advantage in passing upon mental capacity which this court does not have, which advantage may turn the scale on review of verdict. But that advantage is very often present in cases wherein we are constrained to hold that, upon the evidence as a whole, the verdict is not supported. While the personal observation of the jury is an element of proof, it is not more than that, and the factor it is in the final decision must, in every case, depend upon the evidence as a whole. In other words, it is not the law that this court can never interfere with a verdict for being insufficiently supported by the evidence, merely because the jury saw the witnesses. It will take a stronger showing to set aside the verdict because the jury saw the witness. But it will not do to hold that no showing will be sufficient. Suppose there were one claim for incapacity, that the defendant had lost the power to correctly add three and five, and the defendant, as a witness, correctly solved a highly difficult mathematical problem. No one would say that the appellate court must find he was utterly lacking in the calculative faculty, merely because the jury saw and the appellate court did not see him when the mathematical problem was being correctly solved.

We are constrained to hold that the motion for new trial should have been sustained, on the ground that the verdict is not supported by the evidence, and is contrary to

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the evidence. Wherefore, the cause is—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

CHARLOTTE PENNYPACKER et al., Appellants, v. A. M. FLOYD,
Appellee.

APPEAL AND ERROR: Unsigned Notice of Appeal. An unsigned notice of appeal is a nullity, even though appellee makes and signs acknowledgment of service thereon, with knowledge that the paper came from appellant's attorneys.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

JANUARY 20, 1919.

THE plaintiffs, who owned 80 acres of land, entered into a contract with defendant, employing him to act as agent in the exclusive supervision of the sale and conveyance thereof. Defendant found a purchaser, to whom the land was sold for \$8,000, as of March 1, 1916, upon the delivery of deed and possession. Of this, \$1,000, upon the allowance of 4 per cent discount, was paid to the agent, recovery of which was sought in this suit, the issue being whether the defendant was to retain all of the purchase price in excess of \$7,000, as compensation for services rendered. On motion of the defendant, verdict was directed for him, and judgment entered thereon.—*Dismissed.*

Treichler & Treichler, for appellants.

E. A. Johnson, for appellee.

LADD, C. J.—Appellants' abstract merely recited that plaintiffs perfected their appeal by serving notice of appeal on defendant's attorney, and the clerk of the district court. In an amendment to the abstract, appellee denies that an

appeal was perfected by serving notice of appeal as alleged, and avers that a paper, properly addressed and in due form, but unsigned, was mailed to appellee's attorney, with the request that he acknowledge service thereon, which was done; and thereafter, and without appellee's consent or knowledge, plaintiffs' attorneys signed same. This was denied; whereupon, defendant applied to the district court to strike the signature to said notice therefrom; for, as was alleged, it was attached subsequent to the acknowledgment of service thereon by the appellee. On hearing, the court ordered that the signature of Treichler & Treichler be stricken from the notice. This ruling has such support in the evidence—is sustained by such preponderance of the evidence—as to preclude any interference therewith. The attorney for defendant, the stenographer employed in his office, and defendant say it was not signed when the acknowledgment of service was made. One of the attorneys of plaintiffs testifies that he signed it before mailing the notice to appellee's attorney. See *Hamill v. Joseph Schlitz Brewing Co.*, 165 Iowa 266. But it is argued that, as the notice of appeal, though unsigned, was presented by attorneys for plaintiffs in the trial court, and service accepted by counsel for appellee, with knowledge of whence the notice emanated, this was a sufficient notice. In forwarding the paper for acknowledgment of service, counsel wrote defendant's attorney:

"Herewith notice of appeal in case of Pennypacker et al. v. Floyd. Will you please accept service of same, and return one copy to us?"

This was signed, "Treichler & Treichler," and, of course, indicated whence it came; but we are not persuaded that this supplied the defect in omitting signature to the notice. Though the statute does not, in express terms, exact the signature of the notice of appeal, we said, in *Doerr v. Southwestern M. L. Assn.*, 92 Iowa 39:

"We think this essential to its validity. It must purport to emanate from someone, in order that the adverse party may be advised that it comes from a proper source. To be binding upon the appellant, it ought to be subscribed, either by himself, or someone authorized to act for him. Without such attestation, the document is, in effect, no more than a blank piece of paper. It is not a case of defective notice, but of no notice."

In *State Sav. Bank v. Ratcliffe*, 111 Iowa 662, in ruling on the same question, the court declared that, "As the notice was not signed, it was no notice."

If no notice, presenting the notice for acknowledgment of service surely would not transform it into a notice. It merely advised the other side whence the paper, such as it was, came,—that is, from the attorneys having the right to take the appeal. Service of notice of appeal is essential to confer jurisdiction in this state, and jurisdiction can be conferred in no other way. *Doerr v. Southwestern M. & L. Assn.*, *supra*.

Our attention has been directed to several cases where the presentation of an unsigned notice of appeal by attorney for appellant personally, and acknowledgment of service by the attorney for appellee, has been held to obviate the omission of signature; but these decisions are on appeals from justice court, where jurisdiction may be conferred by consent (*Eaton v. Supervisors*, 42 Wis. 317; *Evangelical Luth. Society v. Koehler*, 59 Wis. 650 [18 N. W. 476]; *Cella v. Schnairs*, 42 Mo. App. 316), or where appearance by a party without questioning the notice is a waiver of service thereof as to him (*Perkins v. Indiana Mfg. Co.*, 58 Ind. App. 220 [108 N. E. 165]).

We are content with the holding of this court that an unsigned notice of appeal is no notice, and that the service of a notice of appeal, duly signed, is essential to confer jurisdiction. Our conclusion is that the order of court cor-

recting the record should be, and it is, affirmed, and that the motion to dismiss the appeal from the judgment in the main case should be, and is, sustained. One half of the costs of printing appellee's amendment to abstract is taxed to appellee.

Affirmed on appeal from order correcting record; *dismissed* on appeal from judgment.

EVANS, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J., specially concurs.

SALINGER, J. (concurring). In this case, a motion was made to correct the record by striking the signature found on a notice of appeal. The ground alleged was that the signature was not made at the time when the notice was served, and that, because it was attached after service, no legal notice of appeal was served. The motion was sustained. The opinion affirms, with the declaration that "this ruling has such support—is sustained by such preponderance of the evidence—as to preclude any interference therewith." I concede it is sustained by a preponderance. But I am astonished that *Hamill v. Joseph Schlitz Brewing Co.*, 165 Iowa 266, should be cited in support of this holding. The *Hamill* case is in flat conflict with the pronouncement in the instant case. In principle, the facts in this and in the *Hamill* case are exactly alike. Here, the claim is that a signature to a notice of appeal appears, on the face of the record, to have been made in due time to make a legal notice, when in truth it was not affixed in due time. In the *Hamill* case, it was claimed the record falsely declared that a signature to a bill of exceptions had been made in time to make an effective bill of exceptions. In both cases, the motion to correct was sustained. In the case at bar, the correction is sustained by holding that the action cannot be interfered with, unless it may be done under the rules that govern our setting aside a verdict: in other words, that

such action may not be interfered with if it has support in the evidence,—will not be reviewed *de novo*. And it is, therefore, affirmed. In the *Hamill* case, three witnesses testified the signature was not attached at a stated time; three, that it was. The opinion in the *Hamill* case declares that each set of witnesses is dealt with as equally credible. But the order correcting is set aside. This is done by review *de novo*. First, it is declared that it is not admitted an appeal from the correction of a record “is governed by the general rules applicable to the review of proceedings at law, and that the findings of the trial court are to have the effect of a jury verdict.” Then comes a review *de novo*. And finally, it is said that a proceeding to correct a record as to when a signature was affixed is an attempt to correct under the statute,—allowing corrections for evident mistake; and that the evidence must show an “evident” mistake by clearly establishing such mistake. The effect of it all is to require more than a preponderance for the correction, awarding review *de novo* on whether there is that degree of proof, and holding that the correction will be set aside if, on such review, it is found that such degree of proof has not been made. If the *Hamill* case supports the holding at bar, then the corpse of a negro is proof that a white man has died. I think the instant decision is right. It follows the one in the *Hamill* case is erroneous, and should be overruled. To let both stand is to embarrass bench and bar with irreconcilable pronouncements. For us to cite either in support of the other is to make this confusion worse confounded.

CECIL QUAINANCE, Plaintiff, v. E. D. LAMB, Sheriff, Defendant.

INSANE PERSONS: Adjudication Excludes Court Action on Indictment. An adjudication of insanity by the commissioners of in-

sanity precludes the district court from proceeding with the trial of a subsequently returned indictment against the same person, until his reason is restored. (Sec. 2279, Code, 1897.)

Habeas Corpus Proceedings.—JOHN F. TALBOTT and K. E. WILLCOCKSON, Judges.

JANUARY 20, 1919.

THE facts appear in the opinion.—*Writ sustained.*

Lewis & Dickson and *R. J. Smith*, for plaintiff.

H. M. Harner, Attorney General, *W. R. C. Kendrick*, Assistant Attorney General, and *F. R. Talbott*, County Attorney, for defendant.

LADD, C. J.—A preliminary information, accusing Cecil Quaintance, 16 years of age, of having committed the crime of murder, was filed June 20, 1918, with a justice of the peace of Poweshiek County, F. D. Light, who issued a warrant for his arrest. Thereupon, he was arrested, and brought before the justice for a preliminary hearing, and waived it. The justice ordered that he be held without bail, to answer any indictment which might be returned by the grand jury against him, and also that E. D. Lamb, sheriff of said county, detain him in jail, to await the action of the grand jury. Two days later, the sheriff removed the accused from the jail in Poweshiek County to that of Mahaska County, where he was detained without authority, other than recited, until August 24, 1918, when said sheriff returned him to the Poweshiek County jail, and he was there detained until ordered by the then chief justice to be delivered to the superintendent of the Hospital for Insane at Mt. Pleasant, pending hearing and determination of this action.

August 23, 1918, the father of accused, Burt Quaintance, a citizen of Poweshiek County, filed in the office of

the district court of Iowa, in and for Mahaska County, an information charging the accused with being insane, and reciting that he was confined in the jail of Mahaska County, charged with the crime of murder, but neither convicted nor indicted. The commissioners of insanity thereupon issued their warrant, ordering him to be brought before them for trial, and he was arrested, and taken before that body, and, upon trial as to whether insane, he was by said commissioners adjudged insane, and a fit subject for detention and treatment at the State Hospital for Insane, at Mt. Pleasant, and an order was issued for his commitment to such institution for detention and treatment. This order was placed in the hands of E. D. Lamb, sheriff, for service. Instead of obeying said order, he removed the accused from the jail of Mahaska County to that of Poweshiek County, where he detained him. Shortly afterwards, the accused, by his next friend, filed a petition, praying for an injunction, in which the facts heretofore recited were alleged, and the alleged purpose of the judge and county attorney to put him on trial, and a stay of proceedings was prayed, and that the accused be conveyed to the Hospital for Insane for detention and treatment, pursuant to the order of commissioners of insanity. On hearing, the petition was dismissed.

On September 10th, following, the court caused the accused to be brought into court for arraignment, he having been indicted in Poweshiek County September 5, 1918, to which he, through his attorney, objected, on the ground that the court had no jurisdiction to proceed with the trial, for that the accused was legally in the custody of the superintendent of the Hospital for Insane, at Mount Pleasant: that he was not subject to the jurisdiction of the court for trial. This objection was overruled, and the defendant was arraigned, and entered a plea of "not guilty."

At the November term following, and on the second day thereof, November 19, 1918, over objections heretofore men-

tioned, the court set the cause down for trial, to begin November 25, 1918, at 1:30 o'clock P. M., and directed that the trial proceed to judgment, unless otherwise ordered. In the meantime, November 22d, the accused applied to this court for a writ of habeas corpus, and a writ was issued by the then chief justice, returnable to the court, with time fixed for hearing and submission.

Such are the facts of the case; and, as will be observed, the question for determination is whether the accused shall be detained in the Hospital for Insane, under and by virtue of the order of the commissioners of insanity, until found by the superintendent of the Hospital for the Insane to be cured, or be tried, as ordered by the district court. The proceedings resulting in the order of the commissioners of insanity were in pursuance of Section 2279 of the Code, which provides that:

"On a written application made by any citizen, stating under oath that a person confined in any prison within the county, charged with a crime but not convicted thereof nor on trial therefor, is insane, the commissioners shall cause said prisoner to be brought before them, and if they find that he is insane they shall direct his removal to and detention in one of the hospitals for the insane, issuing their warrant therefor, and stating therein that he is under criminal charges, and the superintendent of the hospital designated in such warrant shall receive and keep such prisoner as a patient. The warrant shall be executed by the sheriff or his deputy by delivering the prisoner to the superintendent in person. After an investigation such as contemplated in this section, the commissioners shall not entertain a like application within six months on behalf of said person."

The situation of petitioner was, in all respects, as described in this statute: i. e., confined in prison, charged with crime, and neither convicted nor tried. The commissioners of insanity, then, did not exceed their authority, if

it can be said to have existed as against the power of the district court to proceed with the trial upon indictment returned in such a case. The section following, however (Code Section 2280), defines when the accused shall be returned from the hospital:

"When any insane person shall be confined in either hospital under the preceding section, the superintendent in whose charge he may be shall, as soon as such person is restored to reason, issue his warrant to the sheriff of the county from which such person is received, directing him to return such person to the jail of said county, which shall be done by said sheriff as soon as practicable, when the accused shall be returned to the jail of the proper county to answer to the charge against him."

This plainly contemplates that the prisoner shall be treated at the Hospital for the Insane until restored to reason. He could not be put on trial before. The superintendent of the hospital is to determine when he is cured, and issue his warrant accordingly. There seems to be no escape from the conclusion that, under these statutes, the accused should have been taken to the Hospital for the Insane, and there retained as a prisoner and treated as a patient until the superintendent found his reason restored, and issued a warrant for his return to the jail of the county, after which he would be subject to being put on trial.

But the defendant contends, as we understand counsel, that these statutes are inconsistent with Section 5540 of the Code, declaring that:

"If a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question."

The section following prescribes the manner of trial of the issue, and Section 5542 reads:

"If the accused shall be found insane, no further pro-

ceedings shall be taken under the indictment until his reason is restored, and, if his discharge will endanger the public peace or safety, the court must order him committed to the department for the criminal insane at Anamosa until he becomes sane; but if found sane, the trial upon the indictment shall proceed, and the question of the then insanity of the accused cannot be raised therein."

This language plainly indicates that "the trial" contemplated in Section 5540 of the Code is that under an indictment; and this was the construction given it in *Stone v. Conrad*, 105 Iowa 21. There, the information charging the accused with being insane was filed before his indictment and arrest, but not heard by the commissioners of insanity until afterwards; and the court held that, after service on the accused of the bench warrant, issued on indictment found, Section 5540 of the Code was applicable, and, prior to that event, Section 2279 of the Code. The court, speaking through Waterman, J., said:

"The district court has exclusive jurisdiction in criminal matters, save where otherwise conferred. Certainly, it will not be contended that the commissioners of insanity have any criminal jurisdiction. When the jurisdiction of the district court has once attached in a criminal case, it continues; and it extends, by express terms of the statute, to the investigation of the sanity of a defendant. When does this jurisdiction attach? It may very properly be asked. The language of Section 5540, quoted above, is, 'If a defendant appears in *any stage of the trial of a criminal prosecution*,' etc. Does this mean, in any stage of the trial on the indictment, or is it a phrase of broader meaning? Can it be that, after the jurisdiction of the district court has attached, but before the trial of the case has actually begun, the commissioners of insanity can open the jail door, take out the criminal defendant, and dispose of him as they may think best? Surely, this is not the law. It must be

that the jurisdiction of the district court attaches at the time of the service of a warrant issued upon an indictment, and that, from this time, it has control of the person of the defendant, not only for the purpose of the criminal investigation, but for all matters incident thereto. The purpose of Section 2279 was to vest authority in the commissioners to inquire into cases of persons in prison charged with crime, and of whose mental condition there might be doubt. This is but reasonable and humane, in those cases in which no other tribunal has authority to make such investigation. But when such authority is lodged elsewhere, neither reason nor humanity supports the claim of jurisdiction on the part of the commissioners."

We discover no reason to reconsider this decision. Section 5542 of the Code unmistakably indicates that the trial contemplated in Section 5540 was that under indictment, and that could not well commence before the accused's arrest thereunder, or his custody upon the return thereof. Prior thereto, Section 2279 of the Code is applicable. There appears to be no conflict between these sections. It follows that the petitioner is ordered to be retained by the superintendent of the Hospital for the Insane, at Mount Pleasant, until restored to reason.

EVANS, GAYNOR, PRESTON, SALINGER, and STEVENS, JJ.,
concur.

MARLIN J. WRAGG, Petitioner, v. J. W. GRIFFIN, Sheriff, et
al., Respondents.

HEALTH: Compulsory Detention and Examination of Persons. In the absence of a clear and definite statute so authorizing, state and local boards of health may not, *on mere* suspicion that a person is afflicted with, or has been exposed to, a venereal disease, cause such person to be compulsorily detained and physically examined by withdrawing blood from the veins and pus

smear from the urethra, for the purpose of determining the existence of such disease in such person, even though such examination, while painful, is not dangerous to life.

Original Proceedings in Habeas Corpus.—Writ sustained.

JANUARY 20, 1919.

Dunshee, Haines & Brody, for petitioner.

H. M. Hawner, Attorney General, and *Geo. F. Henry*, Acting County Attorney, for respondents.

WEAVER, J.—The petitioner alleges that he is illegally restrained of his liberty by the respondent, sheriff of Polk County, Iowa, and the custodian of the county jail; that such restraint has been so imposed pursuant to an order made by the mayor of the city of Des Moines, who is ex-officio chairman of the local board of health, and by Dr. Witte, acting as health officer of the United States, directing that petitioner be arrested and compelled to submit to compulsory physical examination, in which examination blood shall be extracted from the veins of the petitioner for submission to the state bacteriologist, to determine whether petitioner is suffering from venereal disease; that no copy of such order has been served upon or furnished petitioner, but he alleges that the action was taken against him upon representations made against him by certain police and health officers. It is further said that such order is void and illegal, and in violation of the constitutional right of the citizen to be protected against unreasonable searches and seizures; and that, unless a writ of habeas corpus issue, he will be forcibly subjected to physical examination and violation of his person, and be further restrained of his liberty by confinement in the county jail or detention hospital.

Upon this petition, a writ of habeas corpus was issued and served upon the respondents, and, pending the hear-

ing thereon, the petitioner was, by order of this court, set at large upon bail.

The respondents, having appeared to this proceeding, make return to the writ, setting up as their sole and sufficient authority for the restraint of the petitioner a certain warrant, or order, in the following words:

"Order of Restraint.

"In the matter of the restraint of M. J. Wragg by the Board of Health of the State of Iowa and Local Board of Health of the City of Des Moines.

"To the Peace Officer of the State of Iowa in Charge of the City Hospital of Des Moines:

"You are hereby ordered to hold in restraint M. J. Wragg and so hold him until the further order of said board and this you will in no wise omit under penalty of the law.

"Des Moines, Iowa, October 22, 1918.

"Board of Health, City of Des Moines,

"By Tom Fairweather, Health Officer."

The matter coming on for hearing before the court, it was submitted for decision upon a stipulated statement of facts and written arguments of counsel. So far as at present material, the following are the agreed facts:

On September 27, 1918, the petitioner was arrested, upon an information filed in the municipal court of Des Moines, charging him and one Isabel Newman with the crime of lewdness. On September 30, 1918, the defendant, being arraigned upon said charge, entered a plea of "Not Guilty;" whereupon, the court made an order fixing his bail bond at \$1,000, but further ordering that he be held subject to the order of the board of health. On the same day, the petitioner presented and filed a good and sufficient bail bond, as provided in the court's order. On October 4, 1918, the grand jury of Polk County returned an indictment, charging the petitioner and Stella Newman with lewd and vicious

cohabitation. The court's order, above mentioned, admitting petitioner to bail, subject to the order of the board of health, having been certified to the local board of health, said board thereupon made the order set out in respondents' return to the writ of habeas corpus as their authority for the petitioner's restraint. At the date of said order, there was no room at the city detention hospital, and the sheriff, therefore, confined petitioner in the county jail.

It is further stipulated that, if he had not been released under the order of this court, pending the habeas corpus proceedings, the petitioner would have been, and if he is remanded to the custody of respondents he will be, compelled to permit an expert to extract approximately five cubic centimeters of blood from petitioner's veins, for the purpose of having the same tested at the state laboratory in Iowa City, to determine whether or not he is afflicted with syphilis, such test being what is known as "Wasserman's reaction,"—a method the correctness of which is recognized by the medical profession generally,—and also to permit the expert to take pus smears from his urethra, to be subjected to microscopical examination, for the purpose of ascertaining whether the petitioner is afflicted with gonorrhea. It is also further agreed that respondents, acting under said order from the board of health, assert the authority to continue the restraint of the petitioner for treatment, in the event that the state bacteriologist, upon completing such examinations and tests, shall report positive reaction; that the extraction of blood for such test does not involve substantial danger to life, but is somewhat painful; and the treatment does not involve such danger, but induces a considerable reaction, causing fever and nausea. It is further agreed that the matron of the city hospital would, if present, testify that, at and prior to their arrest, the petitioner and Miss Newman were registered at a hotel in Des Moines as husband and wife; that, upon the making of this arrest,

Miss Newman was taken to the hospital, where an examination developed the fact that she was afflicted with gonorrhea, and she was detained for treatment until October 21, 1918. Attached to and made part of the stipulation is a printed copy of the rules of the board of health of the city of Des Moines; also copy of a publication entitled "Venereal Diseases. Iowa State Board of Health. Bulletin No. 7." So much of the exhibits named as appear to be material upon the matter in hearing will be hereinafter set out more particularly.

The question presented by the record and the arguments of counsel may, in its final analysis, be stated as follows: May the local board of health of the city of Des Moines, upon a suspicion that the petitioner is afflicted with a venereal disease, or has been exposed to such contagion, lawfully order him under arrest, and subject him by force to an examination of his person, and compel him against his will to permit a quantity of blood to be extracted from his veins, and then be held in continued durance until the blood has been sent to an expert in a distant city, and by test thereof it is determined whether such petitioner is or is not in fact so diseased?

It may be said at the outset that the objection raised by this petitioner does not necessarily challenge the validity of any statute or any rule of the board of health by which authority is given to quarantine persons who are afflicted with contagious disease, or to remove or segregate a person so diseased from his own home for detention in a separate house or detention hospital, and there detain him until he has so far recovered his health as to be no longer a menace to the health of the community. All such measures may, for the purposes of this case, be sustained, as a wise and valid exercise of the police power for the general good. But, admitting such to be the case, does it follow that a person not known to be so diseased, and (so far as here appears)

showing no visible evidence, sign, or symptom of such disease, may be subjected to arrest, imprisonment, and violation of his person, for no better reason than that he is "*suspected*," by someone whose identity is not revealed, to be diseased, and to satisfy the board of health or some of its officers whether there is, in fact, any ground for such suspicion? If such extraordinary and drastic authority exists, it must be found in the statute, or in some valid rule or rules lawfully prescribed by the board of health. *State v. Kirby*, 120 Iowa 26. This may be taken for granted.

Is such authority shown or pointed out by the respondents? We have examined with some care the various statutory provisions and board rules to which counsel have called our attention, and are forced to the conclusion that the power is nowhere provided, either expressly or by necessary implication. The statute providing for a state board of health provides that it shall have charge and supervision over the interests of the health and life of the citizens of the state, including quarantine, and may make such rules and regulations and sanitary investigations as may be found necessary for the preservation and improvement of public health, and provide rules for enforcement by local boards. Code Section 2565. Local boards may make sanitary rules and regulations, and establish quarantine against all contagious and infectious diseases. Code Section 2568. Syphilis and gonorrhea are quarantinable diseases. Section 2575-a6a, Code Supplement, 1913. Peace officers and police officers are required to enforce rules of the board of health. Section 2572, Code Supplement, 1913. When any person shall be sick or infected with any contagious disease, the local board may take such action as is best calculated to protect the public therefrom, and may remove the person so afflicted to a separate house or detention hospital. Section 2571-a *et seq.*, Code Supplement, 1913.

It will be observed that these statutes are framed in

general terms, within the proper scope of which boards of health prescribe specific rules and regulations; and, as we have already noted, while in terms authorizing boards of health and health officers to deal with quarantinable diseases, there is no express provision for interfering with the liberty of persons who are merely "suspected" of being diseased.

If the power is not found in the statute, is it discoverable in the rules of the board? The rules exhibited in the stipulation of facts include much matter irrelevant to the present discussion, and the paragraphs which have some bearing, near or remote, upon the issue may be culled as follows:

The state board is found to have framed and approved a series of rules which local boards were directed to adopt, record, and publish. The local board of the city of Des Moines did adopt rules as follows:

"(1) Every physician, nurse, attendant, hospital superintendent, druggist, member of police department, police magistrate, or other person having knowledge of a known or suspected case of syphilis or gonorrhea must immediately report to the mayor" in writing, with certain specific details of information.

"(2) It shall be the duty of the chief of police to cause all persons arrested for being found in a disorderly house, all prostitutes, and all other persons held under arrest who are suspected of having syphilis or gonorrhea in the infectious stages to be examined before released or discharged, and if any such persons are found to be afflicted with either of said diseases, to report the same to the mayor, as provided in Rule 1.

"(3) It shall be the duty of the mayor, upon receiving notice of the existence of a case of venereal disease * * * to immediately issue an order to the chief of police directing him to cause the person afflicted with such disease to be re-

moved to a separate house of detention or hospital and there restrained," until the city's health physician authorizes his release.

Among the rules of the state board, though apparently not carried into the rules of the local board, is one which provides (4) that local health officers are directed to make such examinations of persons *reasonably suspected* of having syphilis or gonorrhea as may be necessary for carrying out the board's health regulations, "and to detain such persons for such length of time as may be necessary in order to determine whether such persons are so affected." In still another clause (3), it is made the duty of the mayor, whenever a person is suspected of having such disease in the infectious stages, or is suspected of having been exposed to such disease, to direct the police or peace officer to cause such person to be investigated, and in case such person is so afflicted, to cause him to be restrained at home, or, if necessary, in a separate house or hospital.

It seems quite clear that Rule 2 of the local board and the corresponding rule of the state board are intended to define the duty of the chief of police with reference to the herd of derelicts which that officer and his aids are wont to round up in their occasional raids on disorderly resorts, and to make it his duty, if he discovers or finds reason to believe that any person so coming into his custody has either syphilis or gonorrhea in the infectious stage, to report it at once to the mayor. It does not appear that this petitioner was ever in the custody of the chief of police, or was by such officer reported to the mayor as a diseased person. Rule 3 of the local board is apparently designed to define the duty of the mayor in giving effect to that part of the statute above quoted (Code Supplement, 1913, Section 2571-a *et seq.*) which provides that, when necessary, the diseased person may be removed from his home to a separate house or detention hospital. Reference to the statute shows

it is made applicable only "when any person shall be sick or infected with any contagious or infectious disease," and neither by word nor inference does it justify such detention or segregation of one who is merely *suspected* of disease.

The language which may most plausibly be relied upon in support of the respondents' position is that to which we have referred as appearing in the rules of the state board of health alone. These rules were prepared May 28, 1918, with a provision or direction to local boards to adopt and make publication of the same. The rules of the local board attached to the stipulation appear to have been adopted and published in January, 1918, before the action of the state board, and the record is without mention of any adoption or publication by the local board of the later rules of the state board. No question is raised in argument because of this omission, and we mention it as explanatory of the apparent lack of harmony which appears at some points between the two codes of rules. The respondents place special emphasis on that part of the rules of the state board to which we have already referred, where it is made the duty of the mayor to direct the chief of police to cause persons suspected of being diseased "to be investigated," and authorizing health officers in such cases "to make examinations" of suspected persons, and to detain them as long as it may be necessary, to determine whether they are so afflicted. But even here, there is an entire absence of any express authority to subject a suspected person to an examination by physical force, or by an extraction of blood from his body by violence for experimental purposes. Men and women were examined and treated by physicians for sexual diseases for generations before the so-called Wasserman test was discovered or invented, and, so far as we are informed, with reasonably reliable results. At least there is no evidence that, even in the technical phrase of physicians, the word "examination," in such cases, is understood as neces-

sarily meaning a blood test by the Wasserman method, or by any other method involving violation of the person; and, in the absence of explicit authority for the subjection of a person to such treatment upon suspicion alone, it ought not to be approved as a valid exercise of authority. This petitioner may be a bad man; but we have no right to assume such a fact for the purpose of minimizing his claim to protection of the ordinary rights of person which law and the usages of civilized life regard as sacred, until lost or forfeited by due conviction for crime. Even when charged with the gravest of crimes, he cannot be compelled to give evidence against himself, nor can the state compel him to submit to a medical or surgical examination, the result of which may tend to convict him of a public offense (*State v. Height*, 117 Iowa 650); and if there be any good reason why the same objection is not available in a proceeding which may subject him to ignominious restraint and public ostracism, it is at least a safe and salutary proposition to hold that, before the courts will uphold such an exercise of power, it must be authorized by a clear and definite expression of the legislative will. This we do not have; and, in our judgment, the restraint of the petitioner, not as a diseased person, whose detention in a separate house or hospital the statute authorizes, but solely as a *suspect*, and for the avowed purpose of forcing the exposure of his body to visual examination, and compelling the extraction of blood from his veins, in search of evidence of a loathsome disease which may or may not exist, is a deprivation of his liberty without due process of law, and he is entitled to be set free.

This conclusion renders it unnecessary for us to decide or consider the further question whether, under the concededly broad scope of power and discretion granted to boards of health, it is competent for them, by rule or otherwise, to provide that the mere fact that a person has been

arrested, or is charged with a sexual offense, or is suspected of having a venereal disease, is sufficient ground upon which to seize and imprison him, and forcibly subject him to physical examination and blood tests. It is enough for present purposes that such is not now the law, by statute or by rule of the board of health.

The writ of habeas corpus is sustained, and the respondents are ordered to release petitioner from restraint.

LADD, C. J., EVANS, GAYNOR, PRESTON, SALINGER, and STEVENS, JJ., concur.

GOODMAN MANUFACTURING COMPANY, Appellant, v. MAMMOTH VEIN COAL COMPANY et al., Appellees.

PRINCIPAL AND AGENT: Conduct as Showing Authority. Pri-

1 ma-facie authority of an agent is shown by evidence that his name appeared upon the principal's letterhead as assistant treasurer; that he acted in the contract matter in question ostensibly on behalf of the principal; that he had the subject-matter in question in his possession, just prior to the bringing of suit therein; and that he was present and active at the trial, ostensibly on behalf of the principal.

CONTRACTS: Extension of Time of Payment. Consideration for

2 agreement to forbear, for a stated time, suit on a note, is shown when it appears that the maker obligated himself to incur, and did incur, added expense in carrying out the terms of the agreement.

CONTRACTS: Forbearing Suit on Note. The relinquishment, by

3 the maker of a note, of a good-faith asserted claim of invalidity in the note, in return for an agreement by the payee to forbear suit on the note for a stated time, is supported by a sufficient consideration. So held where the invalidity was on the point that the president of a corporation executed the note without authority.

CORPORATIONS: Execution of Promissory Notes. Principle rec-

4 ognized that the position of *president* of a corporation does not, of itself, carry authority to execute the promissory notes of the

corporation, even though the president does hold practically all the corporate stock.

EVIDENCE: Subsequent and Independent Agreement. The rule
5 that parol evidence is inadmissible to vary, etc., the terms of a valid written instrument, is not violated by evidence that, subsequent to the execution of a note, an independent oral agreement on a new consideration was entered into, under which the payee agreed to forbear suit for a named time, and agreed to accept payment in a manner different from that provided in the note.

ABATEMENT AND REVIVAL: Agreement to Forbear Suit. Breach
6 of a valid agreement by the maker of a note to forbear suit for a stated time, does not drive the payee to an action for damages consequent on the breach.

CONTRACTS: Indefinite Extensions of Time of Payment. A con-
7 tract, though on adequate consideration, for an extension, to *an indefinite and uncertain date*, of the time of payment of a matured obligation is non-enforceable.

PRINCIPLE APPLIED: A coal mining corporation had outstanding, a large bonded indebtedness, secured by mortgage. The mortgage required that ten cents on every ton of coal mined should be placed in a sinking fund, for the payment of said bonds and interest thereon as it matured. It seems that this had not been done, and that a deficit necessarily existed in said fund. In this condition, an action was brought against the corporation on a series of matured promissory notes, aggregating some \$900. Evidently, the plaintiff made discovery that the bonds were prior in lien to his claim. An agreement was entered into, on sufficient consideration, under which agreement the suit was dismissed. The corporation (1) agreed to carry out its violated agreement in regard to said sinking fund,—that is, agreed to replace the accrued deficiency (the amount of which was then unknown),—and to meet the accruing sinking fund, *from said ten cents on each ton of coal mined*, and (2) agreed that, when the said fund was intact, it would, from its excess funds, commence to pay plaintiff at least \$100 per month, and as much more as possible. Plaintiff agreed that it would forbear suit so long as the corporation kept said agreement.

Held, the agreement was not enforceable, inasmuch as the time when the notes could be paid off under this arrangement was wholly indefinite and uncertain.

BILLS AND NOTES: Indefinite Extension of Time of Payment. An
8 agreement for an extension of time of payment of a matured

promissory note until the happening of a specified contingency may not, when the contingency is discovered to be wholly uncertain, be construed into an agreement for an extension "for a reasonable time."

Appeal from Polk District Court.—CHAS. A. DUDLEY, Judge.

SEPTEMBER 30, 1918.

REHEARING DENIED JANUARY 21, 1919.

ACTION on nine promissory notes, executed by the Mammoth Vein Coal Company, November 1, 1915, to the Goodman Manufacturing Company, and indorsed by J. A. J. Powers, aggregating \$917.94, aided by garnishment proceedings. Defendants interposed a plea in abatement, and, by way of counterclaim, prayed for damages consequent on the wrongful suing out of the writ of attachment. The outcome was a judgment in abatement and on the counterclaim, and the assessment of attorney fees. The plaintiff appeals.—*Reversed.*

E. D. Smith, George W. Brown, and J. W. White, for appellant.

McClelland & Powers and Stipp, Perry, Bannister & Starzinger, for appellees.

LADD, J.—I. Recovery in this action, begun July 3, 1916, is sought on nine of a series of eleven promissory notes for the aggregate sum of \$917.94, with interest. These notes purported to have been executed to plaintiff by the Mammoth Vein Coal Company, and indorsed by defendant, Powers. A condition of each note was that, "in case of default in payment of any note of said series, all notes of the same series shall, at the option of said Goodman Manufacturing Company, become due and payable on the day following such default." The plaintiff, as well as the defendant Mammoth Vein Coal Company, was a cor-

poration, and no question is raised but that the several notes had become due. Plaintiff had sued thereon in February or March, 1916, but that action was dismissed, as defendants alleged in their answer, in pursuance of an oral agreement wherein plaintiff promised so to do.

"And not again sue upon the notes * * * so long as the defendants carried out the agreement that the sinking fund on the bonds of the Mammoth Vein Coal Company, which was then delinquent, and the sinking fund as it accrued, be first paid out of the net earnings of the Mammoth Vein Coal Company, to the trustee for the bondholders of the Mammoth Vein Coal Company, and when this payment was completed on the sinking fund, the defendants in this action were to commence the payment of not less than \$100 per month to the plaintiff in this action upon their said notes, and to pay as much more as possible, taking into consideration the other creditors of the Mammoth Vein Coal Company, until the whole amount of plaintiff's claim was paid. These payments were to be made out of the moneys above the current and delinquent sinking fund. Defendants further state that it was orally agreed at said time that the defendant Mammoth Vein Coal Company should appoint and employ J. B. Weede as the person who would check up and pay any claims which were to be paid by the Mammoth Vein Coal Company, and in accordance with said agreement, the defendant Mammoth Vein Coal Company employed the said J. B. Weede for the purpose agreed upon, and ever since said time, the said J. B. Weede has performed said services for the Mammoth Vein Coal Company. It was further agreed by the defendants that the Mammoth Vein Coal Company would not make defense to said notes on the ground that they were issued without the consent of said corporation, or without any authority given by the managing powers or board of said company."

A counterclaim for the alleged wrongful suing out of a

writ of attachment also was pleaded. The plaintiff, in reply, averred that: (1) There was no consideration for the agreement; (2) said agreement might not be proven, for that it was not in writing, and not to be performed within one year; and (3) plaintiff never entered into such agreement, nor ratified or confirmed the same. Issue was joined on the counterclaim. The evidence of the representative of de-

1. PRINCIPAL
AND AGENT:
conduct as
showing au-
thority.

fendants that an oral agreement, such as alleged, was entered into by a representative of defendant with one Johnston, assistant to the treasurer of plaintiff company, is not controverted; but it is argued that the evidence was insufficient to show that Johnston was authorized to act for the company. It appears from the evidence that the representative of the defendant company called up the plaintiff's office by telephone, and that Johnston responded, ostensibly in behalf of the company, and arranged a meeting; that they met, in pursuance of such arrangement, and entered into an agreement in substance as pleaded by defendant company. Thereafter, Johnston, noted as assistant treasurer on plaintiff's letterhead, wrote to defendant's representative, advising him that the matter of adjustment had been turned over to its attorney, Smith, of Des Moines; and the suit was dismissed, precisely as agreed. Moreover, the evidence discloses that Johnston had these notes in possession, immediately prior to the bringing of the first suit, and sat at the trial table with plaintiff's counsel throughout the trial. Evidence of these facts was sufficient to carry the issue as to Johnston's authority to the jury.

II. Appellant also contends that the oral agreement pleaded was without consideration. That a valuable consideration is essential to an agreement to extend the time

2. CONTRACTS:
extension of
time of pay-
ment.

of payment or to forbear bringing suit, cannot well be questioned. *Hensler v. Watts*, 113 Iowa 741; *Marshall Field Co. v. Oren*

Ruffcorn Co., 117 Iowa 157. See, also, note to *Lahn v. Koep*, 139 Iowa 349, in 52 L. R. A. (N. S.) 327. To constitute a consideration in such a case, there must be a benefit to the creditor: something must be secured to him which he could not otherwise demand, or there must be a detriment to the debtor. The latter must do or obligate himself to do something which, in the absence of an agreement, he would not be bound to do. *Harlan v. Harlan*, 102 Iowa 701; *Daily v. Minnick*, 117 Iowa 563.

Two considerations for this contract are pleaded. The first of these is that the defendant company would employ Weede to check up the pay roll, to ascertain the amount of coal and the proceeds derived from the sale thereof, and to see that 15 cents per ton of the coal mined be paid to the trustee, in pursuance of the provision of a trust agreement and supplemental trust agreement. This money was to go into a sinking fund, and the representative of the company suggested that enough would be paid about the first of October to meet the interest charges; and to that time, Weede had been employed.

Johnston replied that he (Weede) would then be discharged, and the company would slip back to its former method of doing business. The defendant's representative undertook to have the company engage Weede until the entire amount owing on the notes should be paid. Subsequently, the directors of the defendant company convened, and, on motion, resolved to commence "payment of the notes due the Goodman Manufacturing Company, of Chicago, and the note due Haw Hardware Company, of Ottumwa, just as soon as delinquent and current sinking fund is paid up, by paying the Goodman Manufacturing Company not less than \$100 per month, and the Haw Hardware Company not less than \$10 per month, and as much more as possible, until the whole amount of these claims are fully paid, these to be paid out of the moneys above the sinking fund."

The resolution then recites that it is on condition that the plaintiff withdraw its suit against defendant and dismiss same without prejudice, and that they accept the face of the notes, with interest, as their claim. Another resolution was passed, that:

"The agreement with J. B. Weede with reference to handling the pay rolls as fully set out in the additional trust agreement be continued until such time as the full amount owing Goodman Manufacturing Company notes are paid in full, and thereafter until further order of the board of directors."

Weede's compensation was then fixed at \$12.50 per trip, in connection with taking the pay rolls to the mine.

Weede testified to going to the mines twice a month, since February 1, 1916, and performing the services in accordance with the employment by the corporation. The latter became obligated by the contract, evidenced by this resolution and Weede's acceptance, to continue Weede in its service, and pay him the stipulated compensation, until the plaintiff should be paid. This, under all the definitions, constituted a valuable consideration. True, Weede owned one share of stock, and was secretary; but in neither capacity was he required to do this work. He appears to have been a trustee in an additional trust agreement, not, however, requiring him to render such services. Moreover, such an agreement was to be made, and the plaintiff is not now in a situation to question the employment of the identical person agreed upon to render the services. We entertain no doubt that this afforded a valuable consideration for the forbearance to bring suit.

The other consideration pleaded was that the undertaking of the representative of the defendant company was the agreement that, if the time of payment were extended, or the plaintiff would forbear bringing suit, the defendant company would not interpose as a defense to the notes that they were is-

2. CONTRACTS :
forbearing
suit on note.

sued without the consent of said company or its board of directors. That such was the arrangement is undisputed. The evidence discloses that these notes were executed by the president of the defendant company, without consulting its directors, and without their acquiescence or consent. The

4. CORPORATIONS: execution of promissory notes.

authorities are without conflict that the president of a corporation has no such implied authority. This is so well established that citation of authorities is unnecessary; but see *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525. The circumstance that the president may have owned nearly all the stock does not obviate this conclusion. The corporation was a distinct entity and under the control of its directors, and the president might not exercise the authority of executing promissory notes thereof on his own motion, or otherwise than as empowered in the articles or by-laws, or by the managing directors of the company. If he so did, as is alleged, without the consent, approval, or ratification of the directors, ostensibly or otherwise, the company is not bound thereby. If the defendant had such a defense, or it believed in good faith that such defense was available to it, and agreed to waive the same on a promise of the plaintiff to dismiss the suit then pending, and forbear bringing another for some time, then this was a valuable consideration. By waiving its right to interpose this defense, it undertook to desist from asserting a right which it otherwise might have done. This, under all of the definitions, was a valuable consideration for the promise on the part of the plaintiff. As remarked by Lord Justice Cotton, in *Miles v. New Zealand Alford Est. Co.*, 32 Ch. Div. 266:

"If there is, in fact, a serious claim, honestly made, the abandonment of the claim is a good 'consideration' for a contract."

See *Cook v. Wright*, Q. B. 1 Best & Smith 559. In *Sisson v. Kaper*, 105 Iowa 599, this court held that waiver

of a right to rescind a contract on ground of fraud constitutes a sufficient consideration for a new contract. A settlement of a disputed claim, even if of doubtful validity, is supposed to be sufficient consideration. "*Richardson & Boynton Co. v. Independent Dist.*, 70 Iowa 573. See *Smith v. C. R. & M. R. R. Co.*, 43 Iowa 239.

The evidence that the representative of the defendant company acted in good faith in asserting such defense, and that the company was relying thereon, even though there was some doubt as to whether the company had not ratified the execution of the notes by the president, was sufficient to carry that issue to the jury; and, as seen, if such defense existed, or if the defendant, through its representative, in good faith asserted its existence, the agreement to waive it in consideration of the forbearance to prosecute the suit against defendant company constituted a valuable consideration.

III. The appellant contends that the parol evidence of the agreement was incompetent, for that it tended to vary the terms of a written instrument. It does not have that effect. It merely tended to prove a subsequent independent agreement. As observed in *Cox v. Carrell & Co.*, 6 Iowa 350:

5. EVIDENCE:
subsequent
and independent
agreement.

"A written contract may be affected in several ways, by parol agreement: for instance, it may be wholly set aside or abrogated; the particulars or details of its performance may be varied, as is often the case in building contracts; and the place of performance may be changed, and so the time may be. Parol evidence is competent to prove the enlargement of the time of performance, says Mr. Greenleaf, in 1 Greenl. Ev. 400, Section 304. The rule seems to be that parol evidence is admissible, if it is not proposed to show that a different contract was made, originally, from that expressed in the writing, but only to show that some subsequent arrangement was

entered into, in reference to the time, place or details of performance."

See, also, *Lahn v. Koep*, supra. Nothing in the authorities cited by the appellant obviates this conclusion. The original notes are the subject of the subsequent contract, which, though relating thereto, does not purport to change them.

IV. Appellant contends that, even though there was a consideration for the agreement to forbear bringing suit on the notes, this might not be pleaded in abatement, for that the remedy in event of a breach thereof would be by action for consequential damages. Decisions so holding may be found. but the rule is otherwise in this state. *Cox v. Carrell & Co.*, 6 Iowa 350; *Lahn v. Koep*, 139 Iowa 349; *Conkling v. Young*, 141 Iowa 676. *Houts v. Sioux City Brass Works*, 134 Iowa 484, is not in point.

V. The more difficult question to be determined is whether the oral agreement to forbear bringing suit was for a definite or certain period, or to a time certain. Unless so definite and certain, it is not enforceable. *Morgan v. Thompson*, 60 Iowa 280; *Davis v. Graham*, 29 Iowa 514. Such agreements must have all the essentials of a binding contract, reasonably definite as to time, and an agreed equivalent for the extension. See *Fanning v. Murphy*, 126 Wis. 538 (4 L. R. A. [N. S.] 666).

The point usually arises in defenses interposed by sureties, though not always; and, of course, the time of the extension must be as definite and certain, in order to obviate a plea in abatement in action on the note by the principal, as to release a surety when the alleged extension is asserted by the surety as a release of his obligation. The agreement alleged and proven was that plaintiff would "not sue upon the notes, so long as the defendants carried out the

6. ABATEMENT
AND REVIVAL:
agreement to
forbear suit.

7. CONTRACTS:
indefinite ex-
tensions of
time of pay-
ment.

agreement that the sinking fund on the bonds of the Mammoth Vein Coal Company, which was then delinquent, and the sinking fund as it accrued, be first paid out of the net earnings of the Mammoth Vein Coal Company, to the trustee for the bondholders of the Mammoth Vein Coal Company; and when this payment was completed on the sinking fund, the defendants in this action were to commence the payment of not less than \$100 per month to the plaintiff in this action upon their said notes, and to pay as much more as possible, taking into consideration the other creditors of the Mammoth Vein Coal Company, until the whole amount of plaintiff's claim was paid. These payments were to be made out of the moneys above the current and delinquent sinking fund." Neither party to the agreement was then aware of the extent of the delinquency in the sinking fund, and it was utterly impossible for anyone to say when it would be met out of the 10 cents per ton of coal mined and sold which made up this fund; for interest on the outstanding bonds was to be paid therefrom as such interest accrued. The wages of miners and other expenses must have been paid, and, though these were to be met out of the proceeds of the coal as sold, they might prove insufficient, and resort to the 10 cents a ton prove necessary, as actually happened on one occasion. Moreover, no one could say in advance how much coal would be mined from day to day or month to month, or the difficulties which might arise in the operation of the mine. In fact, the readjustment of wages and consequent changes in prices of coal greatly interfered with coal production in April, following the making of the agreement, and the delinquency in the sinking fund increased during every month up to the time of trial. No one could say from the agreement, even in the light of the record of this trial, even approximately when the delinquency in the sinking fund would be overcome by the payment therein of 10 cents per ton on all coal mined, or when there would be

"moneys above the current and delinquent sinking fund" out of which to make payment on the notes. There is no escape from the conclusion that the period of extension or forbearance was indefinite and uncertain. See *Union Nat. Bank v. Cross*, 100 Wis. 174 (75 N. W. 992).

Appellee argues that, even were this true, the agreement must be construed as contemplating forbearance for a reasonable time. See *Hakes v. Hotchkiss*, 23 Vt. 231. The

8. **BILLS AND
NOTES:** indef-
inite exten-
sion of time
of payment.

trouble with this is that the agreement was otherwise, and an arrangement to forbear until a contingency cannot be construed into something else: i. e., for a reasonable time.

For all that then appears, the contingency might happen in much less than a reasonable time, or long thereafter.

We are of opinion that the court should have denied the plea in abatement, and have awarded recovery on the notes.
—*Reversed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

LEVI L. WELLS, Administrator, Appellee, v. PARK CHAMBERLAIN, Receiver, et al., Appellant.

APPEAL AND ERROR: Assignment of Error—Sufficiency. A gen-

- 1 eral assignment, to the effect that the court erred in overruling a 26-pointed motion for a new trial, or erred in excluding certain evidence, which exclusion can only be discovered by reading the entire abstract, will be ignored.

TRIAL: Instructions—Form, Requisites, Etc.—Assumption of Fact.

- 2 No assumption of want of due care results from a recital of the degree of care required by the law, followed by the statement that "a failure to exercise such degree of care constitutes negligence."

APPEAL AND ERROR: Briefs—Ignoring Assignment of Error.

- 3 An assignment of error which is in no manner covered in the "proposition or points" required by Rule 53 will be ignored.

TRIAL: Instructions—Assumption of Fact. Instruction reviewed 4 in its entirety, and held that the reference to a hanging wire "which caused the death of Jesse Wells," did not assume that the death was brought about by a hanging wire.

NEGLIGENCE: Instructions—Recklessness and Wilfulness as Elements of Contributory Negligence. Recklessness or wilfulness is not a *necessary* element of contributory negligence, and an instruction which so states or infers is prejudicially erroneous.

TRIAL: Instructions—Circumstantial Evidence Cases—Consistency with Other Hypothesis. Circumstances, in order to be sufficient, of themselves, to establish liability, must be wholly inconsistent with any other hypothesis than that of liability, and, on request to so instruct, it is reversible error to refuse.

NEGLIGENCE: Instructions—Undue Emphasis—Unequal Degree of Care. Whether instructions are prejudicially erroneous which place the duty of ordinary care on plaintiff, and possibly, in effect, on defendant, yet, in addition, call the jury's attention to the dangerous instrumentality which *defendant* was handling, and the "high" degree of care which he should exercise, etc., *quaere*. (The court suggests modification on retrial.)

TRIAL: Instructions—Exceptions—Failure to Request Correct Instruction—Waiver. The right to insist on a definite exception to an instruction is not waived by failure to ask a correct instruction on the same point.

APPEAL AND ERROR: Briefs—Propositions and Points—Necessity for Argument. Argument *in extenso* is not necessary in order to secure consideration of properly made brief points.

NEGLIGENCE: Instructions—Duty to Define Statutory Terms—"Proper Insulation." Statutory terms which carry a technical meaning must, without request, be defined by the court in its charge to the jury, in actions based on injury by reason of the violation of such technical terms. So held as to the term "*properly insulated*," in the statute governing maintenance of electric transmission lines. (Sec. 1527-c, Code Supp., 1913.)

APPEAL AND ERROR: Harmless Error—Instructions—Vital Omission—Overwhelming Testimony. One may not contend for harmless error by reason of the great array of his testimony, when the error in question consists of a *vital omission* in the instruction of a proper guide to the jury in considering such testimony. So held where the court failed to define the statutory and technical term "*properly insulated*," as applied to electric transmission lines.

ELECTRICITY: Insulation—Statutory Command—Evidence. On 12 the issue whether electric transmission lines were "*properly insulated*," as required by statute (Sec. 1527-c, Code Supp., 1913), it may be shown that no material had ever been discovered that will, when *wrapped* around high voltage wires, prevent the escape of electricity.

Appeal from Jones District Court.—F. O. ELLISON, Judge.

JULY 1, 1918.

REHEARING DENIED JANUARY 21, 1919.

THE defendant appeals from a judgment awarding the plaintiff damages alleged to have been sustained by reason of the negligence of the defendant.—*Reversed and remanded.*

E. C. Johnson, C. B. Paul, and Barnes, Chamberlain & Randall, for appellants.

George C. Lawrence and Wade, Dutcher & Davis, for appellee.

SALINGER, J.—I. The eighth proposition complains that the motion for new trial was overruled, and a judgment on the verdict was entered. The motion for new trial referred to has 26 grounds. We will not consider complaints so general and vague as this.

1. APPEAL AND
ERROR; as-
signment of
error: suffi-
ciency.

1-a

There is further complaint that the court refused to let the defendant show what is deemed "proper insulation," in electrical technology, and that it was in this connection other evidence referred to later was excluded. We have said, in a very recent case, that, where a ruling in the taking of testimony is complained of, it is in the power of the appellant to point to some spot in the record where that ruling is, and that, if this be not done, we will not go through the record to ascer-

tain whether the ruling complained of was made. The brief refers to certain pages on which we find other evidence excluded, but these exhibit no exclusion of what is deemed proper insulation; and no other reference is made, indicating where it can be found. We may not consider this alleged exclusion.

II. There are many cases cited for the elementary proposition that the instructions should not assume the existence of material matters which are in dispute. Of

course, this is not to be done. Was it done?

2. TRIAL: instructions: form, requisites, etc.: assumption of fact.

We find in the record that Instruction 4 was excepted to on the claim that its last sentence assumed due care was not exercised. The instruction, after reciting the

degree of care due from defendant, concludes: "And a failure to exercise such degree of care constitutes negligence." It seems to us this does not assume that the requisite care was lacking, but is merely a statement of the consequences if it is found not to have been exercised.

There was an exception to No. 8, charging that the first paragraph seems to assume there was a failure on part of defendant to properly insulate its wires. The instruction declares that, if it is found from the evidence that the wire which caused the death of decedent was placed on the transmission wire of defendant by someone other than decedent, and found that the defendant's wires were not insulated, and found that decedent, while rightfully upon the highway, and in the exercise of ordinary care for his own safety, accidentally ran against the hanging wire, or inadvertently took hold of it, and was killed, and it is found that defendant's failure to insulate these wires was the proximate cause of such death, defendant would be guilty of negligence, regardless of the length of time that the wire hung upon the transmission wire. We are unable to see what matter, material or otherwise, is so far assumed to be true.

The instruction continues that if, on the other hand, it is believed from the evidence that decedent placed the hanging wire on the electric wire, or if it is found that said wire was hanging in plain view, and could be readily seen by deceased, and if it be believed that decedent saw the wire, or, in the exercise of ordinary care and diligence, should have seen it, before he touched it, and, with knowledge of its position and condition, failed to exercise that degree of care for his own safety that an ordinarily careful person would exercise under like circumstances, but recklessly or wilfully, and without exercising ordinary care, took hold of the hanging wire to remove it, and was killed, then he would be guilty of contributory negligence, and plaintiff could not recover, even though it was believed that defendant was also guilty of negligence in failing to properly insulate its wire; and the verdict should, in that event, be for defendant. We find that, in the errors relied on for

8. **APPEAL AND
ERROR: briefs:
ignoring as-
signment of
error.**

reversal, this instruction is further challenged because it is said to be the entire theory of defendant's case that decedent was not killed by reason of the hanging wire, but, on the contrary, by attempting to throw a wire over defendant's high tension line. But the only complaint in the brief points is that this instruction assumes material matters which are in dispute, to be true. We are concluded by the presentation in the propositions or points; and whatever vice there may be in Instruction 8. it is not one of them that it assumes disputed matter to be true. A charge which fails to adopt the theory of one of the parties does not thereby indulge in an erroneous assumption of fact.

In Instruction 10, the jury is told that, if it believes the high tension wires of the defendant which extended across the highway were properly insulated, so as to be rea-

sonably safe, as suspended or placed, "and that the hanging wire which caused the death of Jesse Wells was placed over the electric wires by someone without the knowledge or consent of the defendant, and that said wire remained so attached to defendant's wire for such a length of time, before the injury to plaintiff's intestate, that the defendant, in the exercise of reasonable care, ought to have discovered it, and known of its dangerous condition, and removed it, but failed and neglected to do so, then the defendant would be guilty of negligence in that regard." The exception to this is that the instruction "squarely" assumes that the death *was* brought about by a hanging wire which caused the death of Jesse Wells. We are unable to sustain this exception.

III. In Instruction 8, the jury was told, in the statement of what would demand a verdict for the defendant, that such verdict was due, among other things, if decedent "failed to exercise that degree of care for his own safety that an ordinarily careful person would exercise under like circumstances, but *recklessly or wilfully*, and without exercising ordinary care, took hold of the hanging wire to remove it, and was killed," he would be guilty of contributory negligence. It is urged that, on the authority of *Mathews v. City of Cedar Rapids*, 80 Iowa 459, *Yeager v. Incorporated Town of Spirit Lake*, 115 Iowa 593, and *Keim v. City of Fort Dodge*, 126 Iowa 27, this instruction was erroneous, in that one who does not exercise the degree of care that an ordinarily careful person would exercise under like circumstances is guilty of contributory negligence, although what is by him done is neither reckless nor wilful. The instruction was excepted to, and it was urged against its giving that, in a second paragraph thereof, the court charged that, if deceased reck-

4. TRIAL: instructions: assumption of fact.

5. NEGLIGENCE: instructions: recklessness and wilfulness as elements of contributory negligence.

lessly or wilfully took hold of the hanging wire, he would be guilty of contributory negligence; whereas the language just preceding such words is a proper statement of the law, which should not be modified by the use of such words as "recklessly or wilfully."

We think so much of this instruction was erroneous. The appellee answers that the case turns on proximate cause, and not on contributory negligence; and that, at all events, as there were no eyewitnesses, therefore a presumption was raised that there was no contributory negligence; also, that the charge, as a whole, was correct, because the words objected to were but additions to a proper statement that want of ordinary care constitutes contributory negligence. It appears to us to be plain that neither meets the fault in this instruction.

IV. The appellant presents that it was entitled to an instruction covering the rule that, if conclusions other than those urged by plaintiff as to the cause of the injury may reasonably be drawn from the facts in

6. TRIAL: instructions: circumstantial evidence cases: consistency with other hypothesis.

evidence, then the evidence cannot be said to support that conclusion; and for this it cites the familiar "equipoise" cases. We have recently passed upon this question in the case of *George v. Iowa & S. W. R. Co.*,

183 Iowa 994, which, in defining what does create equipoise as matter of law, makes clear that, ordinarily, it is for the jury to say whether the evidence is in equipoise, and that there is a case for the jury if reasonable men may, on the evidence, differ on whose theory is the better supported. If, then, we have here—and we do have—a pure case of circumstantial evidence, and upon such evidence a jury might as reasonably draw the conclusions contended for by defendant as the ones upon which plaintiff insists, it may become the duty of the court to charge on how the burden of proof in a circumstantial evidence case must be dis-

charged; and if it be not done, when there is proper request therefor, the refusal so to charge will be error. The defendant did ask the court to charge that plaintiff's case, as presented by the evidence, is bottomed solely upon circumstantial evidence, and, unless it found that the circumstances relied upon by plaintiff as sustaining his theory of the case are wholly inconsistent with any other reasonable hypothesis as to the manner in which decedent came to his death, then plaintiff has not met the burden of proof, and the verdict must be for the defendant. For the purpose of stating the rule which presumes freedom from contributory negligence where there are no eyewitnesses, the court did say what amounts to stating that the case was wholly one of circumstantial evidence. But this is all it did in the matter. We are of opinion that the instruction requested should have been given.

V. Instruction No. 2 charged the jury that the deceased "would only be held to the exercise of ordinary care and diligence." The same thought is found in Instruction

7. NEGLIGENCE:
instructions:
undue emphasis:
unequal
degree of
care.

3. In Instruction 4, the jury was told that one in the business in which defendant was engaged was bound to exercise a high degree of care, prudence, and judgment, to avoid injury to those who might come in contact with the production or distribution of electricity by defendant; and that the care required of the defendant should be in proportion to the character of the acts to be done, the dangers involved, and the magnitude of the injury or damages that might arise from the want of such care. In Instruction 6, it was charged that, in the business defendant was engaged, the law imposes a duty upon it to properly insulate its wires, and, if this be not done, an obligation to use "such other means of protection from danger as reasonable care would require, including such examinations or inspections at such times as reasonable pru-

dence and care would require, considering the dangers, if any, involved to those who might be upon the highway or any part thereof." In Instruction 7, the jury is told that decedent was not relieved from exercising that degree of care and caution for his own protection and safety which an ordinarily careful and prudent person would exercise under like or similar circumstances. No. 8 requires of the decedent the exercise of ordinary care for his own safety. Instruction 10 exacts not more of decedent than the exercise of reasonable care. These instructions on the respective care due from each of the parties were challenged below: First, on the ground that they required ordinary care only of the decedent and greater care than that of the defendant, whereas it should have been charged that neither was to be held to more than the exercise of ordinary care; second, that, while the instructions in question failed to explain that the care due from decedent must be proportionate to the injury to be apprehended and the dangerous instrumentalities with which he was dealing, just that degree of care was exacted of the defendant—and the exceptions assert this was error, because both parties were bound to exercise care in proportion to the character of the acts to be done, the dangers involved, and the magnitude of the injury or damages that might arise from the want of such care. In the brief, the point is made that, on the authority of *In re Estate of Townsend*, 122 Iowa 246, and *Gray v. Chicago, R. I. & P. R. Co.*, 160 Iowa 1, instructions should be so written as not to give undue prominence to the duties of one party and not sufficient prominence to the duties of the other. The ultimate complaint is that the charge holds decedent to the exercise of ordinary care and diligence only, but fails to limit in like manner the care due from defendant, and tends to hold it to a much higher degree of care than plaintiff.

Appellee insists that, if there be error in these instructions, the complaint may not be considered: First, because

no instruction was asked upon this point; and second, because "nowhere is there a line of argument

8. TRIAL: instructions: exceptions: failure to request correct instruction: waiver.

upon the thought expressed in the assignment of error, and under the rule, we are not required to argue." Both contentions have been disposed of in this court against the appellee. *State v. Brooks*, 181 Iowa 874,

holds that, where an exception clearly advises the court in advance wherein it is claimed that a proposed charge is faulty, a right of review of the propriety of the instruction given is not waived by a failure to ask instructions upon the point. In *Powers v. Iowa Glue Co.*, 183 Iowa 1082,

9. APPEAL AND ERROR: briefs: propositions and points: non-necessity for argument.

it is settled that, where brief points or propositions are made in the manner prescribed by rule, review must be granted though there be no argument *in extenso*. The point is not free from doubt, and we suggest that

this instruction be amended on retrial.

VI. Chapter 94, Acts of the Thirty-third General Assembly (Code Supplement, 1913, Sections 1527-c, 1527-d), requires that the franchise holder shall use

10. NEGLIGENCE: instructions: duty to define statutory terms: "proper insulation."

only strong and proper wires, "properly insulated." In Instructions 5 and 6, the jury was merely told that it was the duty of the defendant to have the wires in question "properly insulated," and that certain consequences attached if they were not "properly insulated"

No definition of what was proper insulation, within the meaning of the statute, was asked or given. Appellant contends this was error. Now while, in *Union Scale Co. v. Machinery & Sup. Co.*, 136 Iowa 171, 174, we reversed because there was a failure to define the term "abandonment of a lease," as used in the law, and because the law had given it a technical meaning, the case is not a controlling authority, because there, there was a request to define the

term, and here there was no request. But in *Kirchoff v. Hohnsbehn Creamery Sup. Co.*, 148 Iowa 508, at 511, there was no request, and we held that it was the duty of the court to tell the jury what would violate a provision of law that a planer should be "properly guarded,"—what the meaning of these words was, in the law. In *Murray v. Daley*, 164 Iowa 612, at 624, in which there was no request, we condemn an instruction because it has nothing "which properly indicates what sort of contrivance would, in law, be considered a proper guard, and the least that may be said is that the trial court should have defined the requirement of the statute, so that the jury could have been able to say whether the machine was properly guarded." The *Kirchoff* case is cited in support. So is *Miller v. Cedar Rapids Sash & Door Co.*, 153 Iowa 735; but we cannot see that this last case has any bearing on the question. As we understand it, appellee has no answer, save to say, first, that the cases just referred to deal with provisions in a factory act, and that there is a distinction because such acts "deal with indefinite and uncertain conditions," and that, therefore, it was not the duty of the court to construe the meaning of the words used in such statutes; second, that, on the whole, the case for the plaintiff is so conclusive that, if there was error in not defining the term "properly insulated," the record demonstrates such error to be harmless. We are unable to see a distinction, because the words here under consideration are not found in a factory act. If there be a distinction, it seems to us more necessary to define what is "properly insulated," within a statute, than to define words such as "proper guards," or "properly guarded." Insulation of high tension wires is surely a more technical subject than the proper safeguards of machinery in a factory, against injuring operatives. If "proper guard" or "properly guarded" come within Subdivision 2 of Section 48 of the Code, certainly the words "properly insulated" do.

A guard to prevent the cutting off of the finger of a saw operator is surely popularly better understood than proper insulation of high transmission wires.

Now, as to the argument that the conclusive character of the plaintiff's testimony as a whole proves no prejudice resulted from failure to define said term. No matter how

conclusive the case for the plaintiff would be if there was a failure to have what the law deems proper insulation, yet he would have no case if the jury could find that there was proper insulation. Therefore, the "con-

11. APPEAL AND
ERROR:
harmless error:
instructions:
vital omission:
over-
whelming tes-
timony.

clusive proof" theory will not meet the situation. We held, in *State v. Pearce*, 178 Iowa 417, that one who does not dispute that the evidence as it stands abundantly supports the verdict, may yet contend that, if no error had been committed, the verdict might have been for either party; that, though it be admitted the scale declared a given weight, it may be urged that the scale was defective, or tampered with. In *Yarcho v. Chicago, R. I. & P. R. Co.*, 183 Iowa 1180, we hold that, though a conclusion of fact by a justice of the peace may not be reviewed on writ of error, the writ may be maintained upon showing that there was error in the taking of testimony; that, though the conclusion of fact is not reviewable, and is right if the foundation for reaching it was properly obtained, it may be urged on the writ that what is otherwise conclusive is not so if laying the foundation for the conclusion was faulty. It is no answer that the instructions were too favorable to the appellant, the reasoning being that, when wire is not insulated as required by law, the defendant is responsible as matter of law, and the court should have said to the jury that, as matter of law, the wire was not insulated as required by law. This is a reasoning in a circle, which is merely an amplification of the argument that the conclusiveness of the proof as a whole made this error nonprejudicial. If

there be any duty to define what is proper insulation, within the meaning of the statute, the duty is created because, no matter how strongly the proper insulation is required, and no matter how strong the case otherwise is, there is no liability unless there is a failure to have proper insulation. The definition is required so that the jury may intelligently find upon the vital question. It is only when it has found there was no proper insulation that the case against the defendant becomes conclusive. That it remains conclusive *if* the proper light to reach the conclusion is given the jury cannot meet that the jury is allowed to reach the vital conclusion without being afforded proper light.

Appellee asserts that *State v. Louisville & N. R. Co.*, 177 Ind. 553 (96 N. E. 340), decides that the trial court in this case did not err in not defining what was proper insulation. We cannot so read the case. It involves an application of the rule that statutes shall not be held to be unconstitutional if any reasonable interpretation will avoid so holding. In applying this rule, it is held that a statute which makes it unlawful to use any locomotive which "is not properly equipped with an efficient automatic device for ringing the bell * * * such device to be at all times kept in proper working order," is not void for indefiniteness on the ground that the words "proper," "properly," and "efficient" were relative terms, and imposed no standard for determining when a crime was committed under the act, "since the thing that was definitely required was a continuous ringing of the bell, and the words quoted might be eliminated as surplusage."

We are unable to see what application *Ingebretsen v. Minneapolis & St. L. R. Co.*, 176 Iowa 74, has to the point now under consideration. Its holding is that, where it is complained of an instruction that it did not tell the jury, in assessing damages, to limit itself to the present

value of the sum found, such omission may not be complained of on appeal, and said:

"The instruction in the form given does not inhibit or negative a computation of damages on the basis of present worth, and we cannot assume that the jury did not, in fact, so reach its determination. Such, indeed, would naturally be the course of intelligent jurors in estimating a sum which would 'fully and fairly compensate' the plaintiff for the wrong done him."

VII. A witness otherwise competent was asked whether or not it is possible "for these service wires" to be insulated; and objection that it was incompetent, irrelevant, and im-

material, did not tend to support any issue in the case, that the law fixed the requirement and conditions, that, if the wires cannot be insulated, they cannot be used, was

12. **ELECTRICITY:**
insulation:
statutory
command:
evidence.

sustained. To inquiry whether there was any known material which may be used in high tension wires, on the wire itself, that will prevent the escape of electricity under pressure of 13,200 volts, the like objection was made and sustained. It is presented that this excluded proof that there was no known substance with which a high tension wire may be wrapped so as to prevent the escape of high tension current. It is answered that the law demands proper insulation, and, if that is impossible, the defendant must simply refrain from using its franchise and placing high tension wires. In our opinion, the requirement of the statute that the holder of the franchise must furnish proper insulation did not require the doing of impossibilities, and did not make the right to use the franchise lapse because there was a failure to do the impossible. It was a charged negligence that wires in question were not insulated or otherwise protected so as to guard the traveling public against a charge of electricity from said wires; that the death of decedent was caused by the negligence of defend-

ant. Now, certainly, the defendant could show by a competent witness that mere failure to wrap the wires in a given way was not a failure to furnish proper insulation, and certainly, showing that insulation by such a method was impossible would tend to show that defendant was not negligent.

The judgment appealed from must be reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

INCORPORATED TOWN OF POLK CITY, Appellee, v. R. P. J. GEMRICHER, Appellant.

MUNICIPAL CORPORATIONS: Equitable Action to Remove Street Obstruction. A municipality may proceed in equity for the removal of a privately maintained obstruction in the public street: e. g., platform scales.

Appeal from Polk District Court.—THOS. J. GUTHRIE, Judge.

JANUARY 22, 1919.

SUIT for a mandatory writ to compel defendant to remove an alleged obstruction from one of the principal streets of plaintiff incorporated town. Decree as prayed.—*Affirmed.*

E. S. Schuetz, for appellant.

Mulvaney & Mulvaney, for appellee.

STEVENS, J.—Plaintiff alleged in its petition that the defendant has built and maintains platform scales on one of its principal streets for personal profit, and that same is so constructed as to create a nuisance. Defendant, in answer, admitted that he maintained scales in the street, but denied that same create or constitute a nuisance, and

averred that he has maintained and operated same with the knowledge and consent of plaintiff, its officers, and agents, and that his right to do so has never been revoked.

Two principal grounds relied upon for reversal are:

(a) That plaintiff has a plain and adequate remedy at law; and (b) that no special injury to plaintiff is alleged or proven, and that plaintiff is without authority to maintain a suit in equity to compel the removal of an obstruction from its streets.

Platform scales have apparently been maintained by the defendant and others at the place in question, since about the year 1883. The evidence tends to show that the surface water is obstructed thereby in a way to cause gutters to be washed in the unpaved street, and, at times, to become muddy, and that, in winter, the same causes ice to form on the adjacent sidewalk. It does not appear from the record whether any other consent than that which may be implied from the lapse of time was ever given defendant to erect or maintain the scales in the street; but before suit was commenced, the town council caused a written notice to be served upon him, demanding that he remove the scales within fifteen days.

Section 753 of the Code confides the care, supervision, and control of streets to cities and incorporated towns, and requires that same be kept open, in repair, and free from nuisance. It is not denied by counsel for appellant that plaintiff, acting through its proper officers, had the right to revoke permission, if any was ever granted defendant, to maintain scales upon the street; but, as we understand counsel, it is his contention that the officers of plaintiff should have proceeded summarily to remove the scales, instead of resorting to a suit in equity. We held, in *Emerson v. Babcock*, 66 Iowa 257, that:

"The fee title of the streets is in the incorporated town, and no private person has any legal right to erect any

structure therein for the purpose of carrying on his private business; and if, having done so, he is required to remove his building or structure, of whatever it may be, from the street, he has no cause of complaint. He is deprived of no right. If the plaintiff was permitted to maintain his scales in the street for a time, the privilege must be regarded as a mere license, which may be terminated at any time, and it is immaterial whether the erection in the street amounts to a nuisance. It is the duty of the town authorities to keep the streets clear and unobstructed, and no person has the right to take and hold possession of any part of the streets for any private purpose."

See, also, *Lacy v. City of Oskaloosa*, 143 Iowa 704; and *Callahan v. City of Nevada*, 170 Iowa 719.

But, conceding the authority of plaintiff, in its corporate capacity, to cause the scales to be removed, is the remedy thus provided exclusive, or may such municipality, by proper proceeding, invoke the aid of a court of equity in causing obstructions to be removed from its streets, and to abate a nuisance existing therein? Counsel for appellant cites and relies upon *City of Ottumwa v. Chinn*, 75 Iowa 405; but this case is not in point. The city of Ottumwa sought to enjoin the defendant from maintaining a slaughterhouse at a place within the city, where it was obnoxious to residents in the vicinity thereof, and which, it was charged, was injurious to the health and comfort of the inhabitants of said city. The court held that plaintiff did not have such special interest in the matter complained of as entitled it to maintain a suit to enjoin or abate it as a nuisance. In the case at bar, the evidence shows that the scales tend to create a nuisance in the street, and constitute an obstruction to travel. Section 753, as above stated, requires that cities and incorporated towns keep their streets in repair and free from obstruction. Not only is this true, but such municipalities may be liable for damages caused

by obstructions in the streets. It has been generally held that, where the duty of maintaining the streets in repair and free from obstructions is confined to municipalities, they have such interest as entitles them to maintain a suit in equity to enjoin obstructions in the streets, and to abate nuisances therein. *City of Waterloo v. Waterloo, C. F. & N. R. Co.*, 149 Iowa 129; *City of Sioux City v. Simmons Hdw. Co.*, 151 Iowa 334; *Wendt v. Incorporated Town of Akron*, 161 Iowa 338; *City of Waterloo v. Waterloo St. R. Co.*, 71 Iowa 193; *City of Jordan v. Leonard*, 119 Minn. 162 (137 N. W. 740); *Town of Burlington v. Schwarzman*, 52 Conn. 181; *Town of Jamestown v. Chicago, B. & N. R. Co.*, 69 Wis. 648 (34 N. W. 728); *Mayor, etc., Jersey City v. Central R. Co.*, 40 N. J. Eq. 417 (2 Atl. 262); *City of Huron v. Bank*, 8 S. D. 449 (66 N. W. 815); *City of Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Yates v. Warrentown*, 84 Va. 337 (4 S. E. 818); *Demopolis v. Webb*, 87 Ala. 659 (6 So. 408); *Metropolitan City R. Co. v. City of Chicago*, 96 Ill. 620; *City of Rockland v. Rockland Water Co.*, 86 Me. 55 (29 Atl. 935); *Inhabitants of Twp. of Raritan v. Port Reading R. Co.*, 49 N. J. Eq. 11 (23 Atl. 127); *City of Kansas City v. Burke*, 92 Kan. 531 (141 Pac. 562), 93 Kan. 236 (144 Pac. 193); *City of Eau Claire v. Matzke*, 86 Wis. 291 (56 N. W. 874); *Waukesha Hygeia Min. Spring Co. v. Village of Waukesha*, 83 Wis. 475 (53 N. W. 675); *City of Santa Ana v. Santa Ana Valley Irrig. Co.*, 163 Cal. 211 (124 Pac. 847); *Pickrell v. City of Carlisle*, 135 Ky. 126 (121 S. W. 1029); *Village of Buffalo v. Harling*, 50 Minn. 551 (52 N. W. 931); *City of Lamoure v. Lasell*, 26 N. D. 638 (145 N. W. 577); *Stevens v. City of Muskegon*, 111 Mich. 72 (69 N. W. 227).

The right of cities and incorporated towns to maintain a suit in equity to enjoin the obstruction of the streets thereof, it will thus be seen, rests upon the same principle as the right of an individual to maintain a suit to enjoin the

maintenance of a nuisance causing him special damages. Courts of other jurisdictions have held that a municipal corporation may maintain a suit in equity to abate a nuisance, even though a summary remedy is also provided; and we see no reason why this right should be denied in this state. *American Furniture Co. v. Town of Batesville*, 139 Ind. 77 (38 N. E. 408); *City of New York v. Knickerbocker Trust Co.*, 104 App. Div. 223 (93 N. Y. Supp. 937); *City of New York v. De Peyster*, 120 App. Div. (N. Y.) 762 (105 N. Y. Supp. 612), affirmed without opinion in 83 N. E. 1123; *City of Elkins v. Donohoe*, 74 W. Va. 335 (81 S. E. 1130); *City of Jordan v. Leonard*, 119 Minn. 162 (137 N. W. 740).

The court below ordered the issuance of a mandatory writ for the removal of the scales. The decree thus entered appears to be in harmony with the undisputed evidence in the case, and will not be interfered with.—*Affirmed.*

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

T. S. SHAY et al., Appellants, v. BOARD OF SUPERVISORS OF RINGGOLD COUNTY et al., Appellees.

DRAINS: Reversing Order of Establishment. An order establishing a drainage district, the wisdom of which has been vouched for by both the board of supervisors and the district court, will not be disturbed on appeal, in the absence of a very clear showing by appellant that due consideration has not been given to the proved facts and circumstances, even though the drainage proposed may not, in some minor respects, be a complete success.

Appeal from Ringgold District Court.—H. K. EVANS,
Judge.

JANUARY 22, 1919.

THE board of supervisors of Ringgold County, acting upon the petition of a number of landowners, ordered the establishment and improvement of Drainage District No. 1. Certain objectors appealed from said order to the district court of that county, where the action of the board was sustained. From that judgment, further appeal brings the matter to this court. There were five separate appeals from the order of establishment, all of which are here consolidated for our disposal in a single opinion.—*Affirmed.*

Carr, Carr & Evans, and Spence, Beard & Hayes, for appellants.

Frank F. Fuller, Chas. J. Lewis, and Geo. A. Johnson, for appellees.

WEAVER, J.—This appeal involves no disputed questions of jurisdiction, or of the regularity of the proceedings in which the drainage district was established. As stated by counsel for appellants in argument, the two contested propositions are:

(1) Was the plan recommended by the engineer a practicable or feasible one?

(2) Was the burden to be imposed by the proposed improvement greater than should be borne by the land to be benefited?

Appellants' position is that the plan was neither feasible nor practicable, and that the cost or burden of the improvement was out of reasonable proportion to the benefits to the district.

Both of these inquiries pertain to matters of fact, and upon both, the board of supervisors, having original jurisdiction, and the district court, exercising appellate jurisdiction, have found with the petitioners for the improvement. Under the statute, these proceedings are to be treated as partaking of an equitable nature, and this court is not bound by the findings of fact in the court below, if, upon

full consideration of the entire record, it is satisfied that the decision appealed from is clearly against the evidence. It is, nevertheless, true that, as the board of supervisors had the advantage of personal acquaintance with the district, and knowledge of its topography and other characteristics, and the district court had the advantage of hearing the witnesses at first hand, their united holding or conclusion is entitled to great weight, and should be reversed only upon very convincing proof that these tribunals have failed to give due consideration to the proved facts and circumstances. Many of these appeals have been brought to this court; and, while we have sustained the refusal of the board to establish drainage districts prayed for, as against the contrary holding by the district court (*Zinzer v. Board*, 137 Iowa 660), and have sustained the district court in overruling the board's order establishing a district (*Focht v. Fremont County*, 145 Iowa 130), and have sustained the action of both the board and the district court in denying a petition for the establishment of a drainage district (*Denny v. Des Moines County*, 143 Iowa 466), we are cited to no case, and we now recall none, where we have assumed to set aside the order for such an improvement, against the united opinion of the board and the trial court. *Temple v. Hamilton County*, 134 Iowa 706; *Prichard v. Board*, 150 Iowa 565; *Chicago, M. & St. P. R. Co. v. Monona County*, 144 Iowa 171; *Mittman v. Farmer*, 162 Iowa 364, 372. We have also held that the objector who seeks the overruling of an order of establishment assumes the burden of proof, and that an order of establishment will be disturbed only upon a fairly clear showing of error. *Hall v. Polk*, 181 Iowa 828.

The cases, as a whole, leave the boundary line between legislative and judicial functions in the matter of establishing drainage districts enveloped in some degree of fog and uncertainty, but the right of this court upon appeal to review the record upon the questions raised in the

present case seems to be clearly held in *Focht v. Fremont County*, supra; and, following that precedent, we have examined with considerable care the record of the trial below. As usual in cases of this kind, it is evident that partisanship and self-interest have led to some extravagance of statement by witnesses on either side, as well as to some discord in the opinions of experts; but it is also to be said that many of the material facts are fairly well proven.

So far as concerns the objection to the cost of the improvement, the evidence tends to show that the aggregate of expense reasonably to be anticipated is somewhere from \$10 to \$14 per acre, upon the lands included within the district, an amount clearly not *per se* great enough to raise any presumption of extravagance; and whether it is a greater burden than the lands ought to bear depends wholly upon the benefits, if any, which the district as a whole will derive from the drainage when completed. Any assessment, however light, is burdensome if the district receives no corresponding or proportionate benefit from the expenditure of its money. Advance estimates of benefits are, of course, matters of opinion or judgment, rather than of accomplished fact, and may prove to be mistaken; but, as applied to drainage, the present condition of the drainage area, its topography, and the proved results of other similar undertakings under approximately the same conditions, ought to lead an intelligent and impartial tribunal, to which the question is submitted, to a reasonably safe conclusion whether the proposed improvement is a desirable one, and whether its benefits will justify the expense. All these matters were laid before the court below, and, we presume, had its consideration. It may be thought that the average board of supervisors is too close to the parties on either side of such a proposition to act with entire freedom of judgment, but such objection to the court which reviews its decision is not often well founded.

We discover nothing in the record to indicate that the case was not fairly tried. On the contrary, the trial court manifested throughout, anxious care to have the facts developed as fully and clearly as possible; and in our judgment, its findings are not open to serious criticism.

It would be unprofitable to burden this opinion with any statement of the evidence of the numerous witnesses, or with cuts of the numerous maps and charts which have been laid before us. There are a few things, however, of which there is no serious dispute, and which should be made clear. A stream, known as Platte River, makes its way through the entire length of the district, by an extremely crooked and irregular channel. It is not of uniform width or depth, and at times carries a large volume of water. It is subject to frequent overflow, which renders the useful employment of adjacent lands precarious, and is often destructive of farm crops grown thereon. The proposed ditch is intended to intercept the flow of this stream at the upper boundary of the district, and carry it in a comparatively straight line to a point near the lower boundary, where it will discharge again into the natural channel. Between these two terminals, the ditch will be $14\frac{1}{2}$ miles in length, while the present course of the river between the same points is about three times that length. The fall per mile of the bottom of the old channel is but from one fourth to one third of the rate on the bottom of the ditch. Water entering the district at its upper boundary will be carried to the lower boundary in much shorter time through the ditch than is possible through the present tortuous channel. The average court is not an expert drainage engineer; but since it knows, presumably, that water under normal conditions runs down hill, and that, the sharper the slope of the hill, the sooner the flow will reach the bottom, it is not hard to believe that, with this proposed improvement completed, the drainage district will be relieved

of its overflow waters more quickly and more effectually through the aid of the ditch than would be possible if left to depend on the natural drainage through the old channel. It would also seem reasonable that, while such improvement may not remove all danger of the greater or extraordinary floods which sometimes defy all barriers, it may be depended upon to avert lesser floods to a very appreciable degree, and insure to the owner a more certain and more profitable use of his land. It is very possible, as contended by some of the witnesses, that, as the river below the mouth of the ditch is to be left in its natural condition, it will naturally check the flow coming down through the ditch, and to some extent set it back upon some of the land in the district; but if this be so (which does not appear to be at all certain), it shows no more than that some lands in the district will be benefited to a greater extent than others, and this disparity ought to be capable of adjustment in the apportionment of benefits, if not in the assessment of damages. Moreover, such conditions are not necessarily permanent or irremediable.

Among other reasons urged upon our attention as showing the impracticability of the improvement in an engineering sense, it is said that there are places where the bed of the old channel is below the bottom of the proposed ditch, rendering it impossible to drain the river into or through the ditch. The explanation of this seems to be that, in its long and serpentine course through the district, the river as is usual in sluggish streams, is, to a considerable extent, a succession or series of holes or pools, with intervening shallows. In some of these holes, the bottom of the stream is below the bottom of the proposed ditch; and, of course, they will not be fully emptied by the improvement. This may be evidence that the drainage is not perfect, in that it will not take all the water from every pool in the district;

but such a standard of perfection would defeat practically all improvement. The excellence or success of every public enterprise is generally a question of comparison and approximation; and, if this drainage district, when improved according to plan, gives reasonable promise of substantial benefit to the property therein, at a not exorbitant expense, it should not be condemned because, in some minor respects, it does not accomplish all that some of the interested parties desire.

The judgment of the trial court is well supported by the evidence, and it is, therefore,—*Affirmed*.

LADD, C. J., GAYNOR, PRESTON, and STEVENS, JJ., concur.

A. T. BOWERY, Appellant, v. WABASH RAILWAY COMPANY,
Appellee.

RAILROADS: Negligence — Sufficiency of Evidence. Record reviewed, and held insufficient to establish any of the grounds of negligence alleged against a railway company by one engaged with his team in cutting weeds upon the right of way.

EVIDENCE: Positive and Negative Testimony. Positive testimony 2 that the statutory bell and whistle signals were given at a railway crossing, met by testimony that such signals were not heard by those *not in a position and mental attitude to have heard them, had they been given*, presents no conflict of evidence, and, consequently, no jury question.

EVIDENCE: Experiments. Experiments made under circumstances 3 and conditions materially different from those existing at the time at issue have no probative force. So held as to experiments which were intended to show how far one on a railway track might be seen by an approaching train.

Appeal from Des Moines Municipal Court.—J. E.

MEYER, Judge.

JANUARY 23, 1919.

ACTION to recover damages for injury to property, caused by a collision with a train. Opinion states the facts. Directed verdict for the defendant in the court below. Plaintiff appeals.—*Affirmed*.

John L. Gillespie, for appellant.

Miller & Wallingford, for appellee.

GAYNOR, J.—Plaintiff claims that, on or about the first of September, 1915, he was employed by the defendant company to cut weeds on its right of way, in the cutting of which weeds he was required to use a mower, drawn by a team of horses; that his employment came through defendant's section foreman; that on said date, he was so engaged; and that, while he was driving his team easterly on the tracks, with his mower astride the south rail of the track, a train, owned and operated by the defendant, ran into and struck the mower and team, demolished the mower, and seriously injured the team; that, before and at the time he was struck, he was in the act of driving the team that pulled the mower that cut the grass growing immediately south of the south rail; that, to cut this grass, it was necessary that he get upon the track. The train that struck him was an east-bound freight train moving in the same direction that he was.

1. RAILROADS :
negligence :
sufficiency of
evidence.

The acts, or omissions to act, which he says constitute the negligence of which he complains, are specifically stated in his petition as follows:

(1) In running the train at a high rate of speed, in view of the fact that they knew, or should have known, that the plaintiff was on the right of way, mowing the weeds.

(2) In failing to have the engine and train under reasonable or proper control, in view of that circumstance.

(3) In failing to give a signal of warning of the approach of the train, a reasonable distance from the place where the plaintiff was mowing at that time.

(4) In failing to keep a reasonable lookout on the track and right of way, ahead of the engine.

(5) In negligently handling and operating the train at said time and place, in view of the circumstances then existing.

(6) In failing to discover plaintiff's whereabouts, and thereafter failing to properly handle the train or apply the brakes, and in failing to stop the engine before it struck plaintiff's property.

The plaintiff says that the negligence of the operators of said engine and train, in one or more of the particulars set out, was the proximate cause of the accident and resulting damages to the plaintiff.

Negligence is the doing of some act, or the omission to do some act, which it was the duty of the party charged not to do or not to omit to do. The acts or omissions to act charged in the petition are the only acts or omissions to act that can be considered in determining the liability of the defendant. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124 Iowa 170. It will be noted that all the acts, or omissions to act, are acts or omissions to act on the part of those in charge of the train. If negligence is to be found upon which liability can be predicated, it must be found either in the fact that this train crew did something which a reasonably prudent person would not do, under like circumstances, and which it was its duty not to do, or that the defendant's crew, in charge of the engine, omitted to do something which it was its duty to do, and which a reasonably prudent person would not have omitted to do, under like circumstances; and it must be found that the doing, or omission to do, was the proximate cause of the injury complained of.

The question that confronts us now is: Was the evidence such that men of ordinary intelligence, assuming them to be reasonable men and honest searchers after the truth, could differ as to the guilt of the defendant, either in omission or commission, in respect to the matters charged,—could reasonable men honestly differ as to the sufficiency of the proof to establish the ultimate fact of negligence in manner and form as charged? To justify the court's action in directing a verdict against the plaintiff, the evidence on the ultimate fact of negligence must so fail, in its probative force, that honest minds, searching for the truth, could honestly reach no other conclusion than that reached by the court. It seems to have been the thought of the court that the record did so fail in its proof.

This brings us to a consideration of the evidence.

The first witness called for the plaintiff was the engineer in charge of the train. He testified that he approached the place where the plaintiff was, on a curve in the cut; that, on the banks of the cut, the weeds were growing so high that he could not see beyond them; that the banks of the cut and the weeds on the banks shut off his view, as he approached the place where he collided with plaintiff's property; that he was at all times on the watch, and looking straight ahead, but did not discover the plaintiff and his peril until he was within 200 feet of the plaintiff, because of the curve in the track, the banks of the cut, and the weeds growing on the banks; that, as soon as he saw plaintiff, he rang the bell and blew the whistle, set the brakes and shut off the engine, put on the emergency and the reverse,—and that was all he could do; that, when he first saw the plaintiff, the plaintiff was driving down the track ahead of him; that he stopped the train within 230 or 240 feet, after discovering the plaintiff. He further testified that he blew the whistle at a grade crossing to the west, giving the usual signal as he approached the crossing. This

grade crossing was a half or a quarter of a mile west of where the accident occurred.

The next witness was the conductor. His testimony was to the effect that he was in the engineer's cab, and standing directly behind the engineer, as they passed through the cut, looking straight ahead; that the train was within 200 feet of the mower when he first saw it; that the whistle was blown and the brakes set; that the track through the cut curved to the left; that the engineer was sitting down, looking straight ahead; that he was standing right behind him, looking over his head; that plaintiff was driving down the track, astride the rails; that he did not know the plaintiff was there before he saw him; that the banks of the cut and the weeds growing on the banks were so high that one could not see beyond them; and that they were between the plaintiff and the approaching train.

The fireman testified that he was also in the cab, and looking ahead; that, when he first saw the plaintiff, the engine was within 200 feet of where plaintiff then was. He corroborates the other witnesses as to the efforts made to stop the train, and as to the signals given.

Plaintiff, called in his own behalf, testified that the curve in the track where the accident happened was to the left; that the track makes a curve, which takes it in an easterly direction; that the top of the bank, or the top of the cut, was about 6 feet; that the weeds had not been cut on the north side of the track, except for a distance of about 50 yards immediately back of where he was at the time he was injured. He testified:

"At the time I met with the accident, I was driving east on the right of way, with one wheel in between the tracks, and the other one on the side of the tracks. The train came from behind, from the west. The first thing I knew, a whistle sounded, real sharp. I looked around; I saw the train coming through the cut. This curve runs

practically all the way through the cut. I wasn't quite in the middle of the cut. The train was 150 feet from me when I first saw it. A wagon road crosses the track, a half or a quarter of a mile west of the place of the accident. I had been cutting weeds for some time before the accident. The section assigned to me to cut was about 6 miles long. Trains frequently passed, while I was cutting on the right of way. They slowed up, but no train stopped. They just checked up a little. They wouldn't slow up if I was not on the track."

He said he had seen three hours go by without a train, and then had seen three trains go by in less than an hour. He further testified that he was on the watch for approaching trains; that, when he discussed with the foreman the danger of going upon the track to cut the weeds, the foreman said he recognized the danger, but that he would speak to the train crews, and have them keep a lookout for him. The record discloses, however, that this train crew knew nothing about the fact that he was engaged in working upon the right of way, or was liable to be upon the track.

Plaintiff further testifies that he was on the watch for trains; that he did not hear the whistle or the signal given for the west grade crossing; that he did not hear any signal until the train was within 150 feet of him; that he immediately looked back, saw the train, but was unable to get his property off the track before he was struck.

It happened that, during the time immediately preceding the accident, the plaintiff was running his mower in gear over the ties, engaged in mowing the grass as far out on the south side of the track as his sickle would extend.

That he did not hear the sound of the whistle, under the circumstances, is without probative force even tending to negative the fact that the signal was given, or to estab-

2. EVIDENCE:
positive and
negative tes-
timony.

lish the fact affirmatively that the signals were not given. He had shown by three witnesses, who were in a position to know whether signals were given, that they were, in fact, given. The mere fact that he did not hear them, under these circumstances, does not negative the positive testimony that these things actually occurred.

It will be noted from plaintiff's petition that he predicates liability on the part of the defendant on the doing, or the omission to do, certain things:

(1) That the train was run at a high and dangerous rate of speed. There is no evidence of the speed at which this train was run.

(2) That defendant did not have the engine under proper control. There is no evidence of this. The engineer was at his post, and, so far as this record shows, the engine in perfect order, all the appliances were in working order, and were used to stop the train.

(3) That a reasonable lookout was not kept up by those in charge of the engine. There is no evidence in the record that those in charge of the train did not keep a reasonable lookout ahead for any obstructions on the track.

(4) That the engineer failed to exercise reasonable care to stop the train after he discovered plaintiff and his peril. There is no evidence in this record that the train could be stopped any sooner than it was stopped after discovering the plaintiff's peril.

(5) That no signals of warning were given. The evidence on this point is that signals were given.

To meet the difficulties of the situation, as presented by the record up to this point, the plaintiff further testified in his own behalf, corroborated by another, as follows:

"I made a special trip down there, the other day, to look at the cut and see the conditions. I took Mr. Bishop with me, and we made observations or measurements with

3. EVIDENCE:
experiments.

reference as to how far you could see from the point of the accident back towards the northwest. We had a little boy, nine years of age, of ordinary height, stand where the mower was, and then we went on northwest for a distance of 21 rails, and we could see the boy. The boy was standing just where the mower was, *just south of the edge of the drainage there*, and his feet were about even with the tops of the ties. The rails were 30 feet in length, and we could see the boy a little farther than 21 rails. The cut slopes down to a level with the right of way, about 40 yards northwest of the place of the accident."

Bishop, who was with the plaintiff, and who was called by the plaintiff as witness, testified:

"The little boy was placed on the *south side of the drainage*, 3 or 4 feet south of the track, so his feet were about level with the top of the ties. Plaintiff and I then walked up the track, and went as far as we could see him, which was 21 rails. The point of the accident was about the center of the cut. From the point of the accident in each direction, the cut decreased gradually, so that, in about 100 yards, the surface of the right of way is about level with the track. From about 100 yards northwest of the accident, where the cut runs out, the track is then on a grade, and as you go on northwest, it gets to be a pretty good grade. This grade extends about half or a quarter of a mile, and then there is another little cut, and then a grade again. At the point of the accident, the cut on the north side of the track is about 4 feet above the top of the rails. It is about the same on the south side. At the point of the accident, the top of the cut, there is about a 2-foot raise out to the fence at the north edge of the right of way. There is a cut there, through most of the length of that curve. The ties stick out about a foot beyond the rails, and then from the end of the tie on down to the drainage covers a

distance of 4 feet; then the cut begins to slope up. In other words, it is about $5\frac{1}{2}$ feet from the rail to where the cut commences. From the point of the accident on northwest, one could see 300 feet before the track straightened out. Had the little boy been standing on the rail, I think I could have seen him."

The accident occurred in September, 1915. The trial was had about October, 1917; so it was nearly two years after the accident that this experiment was made. It is not shown that the conditions were then the same. In fact, in some respects it is shown that the conditions were not the same. It is shown that all the weeds on the north side were cut down at the time this experiment was made. Another significant fact in this experiment is that the boy was placed south of the track, instead of on the track between the rails, and that the boy was placed at a point some distance south of where the plaintiff was at the time of the accident. Without this testimony, there is positive proof introduced by the plaintiff negating the matters upon which he relies for recovery. Does this proof make it a jury question?

It is true the plaintiff is not bound by the testimony of the train crew. He may show the fact to be other than as testified to by them, and in so doing, lay a foundation for recovery; but he has seen fit to introduce the train crew, and by so doing, has vouched for their credibility, and has taken their statements upon the facts in issue. The testimony given by the plaintiff himself can do no more than inferentially show a state of facts other and different from that which is testified to by the train crew, and it was intended, inferentially, to establish a state of facts other and different from that testified to by the train crew. Does it do so? The testimony of the train crew is that the signals were given. The testimony of the plaintiff is that he did not hear the signals. The conditions that attended plain-

tiff at the time leave both statements proven: First, that the signals were given; and second, that he did not hear them. That he did not hear them does not, under the circumstances that attended them, even tend to negative the fact that they were given. The second proposition which the plaintiff seeks inferentially to establish is that, because he and his friend visited the place some time afterwards, under changed conditions, and were able to see, for 600 feet, a boy standing at a point south of the track, and not where the plaintiff was, the train crew, if diligently watching, as it was its duty to do, should have seen, and therefore did see, plaintiff for 600 feet before the contact, and, having been able to stop the train in 240 feet, as they did, it follows that they could, if they had exercised diligence, have seen the plaintiff in time to have stopped the train, in the exercise of reasonable diligence, after discovering the plaintiff and his peril. To make the inference justifiable, the conditions must be the same as that which attended the engineer at the time. This is not shown to be true,—in fact, is shown not to be true; and, therefore, the inference fails. We think the record fails to establish the plaintiff's claim, and as to this conclusion, reasonable minds could not differ, and the court was right.

We do not, therefore, enter upon a discussion of whether the plaintiff was guilty of contributory negligence, but we have to say this: that, if the plaintiff's testimony has probative force on the issues tendered, he was watching and listening for approaching trains, knew and appreciated the peril of his situation; knew that he was in a cut; knew that the view of the approaching engine was, to some extent obscured; knew that this train could have been seen for 600 feet before it reached him; and yet he did not discover its approach until it was within 150 feet of him, and at a time when it was too late for him to extricate himself from his situation.

Upon the whole record, we think the case must be affirmed, and it is—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

COHN, BAER & BERMAN, Appellees, v. DAVID BROMBERG, Appellant.

JUDGMENT: Foreign Judgment—Defense. A judgment defendant, sued in this state, on a judgment rendered against him by a court of competent jurisdiction in another state, by confession upon warrant of attorney, may show that, prior to the rendition of such judgment, he and the plaintiff in said judgment *cancelled said warrant of attorney* by mutually adjusting and settling all existing claims between them.

PRINCIPAL AND SURETY: Pleading Counterclaim. A surety may, with the consent of the principal, interpose any counterclaim which would be available in favor of the principal as against such indebtedness.

SET-OFF AND COUNTERCLAIM: Right of Surety. A surety may not, in an action on the contract of suretyship, plead, as a counterclaim, claims assigned to him by the principal *after* the commencement of the action. (Sec. 3570, Code, 1897.)

DAMAGES: Speculative Damages—Evidence. Evidence reviewed, in an action wherein recovery was sought for commissions lost by reason of the wrongful discharge of an agent, and held to be fatally lacking in certainty.

Appeal from Appanoose District Court.—D. M. ANDERSON, Judge.

JANUARY 23, 1919.

ACTION upon a judgment by confession upon warrant of attorney of record in Cook County, Illinois.—*Reversed*.

Howell, Elgin & Howell, for appellant.

H. E. Valentine, for appellees.

STEVENS, J.—I. One Jacobi, son-in-law of defendant, was employed by a contract in writing, as salesman for plaintiff for one year from August 1, 1913, to August 1, 1914.

- The compensation to be paid was $7\frac{1}{2}$ per cent of the total sales made by him and consummated by the delivery of the goods.
1. JUDGMENT: foreign judgment: defense.

The contract also provided for advance payments to him as follows: \$25 per week, and, when on the road, an additional sum of \$50 per week. All sums advanced were to be charged to Jacobi, and repaid out of the commissions earned; and if the total earnings at the close of the contract were less than the amount advanced to him, he agreed to pay the difference to plaintiff in cash. For the purpose of securing the payment of the latter sum, the defendant executed an instrument in writing, by the terms of which he bound himself to pay plaintiff whatever amount, if any, was due it from Jacobi, when the services were concluded, and further authorized any attorney of record in Cook County, in term time or vacation, to appear for him and confess judgment therefor, together with costs and a reasonable sum for attorney fees. After working about six months, Jacobi was discharged by plaintiff. At the time of his discharge, he was, as shown by plaintiff's books, indebted to it in the sum of \$376.40. On September 12, 1914, one Ward B. Sawyer, an attorney of record in Cook County, appeared in the circuit court thereof in term time, and confessed judgment against the defendant for the above amount and costs.

On December 12, 1914, plaintiff commenced suit in the district court of Appanoose County, Iowa, upon the judgment so entered. Numerous defenses to plaintiff's cause of action were pleaded, among which were (a) that the alleged warrant of attorney was void under the laws of Illinois, and did not confer authority upon Sawyer to confess judgment against him, and (b) that same was cancelled, re-

scinded, and revoked by mutual agreement of the parties, before judgment was entered. At the close of all the evidence, the court, upon motion of counsel for plaintiff, directed the jury to return a verdict in its favor.

While numerous alleged errors of the court are complained of by counsel for appellant, most of them, in view of a verdict for plaintiff by direction of the court, have no conceivable merit upon this appeal, and will not be discussed. The principal questions involved are whether certain defenses pleaded by defendant were available to him against the judgment rendered by an Illinois court of competent jurisdiction, and whether the issues tendered thereby, together with a counterclaim for a considerable sum, should have been submitted to the jury.

Section 88, Hurd's Revised Statutes, 1913, page 1873, is as follows:

"Any person, for a debt, *bona fide* due, may confess judgment by himself or attorney duly authorized either in term time or vacation without process."

The ground upon which the validity of the warrant of attorney is assailed by defendant is that it was obtained by fraud, and does not fix the amount for which judgment may be confessed, or contain provisions for determining same. Instruments of the character in question are universally strictly construed. *Hamilton v. Schoenberger*, 47 Iowa 385; *Cuykendall v. Doe*, 129 Iowa 453; *Gardner v. Bunn*, 132 Ill. 403 (23 N. E. 1072); *Weber v. Powers*, 213 Ill. 370 (72 N. E. 1070); *First Nat. Bank v. White*, 220 Mo. 717 (120 S. W. 36); *National Exch. Bank v. Wiley*, (Neb.) 92 N. W. 582.

Article 4, Section 1, of the Constitution of the United States provides that:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, pre-

scribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

But judgments of a sister state are entitled to no greater credit in the courts of this state than will be given thereto by the courts of the state where rendered, and may, in an action thereon, be impeached for want of jurisdiction or fraud in their procurement. *Rogers v. Gwinn*, 21 Iowa 58; *Chaloupka v. Martin*, 179 Iowa 1173; *Cuykendall v. Doe*, supra; *Mahoney v. State Ins. Co.*, 133 Iowa 570; *Longueville v. May*, 115 Iowa 709; *Teel v. Yost*, 128 N. Y. 387 (28 N. E. 353); *Forrest v. Fey*, 218 Ill. 165 (75 N. E. 789); *Mottu v. Davis*, 151 N. C. 237 (65 S. E. 969); *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348 (60 N. E. 663); *Kenney v. Supreme Lodge*, (Ill.) 120 N. E. 631.

"What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject-matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This presupposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another state. *Hanley v. Donoghue*, 116 U. S. 1; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615; *Lloyd v. Matthews*, 155 U. S. 222; *Western Life Ind. Co. v. Rupp*, 235 U. S. 261. Here, the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted." *Gasquet v. Lapeyre*, 242 U. S. 367 (61 L. Ed. 367).

Mr. Justice Dillon, speaking for the court in *Rogers v.*

Gwinn, 21 Iowa 58, referring to an equitable defense set up in an answer to a cause of action based upon a judgment of a Kentucky court, said:

"It is true that, for many purposes, the judgment of the court of another state is conclusive, but not for all. Thus, in a suit on a foreign judgment, it is settled, both in the Federal and state courts, that the judgment debtor may successfully defend, by showing that the attorney who entered an appearance for him had no authority to do so. *Harshey v. Blackmarr*, 20 Iowa 161, and authorities there collected. And courts are in the constant habit of relieving parties upon equitable terms from judgment rendered against them in consequence of the fraudulent acts of the successful party or his attorney. *Id.*, and cases cited; 5 Am. L. Reg. (N. S.) 389, and cases cited; 2 Story, Eq., Sections 194, 195; *Pearce v. Olney*, 20 Conn. 544, approved 12 N. Y. 156; *Milne v. Van Buskirk*, 9 Iowa 558. If the judgment sued on had been rendered by a court in Iowa, the facts found by the court below would be a good defense, at least in equity, to an action upon it, or sufficient to require a court of equity, upon petition filed for that purpose, to cancel it. And we cannot doubt that they would be so regarded by the courts of Kentucky, if this action had been brought in that state, or if the defendant in that state had sought relief against the judgment. So that, if we should hold as the appellant insists we should, we would be giving to the judgment of the court of one sister state a *greater* force and effect than it would have there, and a greater force and effect than we would give to a like judgment rendered by our own courts. This, the Constitution of the United States and the act of Congress do not require. We are only required to give to it the *same* effect here that it would have in the state of Kentucky."

Judgment by confession upon warrant of attorney is not authorized in this state. *Hamilton v. Schoenberger*,

supra; *Cuykendall v. Doe*, *supra*. But where valid by the law of the state where entered, it will be given the same force and effect by the courts of this state as is accorded thereto in the state where rendered. *Cuykendall v. Doe*, *supra*.

No notice was served upon the defendant, and he appears not to have known of the proceedings in the Illinois court until this action was commenced. The only jurisdiction obtained by the circuit court of Cook County over the defendant was such as the instrument in question conferred. If the attorney who signed the confession was not authorized to do so, then the Illinois court was without authority or jurisdiction to enter judgment thereon. The court was bound to act within the strict authority conferred by the instrument executed by defendant. If the authority conferred thereby had been previously cancelled, rescinded, or revoked, the judgment was wholly void. *Green v. Equitable Mut. L. & E. Assn.*, 105 Iowa 628, 633; *Cuykendall v. Doe*, 129 Iowa 453; *Hester v. Frink*, 189 Mo. 40 (176 S. W. 481); *Mottu v. Davis*, 151 N. C. 237 (65 S. E. 969); *Weber v. Powers*, *supra*; *Jaster v. Currie*, 69 Neb. 4 (94 N. W. 995); *First Nat. Bank v. White*, *supra*; *Dobbins v. Dupree*, 39 Ga. 394; *Chicago Bldg. Society v. Haas*, 111 Ill. 176; *Davant v. Carlton*, 57 Ga. 489.

The Supreme Court of Nebraska, in *National Exch. Bank v. Wiley*, 92 N. W. 582, held that a judgment by confession upon a warrant of attorney, entered by an Ohio court of competent jurisdiction, was void because the attorney confessing same had no authority to do so. The judgment of the Nebraska court was, upon error to the Supreme Court of the United States, affirmed. 195 U. S. 257 (49 L. Ed. 184).

The rule was laid down in *Shumway v. Stillman*, 6 Wend. (N. Y.) 448, 453, that:

"The judgment of a court of general jurisdiction, in any

state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: (1) If it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and (2) if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." *Teel v. Yost*, 128 N. Y. 387 (28 N. E. 353). Jacobi testified, upon the trial, that, some time before suit was brought, he and defendant went to Chicago, and talked the matter of his indebtedness over with plaintiff; that, at the time, plaintiff was indebted to him for commissions earned, in an amount in excess of the sum claimed by plaintiff; and that they mutually agreed to offset one claim against the other, and each acknowledged full settlement thereof; that plaintiff agreed to return to Jacobi the instrument signed by defendant. This testimony was corroborated by that of defendant. No other evidence was offered, tending to prove a revocation of the authority conferred by the warrant of attorney; but agreement between the parties to offset mutual claims, one against the other, was valid and binding, and had the effect of extinguishing the indebtedness, and, as a necessary incident thereof, revoked the authority conferred by the written instrument upon Sawyer to confess judgment against the defendant. A settlement by offsetting mutual accounts was as effectual to deprive Sawyer of authority to act under the warrant of attorney as actual payment of the debt, or a specific revocation. The evidence offered on behalf of defendant to sustain his claim of settlement was at least sufficient to entitle him to have that issue submitted to the jury. Whether the judgment was void because of some defect in the warrant of attorney, or whether same may be collaterally attacked for fraud practiced upon the defendant at the time the in-

strument was signed, depends upon the laws of the state of Illinois, proof of which as to numerous material matters is wanting.

II. The amount of the Illinois judgment was erroneous in two or three particulars. Plaintiff failed to give defendant credit for a portion of the commissions to which it is conceded he was entitled, and included therein a charge of \$12 for an overcoat, together with some other small items. Counsel for appellant quite earnestly argues that the inclusion of these items rendered the judgment wholly void. It would seem, however, that the judgment was erroneous only to the extent that it was unauthorized. *Davenport v. Wright*, 51 Pa. St. 292.

Plaintiff's attorney, at the time of moving for a directed verdict, also requested the court to instruct the jury to deduct the aggregate of the items erroneously included in the Illinois judgment, and to return a verdict only for the proper balance. This request was sustained, and the verdict returned was for the difference between the sums advanced under the contract, and the commissions allowed. Defendant complains of the court for permitting the deduction to be made by the jury; but this was, of course, without prejudice to him.

III. Defendant, by way of counterclaim, alleged that Jacobi was damaged in the sum of \$1,000 because of his wrongful discharge by plaintiff, and that this claim, together with an item of \$435 claimed by Jacobi as a balance due him for commissions, was assigned to him in writing, bearing date March 29, 1915, which was after this suit was commenced. The \$435 item is based upon the aggregate amount of sales made by another salesman in the territory assigned to Jacobi, after the plaintiff discharged the latter. Defendant also set up in his answer that he signed the instrument agreeing to pay whatever indebted-

2. PRINCIPAL
AND SURETY:
pleading counterclaim.

ness would be due it from Jacobi, as surety only, and pleaded the above alleged claims for damages and commissions as a counterclaim, under Section 3572 of the Code. This he had a right, with the consent of his principal, to do. *Reeves v. Chambers*, 67 Iowa 81, 83; *Beh v. Ray*, 127 Iowa 246, 248; *Secor v. Siver*, 165 Iowa 673, 676.

Upon objection of counsel for plaintiff, the written assignment was denied admission in evidence; but all of the competent evidence offered by defendant in support of his counterclaim was admitted. Defendant was not prejudiced by the ruling of the court sustaining the objection to the offer of the assignment. Possibly, same might have been admissible for the purpose of showing consent of Jacobi to plead the items as a counterclaim, under Section 3572.

Section 3570 of the Code provides:

"Each counterclaim must be stated in a distinct count or division, and must be: * * *

3. SET-OFF AND COUNTER-CLAIM: right of surety. "3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead."

* As the assignment of the items constituting the counterclaim was made after suit was commenced, the defendant could not rely thereon or plead same as a counterclaim. *Cawker City St. Bank v. Jennings*, 89 Iowa 230.

The court withdrew the counterclaim from the consideration of the jury, upon the ground that defendant failed to prove the alleged damages. In this, we think the court was right. All of the competent evidence offered by defendant upon this point was admitted by the court. The jury could not have formed an intelligent conclusion as to

4. DAMAGES: speculative damages: evidence.

the amount of damages, if any, that were sustained by Jacobi. While it is true that plaintiff agreed to pay Jacobi 7½ per cent commission for all goods sold, delivered, and paid for, the latter was to pay the necessary expenses incurred by him in making such sales. He could not, therefore, recover the full amount of commissions due for sales made in the territory assigned to him. His earnings as damages would have to be depreciated by the amount of expense necessarily incurred in selling the goods. *Hichhorn, Mack & Co. v. Bradley*, 117 Iowa 130; *Howard v. Brown*, 168 Iowa 410, 417. No evidence thereof was offered.

Many other alleged errors are discussed by counsel for appellant, most of which were wholly without prejudice in the court below. In view of the conclusion reached herein, we refrain from further consideration thereof. On account of the errors pointed out, the judgment of the court below must be and is—*Reversed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

BERTHA MILLER, Appellee, v. CITY OF ELDON, Appellant.

APPEAL AND ERROR: Presence of Facts Justifies Exclusion of

- 1 **Opinion.** Receiving an opinion from one party on a certain matter and rejecting the opinion of the other party on the same matter is harmless error, when the illuminating facts bearing on the matter in controversy are fully before the jury. So held as to whether a party had his team under control.

DAMAGES: Services Rendered by Unlicensed Practitioner.

- 2 injured by actionable negligence may recover of the wrongdoer such reasonable sum as has, in good faith, been paid for necessary medical services, *even though the practitioner was unlicensed*, and therefore practicing in violation of law.

Appeal from Wapello District Court.—C. W. VERMILION,
Judge.

JANUARY 23, 1919.

PLAINTIFF alleged in her petition that a team of horses, which she was driving upon one of the streets of defendant city, became frightened at an excavation and some obstructions in the street, causing her to be thrown from the buggy and severely injured, her buggy to be broken and damaged, and one of the horses so injured that it had to be killed. There was judgment upon the verdict of the jury in her favor for \$1,000, and defendant appeals.—*Affirmed.*

Adelbert Christie and Merrill C. Gilmore, for appellant.

Jaques & Jaques, for appellee.

STEVENS, J.—I. But two questions are argued by counsel for appellant. Plaintiff was permitted to testify that she approached the obstruction in the street with her horses under control. Counsel for defendant

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ence of facts
justifies ex-
clusion of
opinion.

sought to offer testimony of witnesses who saw the accident that, in their opinion, she did not, at said time, have the team under control, but that it was running away. Numerous witnesses called on behalf of defendant testified fully and minutely to the appearance of the team at the time, and after it had passed the obstructions, and described the efforts of plaintiff to stop and control the horses. From the details shown, the jury was in a position to determine whether the team was under the control of the driver, or whether the same was running away at the time it approached the scene of the accident, as accurately as the witnesses who were present and saw the occurrence. If it were conceded that the court committed error in the respect claimed, we are unable to perceive wherein the defendant was prejudiced thereby.

II. Included in the items of damages for which plaintiff sought recovery was \$100 for medical services alleged to have been rendered her by a chiropractor, who, it is conced-

2. DAMAGES:
services rendered by un-
licensed practitioner.

ed, was not authorized to practice medicine in the state of Iowa. Plaintiff paid for the services rendered before this action was commenced. Defendant objected to the evidence offered to prove this item, and requested the court to withdraw the same from the jury. The court, however, overruled the objection and motion to withdraw same, and permitted plaintiff to recover therefor. Defendant complains of this ruling of the court, and seeks a reversal on account thereof.

It is true we held, in *Lynch v. Kathmann*, 180 Iowa 607, that a person not authorized to practice medicine in this state cannot recover for alleged medical services rendered by him. See, also, *Rader v. Elliott*, 181 Iowa 156. But, so far as the record discloses, plaintiff employed the chiropractor and paid her for the services rendered in good faith. Having done so, she was entitled to recover the reasonable value thereof. *Dixon v. Bell*, 1 Starkie's Rep. 287; *Mueller v. Kuhn*, 59 Ill. App. 353; *City of Chicago v. Honey*, 10 Ill. App. 535, 538; *Klein v. Thompson*, 19 Ohio St. 569; *Ohio & M. R. W. Co. v. Dickerson*, 59 Ind. 317; *Houston & T. C. R. Co. v. Gerald*, 60 Tex. Civ. App. 151 (128 S. W. 166); *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443 (27 S. W. 752); *Lester v. Howard Bank*, 33 Md. 558 (3 Am. Rep. 211); *Cheuvront v. Horner*, 62 W. Va. 476 (59 S. E. 964).

It follows that the judgment of the court below must be—*Affirmed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

G. W. STORM, Appellant, v. GEORGE O. THOMPSON, Appellee.

MASTER AND SERVANT: Contractor (?) or Employee (?) One who, in pursuit of his regular occupation, contracts to remove

a stated number of trees from the land of another, for a stated price, plus the wood derived from such trees, and performs the work solely by his own labor, in his own time, and with his own tools, is a "contractor."

Appeal from Polk District Court.—THOS. J. GUTHRIE,
Judge.

JANUARY 23, 1919.

THE opinion states the case.—*Affirmed.*

John D. Denison and Royal & Royal, for appellant.

Brockett, Straus & Shaw and Frank T. Jensen, for appellee.

WEAVER, J.—The plaintiff, for a period of two years or more, had made a business of what he calls "tree work." Concerning it, he says his occupation was "anything to be done with trees, such as trimming, removing, and chopping them down. That is the way I make my living." The defendant was a contractor, engaged in grading a city street. The progress of this work appears to have required the removal of certain trees upon the land through which a way for the street was being cut. On March 17, 1917, the parties entered into a contract for the removal of the trees. The agreement was in writing, and, omitting the signatures, reads as follows:

"This contract, entered into by G. W. Storm, party of the first part, and G. O. Thompson, party of the second part, witnesseth:

"The party of the first part agrees to remove by grubbing, if necessary, sixty-two (62) trees, located on Sixth Avenue between Center and School Streets, for the sum of seventy-five (75) dollars and the wood that said trees will make.

"Party of the second part agrees to remove stumps from

job and furnish teams to haul wood to No. 1060, Sixth Avenue."

Plaintiff proceeded with the work mentioned in the contract, and, while so engaged, and in the act of removing one of the trees, he was accidentally injured, in such manner as to cause the loss of two fingers of his left hand. On the theory that he was an employee engaged in the service of the defendant, he made claim for an allowance of damages under the Workmen's Compensation Act. This demand was resisted by the defendant, on the ground that plaintiff was not its employee, but a contractor, and as such, did not come within the protection of the statute. The majority of the arbitration committee to whom the matter was submitted found against the plaintiff, on the theory that he was not an employee, within the meaning of the Compensation Act, but a contractor.

On the hearing before the court, the contract was introduced in evidence, and the fact of plaintiff's injury was shown. In addition, plaintiff testified that he did the work alone, using his own saws, axes, ropes, and other tools, but procured or borrowed from defendant a bar, pick, and shovel, for temporary use on some parts of the job. As the defendant's steam shovel was also working in that vicinity, and it was necessary to have the trees nearest the front of the shovel removed, to avoid delaying its operation, it was understood between the parties that this work should have priority of attention, and on several occasions, the defendant gave directions to that effect. Plaintiff controlled his own hours and times of work, so long as he kept it ahead of the shovel. After the accident, defendant furnished a man to complete, or to assist plaintiff in completing, the removal of the trees.

There is no dispute as to the facts in the case. The trial court affirmed the arbitrators' finding, and plaintiff appeals.

The Workmen's Compensation Act, after defining the

word "workman" as synonymous with "employee," and as meaning any person who has entered into the employment or works under contract of service for an employer, with certain specified exceptions, attaches to such definition the following proviso:

"Provided that one who sustains the relation of contractor with any person, firm, association, corporation * * * shall not be considered an employee thereof." Section 2477-m16, Code Supplement, 1913.

The question we have to consider in this case is whether the plaintiff's relation to the defendant, as shown by the evidence, is that of a workman, or employee, within the statutory definition of the term, so that he is entitled to an award in damages, or whether he is to be regarded as a contractor, and, therefore, not within the protection of the act.

Whether the distinction thus drawn between workman and contractor is, in all respects, logical and just, is a consideration for the legislature, and not for the court, which must apply and give effect to the statute according to its plain and unequivocal terms. The only debatable question, therefore, is whether, upon the admitted facts, the arbitrators and the trial court erred in classing plaintiff as a contractor. The term is one of very frequent use in common speech, and its meaning has often been considered by the courts. As is not unusual in judicial definitions of even the most familiar words, it has been variously phrased and interpreted; but we think there has been developed no radical difference of opinion as to its substantial meaning or effect. In its broadest sense, every person who enters into a contract or takes upon himself contract obligations of any kind is a contractor; but, as ordinarily used, it is applied to any person "who, in pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting him-

self to their control in respect to all its details. The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Jahn's Admr. v. McKnight & Co.*, 117 Ky. 655. See, also, *Caldwell v. Atlantic B. & A. R. Co.*, 161 Ala. 395; *Halstead v. Stahl*, 47 Ind. App. 600; *Carey-Lombard Lbr. Co. v. Jones*, 187 Ill. 203; *Humpton v. Unterkircher*, 97 Iowa 509, 514; *Carlson v. Stocking*, 91 Wis. 432; *Madix v. Hochgreve Brewing Co.*, 154 Wis. 448 (143 N. W. 189); *Parrott v. Chicago G. W. R. Co.*, 127 Iowa 419; 2 Words & Phrases 1534.

Tested by this rule, which seems to fairly reflect the consensus of judicial opinion, there can be little doubt of the correctness of the decision of the trial court in this case. The plaintiff made a specialty of this kind of work, and had supplied himself with substantially all the tools and appliances necessary for the performance of such jobs. His agreement with the defendant was to produce a certain result, to wit, the removal of 62 trees, standing on a described tract of ground. The method and manner of their removal was left wholly to his own choice and discretion, except that the trees should be "grubbed" where necessary. No right to control or direct the work was reserved to the defendant, though plaintiff says it was understood that he was to keep in front of the steam shovel, in order to clear the way for its operation. He was not limited in the time for the performance of the work, except as the law implied a duty to complete it within a reasonable period. He controlled his own time, and was, in all essential respects, his own master, being answerable to the defendant for nothing except the accomplishment of the promised result—the removal of the trees; or, if we go beyond the writing, the removal of the trees in such time as not to delay the

operation of the steam shovel with which defendant was doing the grading through the land from which the trees were to be taken. To say that, under these circumstances, the plaintiff was not a contractor, but an ordinary employee or servant, is quite impossible, unless we are ready to disregard all precedent. The statute must be presumed to have used the word "contractor" in the sense in which the term is commonly employed, and in which it has been defined by the courts; and we are satisfied that plaintiff's own showing brings him very clearly within that class.

This decision is in no way out of harmony with any of the authorities cited by appellant, unless it be *Rheinwald v. Builders' B. & S. Co.*, 168 App. Div. 425 (153 N. Y. Supp. 598). That decision seems to have been reversed on appeal (see 174 App. Div. 935 [160 N. Y. Supp. 1143]), and cannot be considered as of controlling authority.

The trial court did not err in holding plaintiff to be a contractor, and not an employee, within the terms of the Compensation Act, and the judgment is—*Affirmed*.

LADD, C. J., GAYNOR, PRESTON, and STEVENS, JJ., concur.

W. C. BROWN, Treasurer of State, Appellant, v. NELS PETERSON, Administrator, Appellee.

TAXATION: Treaty Limitations. A treaty provision to the effect that the alien, nonresident "representatives" of an intestate resident of this state shall succeed to the estate on the same terms as the inhabitants of this state may succeed thereto, includes "heirs," etc., and limits the collateral inheritance tax to 5 per centum.

Appeal from Henry District Court.—OSCAR HALE, Judge.

JANUARY 27, 1919.

THE opinion states the case.—*Affirmed*.

H. M. Hawner, Attorney General, and *C. A. Robbins*, Assistant Attorney General, for appellant.

W. F. Kopp, for appellee.

WEAVER, J.—*Nellie B. Ockerson* died intestate, April 25, 1914, and her entire estate passed to collateral heirs, subject to the inheritance tax provided by the statutes of Iowa. The administrator, conceding the liability of the estate to this charge, paid to the state treasurer an amount equal to 5 per cent upon the net value of the entire estate. Upon the filing of the final report, the state treasurer appeared, excepted thereto, and objected to the discharge of the administrator, upon the ground that three of the collateral heirs sharing in the estate were natives and subjects of the kingdom of Sweden, and their inheritance was, therefore, chargeable with a tax of 20 per cent, instead of 5 per cent. This claim was contested by the administrator. On hearing before the trial court, the exceptions taken by the state treasurer were overruled, the administrator's report was approved, and he was ordered discharged. From this order, the treasurer appeals.

The liability of the estate to the payment of the inheritance tax being conceded, the sole question to be considered is the rate at which the charge is to be computed. The general provision of the statute (Section 1481-a, Code Supplement, 1913), is that the rate generally applicable where inheritances are taxable is 5 per cent; but, where the property passes to heirs, devisees, or other beneficiaries who are aliens and nonresidents of the United States, it shall be subject to a tax of 20 per cent. Does the record make a case for imposing a tax at the latter rate?

It is conceded by the appellant, as has been heretofore held by this court, that, in so far as our inheritance tax may be found to be inconsistent with the stipulations or provisions of a treaty between the United States and any for-

eign nation or power, the latter must be allowed to prevail. It appears that, at the date of the death of this intestate, there was an existing treaty between the United States and Sweden, in which is found the following provision:

"The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise, and their representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may in accordance with and acting under the provisions of the laws of the jurisdiction in which the property is found take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases." Art. XIV, Treaty of 1911.

The trial court sustained the contention of appellee that this agreement between the governments forbids the imposition of the higher tax, and we are of the opinion that this interpretation of the compact is correct. The provision in question, being found in one long sentence, which includes many subsidiary clauses, is naturally somewhat difficult of statement or paraphrase in few words; but the idea sought to be expressed is not obscure. The word "representatives" manifestly refers to and includes all those who, in the absence of disability on account of alienage, would rightfully succeed, as heirs, devisees, or legatees, to the property and estate of a deceased citizen of either of the contracting powers. Bearing this in mind, it will be seen that the agreement provides (1) for the right of a citizen of either country to freely dispose of his property within the jurisdiction of the other; and (2) for the right and authority of citizens of either power to succeed, as heirs or legatees, to personal estates, within the jurisdiction of the

other power, subject to "such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases." If this be a correct construction of the treaty clause, no further discussion is required. Our statute, as we have seen, imposes upon such an inheritance by one of our own citizens a tax of but 5 per cent, and such must be the maximum charge upon an inheritance by a subject of Sweden. The appellant places some reliance upon the opinion in *In re Estate of Peterson*, 168 Iowa 511, where a succession tax of 20 per cent upon property inherited by a citizen of Sweden was upheld. An examination of the case reveals that it was decided upon the terms of a treaty between those powers bearing date in the year 1827. That agreement has since been abrogated or substituted by another, which was made in the year 1911. The language above quoted is from the more recent treaty, and we think it fairly susceptible of the meaning given it by the trial court. This conclusion is also quite in harmony with our rulings in *In re Estate of Moynihan*, 172 Iowa 571; *McKeown v. Brown*, 167 Iowa 489. The decisions in *Frederickson v. State of La.*, 64 U. S. 445, and *In re Estate of Anderson*, 166 Iowa 617, cited by the appellant, involving treaties with Wurtemberg and Denmark, we do not consider controlling, as they turn upon language in those treaties for which we find no equivalent expression in the present treaty with Sweden.

There is no error in the record, and the order appealed from is—*Affirmed*.

LADD, C. J., GAYNOR, SALINGER, and STEVENS, JJ., concur.

JAS. G. BULL, Appellant, v. L. WEISBROD, Appellee.

CONTRACTS: Forfeitable Land Contracts. Forfeitures of land
1 contracts for breach of contract conditions must be worked out
through the 30-day notice provided by Sec. 4299, Code Supp.,
1913.

ASSIGNMENTS: Land Purchase Contracts. A contract for the pur-
2 chase of land on monthly payments is assignable.

CONTRACTS: Forfeiture—Inconsistent Conduct. A party to a con-
3 tract may not demand and receive the amounts due under a
contract, and later, without any change of condition intervening,
claim that the contract has been forfeited.

VENDOR AND PURCHASER: Contract for Warranty. A contract
4 to give a warranty deed conclusively implies a warranty *against*
all incumbrances, even though vendor describes that which he
sells as "all my right, title, and interest."

Appeal from Union District Court.—HOMER A. FULLER,
Judge.

JANUARY 27, 1919.

ACTION to quiet title. Opinion states the facts. De-
cree for the defendant. Plaintiff appeals.—*Affirmed.*

D. Davenport and Jas. G. Bull, for appellant.

Hunn & Jones and P. C. Winter, for appellee.

GAYNOR, J.—This action was brought to quiet title to certain lots in the city of Creston, Iowa. Plaintiff claims to be the absolute and unqualified owner of the lots, and is in possession.

The defense interposed is that, on the 2d day of April, 1912, the plaintiff sold the lots to Ray B. and Doris Weisbrod, husband and wife, and, at the time of the sale, executed and delivered to them a contract, in writing, by the terms of which he agreed to sell to the Weisbrods all his

right, title, and interest in and to the lots, on the performance of certain agreements on their part, as follows: They to pay for the lots the sum of \$1,100, \$10 on the 20th day of April, 1912, and \$10 on the 20th day of each and every succeeding month thereafter, until the whole amount, with interest at 6 per cent per annum on unpaid amounts (the interest to run and be paid by stated monthly payments), was fully paid. The Weisbrods were to pay the taxes. The contract then provided:

"But if such sums of money, interest and taxes are paid promptly at the time aforesaid, the plaintiff will execute and deliver to them a warranty deed of said premises as above agreed."

On the 27th day of September, 1915, this contract was assigned to this defendant by the Weisbrods, and this action is brought against him as one claiming some interest under the contract, by virtue of this assignment.

There is very little dispute in the evidence. The only question here is the legal rights of the parties under the facts.

Upon the execution of the contract, the Weisbrods took possession of the property, and made payments in accordance with the contract. They subsequently moved to the state of Colorado. The husband went first, and the wife followed later.

Defendant is related to Mrs. Weisbrod. After the Weisbrods went to Colorado, defendant undertook to pay to the plaintiff all sums claimed by plaintiff to be due upon the contract. We may assume that these payments were made by him for the Weisbrods.

On July 17, 1915, defendant wrote to the plaintiff, enclosing a check for \$10, to apply on the contract, and, in the letter accompanying the check, asked him if there were any delinquent payments. The plaintiff received this check, cashed it, and, in reply, advised him that there was \$40 due

on payments, and \$85.28 on taxes and interest, and that he thought the Weisbrods had no notion of returning, and he didn't want to carry them any longer. Defendant replied to this letter, and enclosed a check for \$40, and asked whether he should send the taxes to the treasurer or to the plaintiff. Plaintiff replied substantially as follows:

"July 21, 1915.

"L. Weisbrod, Des Moines, Iowa.

"Your favor at hand enclosing \$40 to be applied on contract. I have paid the taxes in order to keep the premises from tax sale. So you will send the taxes to me. The amount includes the taxes for this year, due Jan. 1, 1915. This covers only the taxes for 1914. The next taxes due will be Jan. 1, 1916, for the taxes of 1915. Weisbrod has paid no taxes at all since they went on the place in April, 1912. They have been in the place 40 months, and have paid for 36 months. Your payment of the \$40 just at hand pays for the 40 months. The taxes and interest now due me is \$85.28."

On the 23d of July, defendant remitted to the plaintiff the \$85.28 due for taxes and interest, as stated in the preceding letter. On the 24th of July, the plaintiff returned to the defendant a receipt, in the following words:

"Received of L. Weisbrod, Des Moines, Iowa, eighty-five and 28/100 dollars, taxes, interest and penalty on Lots 3, 4, 5 and 6 in Block One, Levy's First Addition to Creston, Iowa, for and on behalf of Ray B. Weisbrod. This is in full of taxes, interest and penalty to date on taxes."

Thereafter, some controversy arose as to whether the \$40 remitted by the defendant to plaintiff did not overpay the amount due. The thought of the defendant was that, in paying the \$40, he had overpaid plaintiff. To this contention, the plaintiff replied:

"If you will count the amount of the payments from the first up to the time I wrote you, you will find they had paid

\$360, or 36 payments. If you will count the time, you will find it to be 40 months."

Thereupon, the defendant sent plaintiff, by letter, a list of payments as they appeared on the contract. Thereupon, the plaintiff wrote defendant:

"I think there is a further credit of \$5, which I failed to count. That will leave only \$5 to pay this month (August). So you will see I am right, except the error of the \$5 in the \$25 payment."

Thereupon, on August 21, 1915, the defendant remitted to plaintiff the \$5 in a letter, in which he said:

"Enclosed \$5 for balance payment on this month, and oblige."

This check was received and cashed by plaintiff.

On September 17th, defendant addressed another letter to the plaintiff, enclosing a check for \$10, to be applied on the contract. This check was returned to defendant in a letter reading as follows:

"Please find enclosed check you sent me for \$10. Mrs. Weisbrod, with her children, has left the premises and gone to her husband in Idaho. I have taken possession, and am having the premises fixed up. They had pretty nearly ruined them. They have paid no interest at all,—just \$10 per month rent. It will take at least \$100 to put the premises in living order. Ray left some months ago. She has now followed. I tried to help Ray, and also the wife; but they seem to be an indolent set, and Ray a dissipated fellow, so that he lost his place on the railroad. I hope he will do well in the country. I don't know his address."

To this, defendant replied:

"Will you please let me know by whose permission you have taken possession and are repairing the property? You state they have paid no interest. On July 17th, I wrote you in regard to back payments and taxes. In your letter of July 19th, you state he is behind in payments on contract,

\$40. Taxes and interest, \$85.28, both of which I paid. I would like to have the original tax receipts; also the amount of interest you claim they owed." ,

Plaintiff replied:

"'Taxes and interest' refer to the interest on the taxes, though I put none on. There is about \$175 interest only. The property has been damaged. It will take \$100 to repair it. They have paid \$420 on the property *as rent*, leaving a balance of principal, \$680; of interest, \$175."

To which the defendant replied:

"The contract which you made with the Weisbrods was assigned to me some time ago. Since then, these parties have made a written assignment and transfer of the contract to me, and have also quitclaimed their interest in the property. This assignment and quitclaim has been forwarded to the recorder. There is no more than one month due, and I sent you my check for that."

Defendant in his letter said:

"After receiving the check which I sent you to cover the amount that you said was due, you now claim there is interest on the deferred payments still due. In this connection, I want to call your attention to the contract, which specifically provides that the monthly payment includes the interest."

To this letter, plaintiff replied:

"The contract is not assignable. A man owning real estate has the right to choose with whom he will contract. I have Mrs. Weisbrod's note for \$10, with a credit of \$3.35. I gave them personal notice some time ago, when they were in default, and had it duly served by a constable, of a forfeiture of their rights under the contract. After notice had been served, they came to me with tears in their voice, and I *rented* the place to them from month to month, as long as they would continue to pay rent and keep the premises in repair; and if they did not default in the payments, and

would keep the place in good repair, and continue until the property was paid for, I would make them a deed. They have failed to keep the house in repair. They let it go to ruin."

Thereupon, the defendant, in a letter to the plaintiff, enclosed a quitclaim deed and \$1.25, with a request that it be executed by the plaintiff and returned to him at once.

This action was commenced on the 18th of January, 1916. Defendant has tendered to the plaintiff all the money due upon the contract. That is for September, October, November, and December, 1915. These tenders were made by check. The money was in the bank on which the checks were drawn. This was the manner in which payments had been tendered and accepted before. No objection was urged to the tender on the ground that it was a check. Plaintiff, upon this point, testifies:

"I could have got the check cashed, but defendant had no interest in the property; so I would not accept it. I owned the property then entirely. I returned the check for this reason, and this reason alone: that he had no interest in the property at all; that I owned it then entirely; that they had forfeited it; they had abandoned it; I had taken possession, and there was an agreement between Ray Weisbrod and his wife and myself respecting the abandonment and cancellation of this contract."

The record discloses no action taken to forfeit the contract, such as contemplated by Section 4299 of the Code of 1897, which provides:

1. **CONTRACTS:**
forfeitable
land contracts. "Any contract hereafter made for the sale of real estate * * * which provides for the forfeiture of vendee's rights therein upon the happening of certain conditions, shall not be forfeited or canceled unless, thirty days before a declaration of forfeiture is made, a written notice be served on the vendee or assignee, notice of whose rights as assignee has been

conveyed to vendor, and on the party in possession of said real estate, which notice shall be served in same manner and by same parties, authorized to serve original notices, and shall contain a declaration of an intention to forfeit said contract, and the reason therefor."

"Sec. 4300. For the period of thirty days after service of said notice the vendee, or those claiming under him, may discharge any unpaid payment * * * or perform any condition broken; and, if said payments are made or conditions broken are performed within said period of thirty days, the right to forfeit for defaults occurring before said notice is served is terminated."

Plaintiff's claim that he had an agreement with the Weisbrods to forfeit and abandon the contract, as made in his oral testimony on the trial, is wholly inconsistent with his conduct in exacting from this defendant unpaid sums due upon the contract, and the repayment of taxes paid upon the premises. So we do not consider that contention as having any support in the evidence.

The case, therefore, turns upon legal questions: Was the contract assignable? Did defendant obtain by the assignment the interests of the Weisbrods under the contract?

That it was assigned to the defendant by the Weisbrods is not in dispute. The effect of the assignment upon the legal rights of the plaintiff is contested. Our statute provides (Section 3044 of the Code of 1897)

2. ASSIGNMENTS: that all instruments in writing by which
land pur- one promises to pay to another, without
chase con- words of negotiability, a sum of money, or
tracts. a sum of money in property or labor, or to pay or deliver
any property or labor, or acknowledges any money, prop-
erty, or labor to be due, are assignable by indorsement there-
on, or by other writing, and the assignee shall have the
same right of action which the maker or debtor had against
any assignor. There is no provision in this contract against

the assignment. Out of it is created no fiduciary or confidential relationship. There is nothing in the nature of the contract that makes an assignment inequitable or unjust. But even if there were an inhibition against assignment, Section 3046 of the same Code still says it may be assigned, but the maker may avail himself of any defense or counterclaim against the assignee which he may have against any assignor before notice of such assignment is given to him in writing. See, upon this point, *Thomassen & Thomassen v. De Goey*, 133 Iowa 278.

The precise question here was considered by the Supreme Court of Minnesota in *Johnson v. Eklund*, 72 Minn. 195 (75 N. W. 14). That court said, speaking of the right to assign a contract such as we have here:

"There is nothing personal in the nature of the contract. All that the vendor was interested in was the payment of the purchase money at maturity. If he received this, it was wholly immaterial to him who paid the money or who got the land. At most, this stipulation against an assignment is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing performance of what was undertaken by the vendee, to wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against an assignment was intended to secure. Under such circumstances, the fact that the assignment to plaintiff was not countersigned by the vendor is no defense to an action by her to compel a conveyance."

In the last-mentioned case, the contract provided against an assignment unless the assignment was countersigned by the vendor. The assignment was made without such countersigning. The assignment was held good, as passing all the right of the assignor in the contract; and we must hold here that, when the Weisbrods assigned all

their right, title, and interest to the defendant, it passed to him all the rights that they had under the contract. At the time the assignment was made, all payments required by the contract had been made or tendered, and all the conditions to be performed by them were performed, either by them or by this defendant. At least, at that time, there was nothing of which this plaintiff could complain.

All that the contract required the Weisbrods to do, to preserve the integrity of the contract, had been done at the time plaintiff claims to have attempted to forfeit their rights under the contract. The possession taken by him was subordinate to the rights given to these Weisbrods. For the purposes of this case, we may assume that he had a right to take possession, for the purpose of preserving the property. At the time he took possession, he was receiving these payments from the defendant, for and in behalf of the Weisbrods. He then recognized the contract as in existence. He was then receiving from the defendant, for the Weisbrods, the money which he would not be entitled to receive, had all relationship under the contract ceased, as now claimed by him. If, as contended by him now, some arrangement had been entered into between him and Mrs. Weisbrod, by which the property was surrendered to him and all rights under the contract released, and Mrs. Weisbrod's occupancy was simply as tenant, paying rent. his subsequent conduct becomes strangely fascinating, because of its apparent and yet seemingly unconscious inconsistencies. If the contract had been abandoned by the Weisbrods, how can his subsequent conduct be explained, consistent with honesty of purpose? Assuming, as he does, that the defendant was acting for the Weisbrods, he wrote that there was still something unpaid upon the contract,—that he had paid the taxes for the Weisbrods, and was entitled to be reimbursed; told him of taxes to be

3. CONTRACTS :
forfeiture :
inconsistent
conduct.

paid under the contract for the coming year, and when they would be due. What interest had the Weisbrods in the taxes, if they had abandoned all rights under the contract, and were simply tenants, paying a monthly rental? What justification is there for taking this money from the defendant after the Weisbrods had left the property, or, as plaintiff now says, after they had abandoned the contract and the property?

At the time of the execution of the contract in controversy, it appears that there was a mortgage on the premises for \$500. It is the claim of the plaintiff, though denied by the defendant, that he informed Mrs. Weisbrod, before the execution of the contract, of the existence of this mortgage.

4. **VENDOR AND
PURCHASER:**
contract for
warranty.

He admits, however, that he did not communicate the fact to her husband, but excuses his conduct by saying that the knowledge of the mortgage was withheld from the husband on request of the wife. It is the plaintiff's claim that he agreed only to convey his right, title, and interest in the land; that it was his understanding, and the understanding of Mrs. Weisbrod, that they should take the property and pay the \$1,100 subject to this mortgage. The mortgage was of record,—a matter not vital to this controversy, in the view we take of it. The court, in its decree, ordered the defendant to pay or tender to the plaintiff the balance due upon the contract, together with such sums as the plaintiff had expended in improving the property since he took possession. Upon the payment of this, the decree directed the plaintiff to execute to the defendant a warranty deed, free and clear of incumbrance. This holding of the court is one of the questions here under consideration.

It will be noticed the contract recites that the Weisbrods bought, or agreed to buy, "the right, title, or interest" of the plaintiff in the premises; but it will be noted,

also, that plaintiff agreed, upon the payment of the sums of money stipulated in the contract, that he would execute to them a warranty deed. It is now the contention of plaintiff that, upon the payment of all the sums stipulated, he is required to execute only a warranty deed subject to this \$500 mortgage.

This brings us to a consideration of the effect of plaintiff's agreement in his contract to execute a warranty deed.

Our statute, Section 2958 of the Code of 1897, provides for the form of a deed in fee with warranty as follows: "I warrant the title against all persons whomsoever." The Code of 1851 provided for the same form of warranty. We must assume that it was the intention of the plaintiff, when he agreed to execute a warranty deed, to execute such a one as the statute contemplated, nothing further being said, and in form prescribed by the statute contemplated. In *Funk v. Creswell*, 5 Iowa 62, this court had occasion to give a judicial construction to the meaning of the words of the statute (Code of 1851, Section 1232, being the same as our present statute), and said that the general covenant of warranty was intended to include all the usual covenants in the deed of conveyance in fee simple. Again, in *Van Wagner v. Van Nostrand*, 19 Iowa 422, this court had occasion to determine the scope and legal effect of the covenant of warranty provided for in the statute. This decision was made under the Revision of 1860, Section 2240, in scope and purpose the same as our present statute. The opinion was written by Judge Dillon. He said, referring to the *Funk* case:

"That decision establishes that the general covenant of warranty [provided for in the statute] was intended 'to include and imply all the *usual covenants* in a deed of conveyance in fee simple.' The plaintiff in this action, upon the covenant set out in the statement [the statement referred to being, 'I warrant the title to the same, against all persons

whomsoever'], has all the rights which he would have had if the conveyance had contained express covenants of seizin, freedom from incumbrances, right to convey, and the like."

When plaintiff undertook and agreed to make to the Weisbrods a warranty deed, he undertook and agreed to make a warranty deed such as is contemplated by the statute, with the covenants of warranty contemplated by the statute, which, construed by this court, covers the very matter here in controversy. Whatever purpose the plaintiff may have had in inserting in the beginning of the contract that the Weisbrods had purchased his right, title, and interest, and whatever purpose he had in saying that he agreed to sell his right, title, and interest, was emasculated by his solemn promise to make to them a warranty deed, upon the performance of the conditions on their part to be performed. Under these decisions, the warranty deed which he agreed to make excludes any thought that the property conveyed should be subject to any incumbrance whatsoever. The warranty deed, when made, must be a warranty against incumbrance, for that is the legal effect of the warranty provided for in the statute.

Upon the record, we find that the contract was in force at the time this action was begun, and that it was rightfully assigned to the defendant; that the defendant was entitled to have it recognized as an existing contract; that, upon the payment of the amount contemplated in the contract, the defendant was entitled to a warranty deed from the plaintiff, in which is freedom from incumbrance.

Upon the whole record, we think the court was right; its decree certainly is just and equitable; and it is, therefore, sustained, and its action.—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

DES MOINES UNION RAILWAY COMPANY, Complainant, v. A.
B. FUNK, Industrial Commissioner, et al., Respondents.

MASTER AND SERVANT: Workmen's Compensation Act—Inter-
1 state Commerce. A servant injured at a time when he is en-
gaged in interstate commerce must resort to the Federal Em-
ployers' Liability Act,—may not resort to the state Workmen's
Compensation Act.

CERTIORARI: Right of Appeal—Effect. The right of appeal from
2 a wholly unauthorized proceeding does not exclude certiorari.
So held where certiorari was held to lie to review a finding by
a board of arbitration under the Workmen's Compensation Act,
in a case where both employer and employee were engaged in
interstate commerce at the time of injury.

Certiorari from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

JANUARY 27, 1919.

CERTIORARI to test the right of a commission appointed
under the Workmen's Compensation Act to hear and de-
termine the liability of a railroad company to its employee,
when the injury arose at a time when both were engaged
in interstate commerce.—*Reversed.*

Parrish & Cohen, for appellant.

Miller & Wallingford and *Oliver H. Miller*, for ap-
pellees.

GAYNOR, J.—Martin Walker was employed by the plain-
tiff company as a wheel borer in one of its shops at Des
Moines, where, on the 25th day of August, 1915, he was
accidentally caught upon the revolving shaft
of certain machinery, receiving injuries
from which he died. Prior to this accident,
both employer and employee had elected to
accept the terms of the Workmen's Compen-

1. **MASTER AND
SERVANT:
Workmen's
Compensation
Act: inter-
state com-
merce.**

sation Act (Chapter 147 of the Acts of the Thirty-fifth General Assembly). Myrtle M. Walker, widow of the deceased, applied to the Industrial Commission, alleging that her husband came to his death by accident, while in the course of his employment, and asking that her damage or compensation be assessed as provided by said act. A board of arbitration was organized, and proceeded to hear the case. The plaintiff herein, as the employer of the deceased, appeared, and denied liability, on the alleged grounds: First, that the deceased was not in the course of his employment at the time of his death; and second, that his said employer, plaintiff herein, was, at that time, engaged in business as a common carrier of interstate commerce, and the employee (for whose death compensation was asked) was, at the time of his death, in the service of the company in and about such business.

The board of arbitration found that the deceased was in the course of his employment at the time of the accident, and that he was engaged in the work of interstate commerce. It also found that the widow's claim was just and recoverable, under the Compensation Act, and assessed the amount of her recovery. Thereafter, the company (plaintiff herein) began this action in certiorari in the district court of Polk County, alleging that the industrial commissioner and the board of arbitration had exceeded their jurisdiction, in that the said company and the deceased were engaged in interstate commerce at the time of the accident, and that the whole remedy of the widow, if any she had, was under the statutes of the United States, or what is known as the Employers' Liability Act.

Upon these allegations, a writ of certiorari was issued to the industrial commissioner and to the widow of the deceased, requiring a return to be made to the district court of the record of the proceedings had before said commissioner and the board of arbitration. Full return was made

and certified to the district court, in obedience to the writ, and upon the showing thus made, the defendants moved to quash the writ and dismiss the certiorari proceedings, because the defendant company had a plain, speedy, and adequate remedy at law by appeal. This motion was sustained, the proceedings dismissed, and the plaintiff appeals.

A determination of the controversy here requires the consideration of the following propositions:

(1) Does the Workmen's Compensation Act provide for any appeal from the assessment of damages under the terms of the said act?

(2) If there be a right of appeal, is it exclusive, or may the jurisdiction of the commission and the board of arbitration in any given case be questioned and determined in a certiorari proceeding?

(3) Does the fact, if it be a fact, that the deceased was killed while employed in interstate commerce, bar his widow from the right to demand and receive the benefit of the Workmen's Compensation Act?

We will consider the last proposition first: Is one entitled to invoke the said Workmen's Compensation Act, when it is shown that both the employer and the employee were, at the time of the injury, engaged in interstate commerce?

For the purposes of this decision, we assume that they were so engaged. The commission so found. There never has been any doubt among the courts that, when Congress acts upon a subject, all state laws covering the same field are necessarily superseded, by reason of the supremacy of the national authority. But there has been some controversy as to whether the Federal Employers' Liability Act does cover injuries occurring without negligence. It has been the contention of some able counsel, and is the holding of some of the state courts, that the Federal Employers' Liability Act covers or regulates the liability or obligation of

carriers and the right of the employee only for injury resulting in whole or in part from negligence, and does not cover injuries occurring without negligence. Following this line of reasoning, some of the courts have held that the state Workmen's Compensation Act could be invoked and relied upon, and relief given, in cases where the liability is not predicated on negligence; and the thought in the reasoning is that the Federal Employers' Liability Act covers liability arising from the negligence of the carrier only. The Supreme Court of New Jersey, in *Winfield v. Erie R. Co.*, 88 N. J. L. 619 (96 Atl. 394), held that, where the Federal Act affords no remedy,—that is, where the injury occurs under such circumstances that no liability is imposed upon the carrier by the act,—the injured employee may invoke the remedy given by the state statute; so it was said that, in order to defeat the right to invoke the state Workmen's Compensation Act, it must affirmatively appear that a right of action is given to the widow or personal representative of the employee by the Federal statute: in other words, that it must appear that the injury resulted in whole or in part from negligence chargeable to the defendant company, in order to bring it within the Federal Employers' Liability Act. On this basis of reasoning, that court held that the liability sought to be enforced was not a liability arising out of negligence, and, therefore, was not covered by the Federal Employers' Liability Act, but rested on a contractual obligation created by the state statute, consented to by both the employer and the employee; and said, in substance, that the injured party is entitled to invoke the state statute, in the absence of any averment by her, or any proof offered, or any admission made by the defendant company, showing that the death of her decedent resulted from the defendant's negligence; that negligence is essential to create a liability against it under the Federal statute.

The New York Court held to substantially the same doctrine in *In re Winfield v. New York Cent. & H. R. R. Co.*, 216 N. Y. 284 (110 N. E. 614). The California and Illinois Supreme Courts, however, held to a different doctrine. *Smith v. Industrial Acc. Commission*, 26 Cal. App. 560 (147 Pac. 600); *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356 (109 N. E. 342). In the last-named case, it was said:

"The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute laws of this state on that subject have been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads, is occupied exclusively by the Federal Employers' Liability Act—and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

Whatever controversy may have existed has now been set at rest by the decision of the Supreme Court of the United States; and the doctrine announced by the courts of California and Illinois has been approved. *Winfield v. New York Cent. & H. R. R. Co.*, heretofore cited, came to the Supreme Court of the United States, and is reported in 244 U. S. 147 (61 L. Ed. 1045); and it was held that the doctrine announced by the Supreme Courts of New York and New Jersey was wrong. It was said:

"True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence; but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury resulted from negligence imputable to it. Every part of the act conforms to the principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. * * * It was the intention of Con-

gress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence."

In *Erie R. Co. v. Winfield*, 244 U. S. 170 (61 L. Ed. 1057), these questions were presented:

"First, Whether the Federal Employers' Liability Act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence, for which the carrier is responsible. * * * Third, Whether, by reason of the state statute [State Workmen's Compensation Act], the carrier became bound contractually to make compensation in this instance, even though it came within the Federal act."

The disposition of the first question was made by referring to what was said in *New York Central R. Co. v. Winfield*, 244 U. S. 147, saying further:

"We are of opinion that the Federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive."

Answering the other question, the court said that the Workmen's Compensation Act differed materially from the Federal act. The Workmen's Compensation Act rejects negligence as a basis of liability, and requires compensation to be made by the employer, wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective." and is

not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby, and to surrender their rights "to any other method, form, or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute; and unless the contract or a notice from one part to the other contain "an express statement in writing" to the contrary, it "shall be presumed that the parties have agreed to be bound" by this part of the statute. The court then said:

"But such a presumption cannot be indulged here, and this for the reason that, by the Federal act, the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the state laws. It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of the state statute, or by imputing such an election to them by means of a statutory presumption. This question must, therefore, be answered in the negative."

We deduce from these holdings that all controversies touching the liability of a railroad company engaged in interstate commerce to its employees engaged in the same way are removed by the Federal Employers' Liability Act from the sphere of state legislation, and that the commission provided for in the statute, for ascertaining and determining liability between employer and employee, has no jurisdiction when the injury occurred while both parties were engaged in interstate commerce.

This brings us to a consideration of the first and second propositions hereinbefore stated.

It appears that, when the matter came before the commission, the plaintiff raised the ground of jurisdiction, and

claimed that both parties were engaged in interstate commerce, and that the rights of the parties were regulated and controlled by the Federal Employers' Liability Act. The commission, however, proceeded to determine the question of liability, and did determine that the plaintiff in this suit was liable for injury under the provisions of the Workmen's Compensation Act. Thereupon, this plaintiff sued out a writ of certiorari, alleging and claiming that the tribunal was without jurisdiction to hear the matter. The defendant in this suit came into court, and moved to dismiss the writ, for the reason that the plaintiff had a plain, speedy, and adequate remedy at law. This was sustained.

Under the statute, no appeal lies from the action of the commission. The commission acts, and determines the rights of the parties, and its finding is filed in the district court, and a judgment is there entered in accordance with the finding. That is the first time that the right of appeal attaches. The direct claim of plaintiff is that the inferior tribunal, from whose action no appeal lies, had exceeded its jurisdiction, and was acting illegally in the premises. Our statute (Sec. 4154, Code, 1897), provides:

"The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

It is the general holding of the courts that, where the objection made is one of jurisdiction,—of a jurisdictional nature,—and it is shown satisfactorily that the proceeding sought to be reviewed is wholly unauthorized, the mere right of appeal is not speedy or adequate, within the meaning of the statute, and certiorari will, therefore, lie. *Davis v. Preston*, 129 Iowa 670; *Young v. Preston*, 131 Iowa 292,

293; *Ryan v. Hutchinson*, 161 Iowa 575; *Barry v. Black Hawk County Dist. Court*, 167 Iowa 306; *Timonds v. Hunter*, 169 Iowa 598; *United States S. Voting Mach. Co. v. Hobson*, 132 Iowa 38.

It is true that the mere allegation that a tribunal is acting without jurisdiction is not, in and of itself, sufficient to justify the issuing of a writ, in all cases. But, when some substantial fact is shown which, if true, proves that the proceeding complained of is unauthorized, and that the tribunal is without power or authority to entertain it, then certiorari lies. In the instant case, the jurisdiction was challenged on the ground, which is not disputed, that both parties were engaged in interstate commerce at the time of the injury. If this be true, then, under the holding of the Supreme Court of the United States, the commission constituted by the Workmen's Compensation Act had no jurisdiction of the subject-matter of this controversy. Further than that, it is not sufficient that there appear to be a right of appeal. The remedy afforded by appeal must be plain, speedy, and adequate. Is remedy by appeal speedy when, by the act itself, the right of appeal is postponed until after a judgment has been entered against the party complaining? The commission was without jurisdiction. It had no right to hear and determine any fact upon which the court, under the statute, might enter judgment. Can it be said that the remedy by appeal is speedy when no direct appeal is allowed from the action of the body whose right to act is questioned, and when the right to review is postponed until after the judgment has been entered upon its illegal and unauthorized findings? Jurisdiction involves the right to hear and determine. The writ of certiorari is allowed, to the end that the right to hear and determine may be investigated. Certiorari is the remedy, under our statute. Plaintiff questioned the commission's right to take evidence,—to hear and determine the liability of this plain-

tiff,—and shows that the subject-matter under investigation is not within the jurisdiction of the tribunal attacked. No discussion can make plainer the fact that the commission had no jurisdiction to inquire into or determine any fact touching the liability of this plaintiff to the injured party, when both were engaged in interstate commerce. The commission assumed jurisdiction. It assumed the right to make a report to the district court, upon which, under the law, without notice to this plaintiff, judgment would be entered against the plaintiff. The proceeding here called in question the very right to do this thing; questioned the right of this tribunal to do it. It was the only speedy remedy open to the complainant here. He was not required to sit by and permit a tribunal, acting upon a subject-matter over which it had no jurisdiction, to determine the existence of a liability which, under that statute, must merge into a judgment, and then appeal from that judgment.

The remedy by appeal was neither plain, speedy, nor adequate. The right to a writ of certiorari existed. The court erred in quashing the writ. The cause is, therefore,—*Reversed.*

LADD, C. J., PRESTON and STEVENS, JJ., concur.

IN RE ESTATE OF J. C. MANSFIELD.

HUSBAND AND WIFE: Antenuptial Contracts—Family Expenses.

- 1 A clause of an antenuptial contract which provides that each party "agrees to contribute to the family expenses" in a named proportion, is not effective in favor of the wife after the death of the husband.

EXECUTORS AND ADMINISTRATORS: Life Maintenance to

- 2 **Wife.** Principle recognized that a wife may not, on the death of the husband, demand support and maintenance from the husband's estate, independent of and supplemental to the rights given to her by statute.

Appeal from Shelby District Court.—THOMAS ARTHUR,
Judge.

JANUARY 27, 1919.

THIS case involves the right of a widow to support out of the estate of her husband, because of the provisions of an antenuptial contract. Opinion states the facts. Demurrer to the petition or claim of plaintiff sustained in the court below. Claimant appeals.—*Affirmed.*

Byers, Byers & Miller, for appellant.

Edward S. White, for appellee.

GAYNOR, J.—This action involves the right of the widow to have a claim allowed against the estate of her husband.

The record does not disclose when the husband died. It does show, however, that, on the 25th day of April, 1916, letters of administration were issued to J. C. Mansfield,

who qualified and gave due notice of his appointment. On the 23d of April, 1917, the widow, Genevra A. Mansfield, filed with the clerk of the court her claim, duly verified, and substantially as follows: That she is the widow of deceased; that she was married on or about the 29th day of June, 1903; that, before the marriage, an antenuptial contract was entered into between her and her deceased husband, in the following words:

“This antenuptial contract, made and entered this the 29th day of June, 1903, by and between Joseph C. Mansfield of Shelby, Shelby County, Iowa, party of the first part, and Mrs. Genevra A. Sampey, of Shelby, Shelby County, Iowa, party of the second part, witnesseth: That whereas the said Joseph C. Mansfield and the said Genevra Sampey have entered into a contract for marriage to be solemnized in the near future, and both of the said parties hereto having real as well as personal property in their own names,

1. HUSBAND AND
WIFE: ante-
nuptial con-
tracts: fam-
ily expenses.

they do therefore make this antenuptial contract and agreement, which shall be mutually binding upon both parties hereto, and their heirs, administrators and assigns forever, to wit: First. That each of the parties hereto shall operate and manage their own property, both real and personal, independently of the other, the same as though they were not married. Second. Each party hereto hereby waives all right of dower which they would otherwise have, in and to all of the property of the other, and also waive all distributive interest which either would otherwise have in the personalty of the other. The intention being that neither shall have any interest in the property of the other, any more than if they had never been married. Third. Each party hereto hereby agrees to contribute to the family running expenses in proportion to their net income from their respective properties."

After the making of the said contract, the marriage was duly consummated. At the time of the execution of said contract, she, the widow, had no property whatsoever. The husband was the owner of both real and personal property, aggregating \$3,500. His estate is now worth approximately \$50,000. She has, since the marriage, acquired property, and has, at this time, property worth approximately \$10,000. No children were born to this marriage. She, the widow, is now 57 years of age. The sum of \$1,000 per annum is necessary for her support: that is, to support her in the circumstances in which she lived as the wife of the deceased.

It is claimed that, under the terms of the antenuptial contract, the estate of deceased should continue to contribute to the "family running expenses;" that the running expenses, in proportion to the net income from the respective properties, are \$1,000 annually; that it is necessary, and for the best interest of the estate, that it be closed within three years. To this claim the administrator appeared, and filed a demurrer alleging that the facts stated

in the claim or petition do not entitle claimant to the relief demanded, for reasons hereinafter referred to. This demurrer was sustained, and the claim disallowed; and from this, the widow appeals.

That the contract, herein set out, is one which the parties to it were competent to make, and that, when made, it is binding upon both, in the absence of fraud, mistake, or undue influence, see *Fisher v. Koontz*, 110 Iowa 498, and cases therein cited. Such contracts are favored by the law. They tend, under some conditions, to promote happiness, by settling property questions which otherwise might be fruitful of dissension. Especially is this true when either or both of the parties had been previously married, and had children. The intent of the parties in making the contract, and the purposes sought to be attained by its making, when made plain in the contract, are recognized and enforced by the courts. When the contract is plain and unambiguous on its face, and the meaning is plainly indicated upon the instrument itself, there is no occasion to resort to any of the rules of construction. In construing a contract, and in ascertaining its meaning and the purpose of the parties, the words used must be given their usual and ordinary signification. There should be no unnatural or strained construction given to any part of the contract, in determining the intent and meaning of the parties. The contract should be construed as a whole, and every part given fair consideration in its relation to all other parts.

This record discloses that the claimant had been married before, but whether she had children or not does not appear. Whether he had been married before and had children, does not appear. He had property. She had none. The contract looked to the future. It had, in its purpose, the fixing and settling of rights in property in existence, and to be acquired during the continuance of the contem-

plated marriage. The contemplated marriage would, of necessity, result in the establishment of a home and family relationship, to preserve the integrity of which it was provided that each should contribute from his or her property in proportion to the net income. The family created by the marriage continued during the life of the marriage. Of course, children might be born, and in that way the family enlarged, and to their support, contribution was required, under the contract. Here, no children were born. Upon the death of either party, the family created by the marriage ceases to exist. Neither of the parties to the contract, in the contract, agreed to support the other after the dissolution of the marriage. Ordinarily, the wife, as such,

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AND ADMINIS-
TRATORS: life
maintenance
to wife.

has no right to support from the husband's property after his death. The rights given to her by statute are the right of homestead, the right of dower in his real estate, and the right to a distributive share of his personal property; and on this the law places limits, and the right of support for one year. No matter whether the property left by the husband is inadequate for the support and maintenance of the wife after his death, she can get from his estate only that proportion of the property left by him, which the law gives to her. There is no legal obligation on the estate of the husband to support the wife after the death of the husband, and there is no legal obligation resting upon his heirs to do so. If no antenuptial contract had been made, the plaintiff could not legally demand and receive what she is now asserting a right to have: to wit, support and maintenance during her life, out of the property of the deceased, independent of, and supplemental to, the rights given her by statute. When she entered into this antenuptial contract, she surrendered the right of dower in his real estate, and the right to a distributive share of his personal property. She stands, then, the same as if, under the law, there

was no provision made for her out of his property upon his death. In the absence of any legal right to participate in the estate left by the husband, she is without right to assert a claim. The claim made here, however, is that, though she has surrendered all rights given her by statute, the contract in question preserves to her the right now asserted. So, in making this claim, she relies upon that provision of the contract which reads, "Each party to the contract agrees to contribute to the running family expenses." Her claim is that death did not destroy the family; that the family still remains, and that she is it; that the family still remaining "has running expenses" to which the other contracting party is bound by the contract to contribute.

The statute (Section 3165 of the Supplement to the Code, 1913), provides:

"The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

This statute has stood upon the books for many years, and yet no one has ever had the temerity to claim that the rights and duties and liability created by this statute continued after death. Upon the death, the property passes to those legally entitled to it, unincumbered by any right of the family, as such, to receive support from it. The owner of the property, notwithstanding this statute, can dispose of it by will, and, on such disposition, it passes absolutely to those to whom it is bequeathed, and this, though the family, as such, is left with no means of support; and this is true, though the wife is a member of the family while it exists. Under this statute, she can receive no more upon the death of her husband than her dower right, her distributive share in his property, and the allowance for her support for one year. This may be wholly inadequate for her support, and yet the law makes no provision for

her, after his death, other than this. Though the share in the husband's property given to the wife is wholly insufficient for her support, the law gives her no further claim. No one has ever thought of construing this statute to say that the wife, after the death of the husband, is entitled, by virtue of the statute, to the support of herself and family out of his property during the life of the wife. The provision of the contract relied upon is not broader in its scope and purpose than is this statute. The family referred to is the family that continues to exist during the life of the husband. That is the family that was contemplated by the contract. That is the family that was brought into existence by the marriage. That is the family that continued to exist, only during the life of the marriage. Upon the dissolution of the marriage, the obligation to support the wife ceased, both under the contract and under the statute. The wife has not here invoked the statute which authorizes an allowance for the support of the widow for one year. The rights she is seeking to enforce here are her rights which she claims grow out of the antenuptial contract; and this contract does not give to her a continuing right to support, after his death, even though we should assume that she is a family. As we have already said, the contract must be interpreted so as to carry out the purpose and meaning of the parties to the contract; must be construed to carry out the evident intent of the parties in making the contract. Let us suppose that children came of this marriage, and that, upon the death of the husband, the family consisted of the wife and the children. The wife having waived all right to the property, it passed to these children, as the heirs at law of the other contracting party. If no antenuptial contract had been made, it would pass to them the same, except that the widow would be entitled to her distributive share out of the property. This is the only provision which the law has made for the wife, and

this she has surrendered. With the dissolution of the marriage, happening immediately upon the death of the husband, the family contemplated by this contract ceased to exist, and the provisions of the contract relied upon ceased to be operative.

On the whole record, we think the plaintiff has shown no right to what she is now claiming, and the demurrer was rightly sustained.—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

J. F. MALLOY, Appellant, v. CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellee.

RELEASE: Unintentional Misstatement of Present Fact. A statement by a physician that an injured party "was all right to go to work," "was all healed up," "was just as good as ever," based on the injured party's apparent condition, and on the history of his injury, is a statement of *present fact*, and, if untrue, even unintentionally so, is sufficient to avoid a release entered into in full reliance that such statement was true.

RELEASE: Release at Law. The avoidance of a release on the ground of mutual mistake may be had in an action at law.

RELEASE: Return of Consideration. A release may be avoided for mutual mistake *without returning the consideration received* for the release, when it appears that the consideration was given to the injured party for known and acknowledged injuries, and for nothing else,—i. e., loss of time. And evidence is admissible to show for what the consideration was given.

APPEAL AND ERROR: Related Objection to Pleading. Inconsistency in pleading both fraud and mutual mistake in avoidance of a release may not be urged for the first time on appeal.

RELEASE: Fraud—Jury Question. *Semble*, that a positive statement by the physician of a railway company, untrue in fact, that an employee "was as good as ever," made with full knowledge that the statement would be used as a basis for settlement with the company, is sufficient to carry to the jury the issue of fraud in the subsequently executed release.

Appeal from Webster District Court.—R. M. WRIGHT,
Judge.

JANUARY 27, 1919.

ACTION to recover damages resulted in a directed verdict for defendant and judgment thereon. Plaintiff appeals.—*Reversed.*

H. W. Stowe and Mitchell & Files, for appellant.

Carr, Carr & Evans and Price & Burnquist, for appellee.

LADD, C. J.—I. The plaintiff was in the employment of defendant, in the evening of March 17, 1915, as one of the helpers in a switching crew. At about 10:30 o'clock, he attempted to get on a car, for the purpose of switching the same and placing it in a train which was being made up. The car was of a style known as the "Gondola" or Hart Convertible. The sides of the car are fastened with hinges at or near the top, with clasps at the bottom. When the clasps are broken or unfastened at the bottom, the sides swing outward: that is, when lifted by hand, or swung by a movement of the car. The car, at the time, was moving in a southeasterly direction, and, while carrying a lantern in his right hand, plaintiff put his foot on the sill-step in the right-hand side and at or near the front, and took hold of the side handrail with his left hand, and attempted to mount the car. As he did so, one of the seven doors constituting the side of the car swung out, caught him, and broke his hold; and, in his words, "My foot struck the ground, and I hung with this hand, and it jerked."

The petition alleged that, in falling, he sprained and lacerated the ligaments of his side, and ruptured a blood vessel or vessels in his lungs; that these injuries were caused by the negligence of the defendant, in permitting the car to be handled with the sides unfastened, knowing that, in

such condition, it was dangerous, in failing to warn plaintiff of its dangerous condition, and in permitting to so remain thereon a sill-step of dimensions of that used; that, in attempting to go on the car, he pursued the customary method; and that his injuries were permanent: and it prayed recovery of damages suffered.

The answer admitted the employment, and that plaintiff was injured; but put the other allegations in issue, and pleaded that, on or about June 15, 1915, the parties hereto compromised the claims sued on, and that, in consideration of \$450 paid him, plaintiff released all claims for damages; and prayed to go hence with its costs.

In reply, plaintiff pleaded that the alleged settlement had been obtained by fraud, and also that it was obtained in consequence of a mistake.

At the close of the evidence, defendant moved the court to direct a verdict in its favor, for that: (1) The evidence failed to show that the condition of the car, as alleged, had existed for such length of time as that defendant was charged with notice, and in the exercise of ordinary care must have repaired same prior to the injury; (2) the evidence was insufficient to show that the compromise was void by reason of fraud; (3) the mistake, if any, was insufficient to set the compromise contract aside, or to render it invalid; and (4) the evidence failed to show any mistake in plaintiff's condition as it in fact was. This motion was sustained, and the only issue presented in this case relates to the sufficiency of the evidence to raise an issue for the jury as to whether the settlement was based on fraud or mutual mistake.

In order to establish the alleged fraud and mistake, the plaintiff has testified to the injuries, as alleged, and to his treatment, first by Dr. Wasen, and afterwards by Dr. Saunders, of Ft. Dodge, and to having spit blood after the injury continually, except for three weeks, and related that

the agent of the defendant at Ft. Dodge handed him a note dated June, 1915, from the superintendent, saying: "Please tell Malloy to come to Oelwein whenever he is ready, and get me by calling Jess Beale's residence on phone." Later, in the same month, he telephoned the agent to communicate a similar message to plaintiff, and on the 15th of the month, requested the agent to "phone Malloy to come to Oelwein at any time, now." Following this last communication, the plaintiff called on Doctor Saunders, the company's physician at Ft. Dodge, and informed him that the superintendent had sent for him, and inquired of the doctor concerning his condition. Plaintiff testified that the doctor said:

"'Did Kinzey send over after you?' and I said, 'Yes, sir.' 'Well,' he said, 'You are all right to go to work now.' He said, 'You are all healed up and everything. When did you spit any blood?' I said, 'I have not spit any blood for about three weeks, I think.' 'Well,' he said, 'you are all right then; but,' he said, 'if you ain't in any hurry, it would be all right to rest a few days longer.' 'Well,' I said, 'what would you call a few days, Doctor?' 'What would you say about the first of July?' he said. 'That is all right.' And he put his hand on my shoulder, and he said, 'You are just as good as ever, Jimmie.'"

The witness swore that he believed Dr. Saunders, and relied upon the statement made to him, and went to Oelwein that night, where he met the superintendent the next day, and:

"I told him I was all right, and he said, 'Yes, I heard you were.' I told him Dr. Saunders said I was all right, and he said he heard I was. We went into the office and out to the yard office, and he figured out my time. He showed me what time I had lost, and wrote out a check for it, and I signed a receipt; and that was all there was

to it. We figured out what the understanding was, and the money we figured it out by the hours."

In signing the receipt, he relied upon what Dr. Saunders told him, and had no other knowledge of his physical condition. Later, he explained that, when he told the superintendent that Dr. Saunders said he was all right, the superintendent replied:

"Well, I have gotten a report from Dr. Saunders, too, and he said you was all right, and you can—we will settle up now, and you can go to work."

He was receiving 37 cents an hour, and the amount was arrived at by computing at that rate. He undertook to work, but was compelled to quit on account of his injury,—having started again to spit blood, and passing blood through the bowels, and continued in that condition up to the time of the trial. The testimony of the plaintiff's wife corroborated his account of the interview with Dr. Saunders.

From this evidence, the jury might well have found that both plaintiff and the defendant, acting through its superintendent, based their settlement on the statement by Dr.

Saunders, that plaintiff was all right "to go to work, now," and that he was "all healed up," and that he was "just as good as ever." Had this been merely an opinion or prophecy as to what might happen in the future, or as to the future results of an injury, and that foretold by way of opinion or prophecy did not happen or result, what was said could not be treated as in the nature of a mistake of fact. *Seymour v. Chicago & N. W. R. Co.*, 181 Iowa 218. A mistake of fact, to constitute the basis of rescission, must relate to some present or past event, and the vital question to be determined is whether what Dr. Saunders said were statements of fact, or merely matters of opinion. If these were statements of fact, it is not very important through

1. RELEASE: unintentional misstatement of present fact.

what process of reasoning or proof they were arrived at,—whether from observation or deductions based on expert or scientific knowledge. The doctor, basing his conclusion on the patient's apparent condition and the history of his ailment, pronounced him then in a condition to go to work, "all healed up," "as good as ever." These statements related to the present, and described his condition in apt language as it then was; and we entertain no doubt in saying that they were statements of facts, and so intended.

In *Haigh v. White Way Laundry Co.*, 164 Iowa 143, a statement by the defendant's agent that the tendons of plaintiff's hand were injured, and that her injuries were trifling, was held to be merely a statement of fact.

In *Huston & T. C. R. Co. v. Brown*, (Tex.) 69 S. W. 651, a release was obtained, based upon representations made by a physician representing the railway company, that the "bones of his arm had knitted and united together, and that the arm was well;" and the court held that these were statements of fact. In response to the contention that they were mere expressions of opinion, the court said:

"The effect of his statement was that the appellee was a sound man, and that the bones of his arms had knitted together, and that it would be all right. It is true that this statement may have been predicated upon his opinion as a medical expert; but the opinion is based upon the facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside, if he was misled by the statement, and executed the release believing the statement was true. In such a case, innocent misrepresentation may as well be the basis of relief as where such statements are intentionally false."

In *Great Northern R. Co. v. Fowler*, 69 C. C. A. 106, the company's surgeon made an examination of the complainant, and found that his injuries consisted of a wound

of the scalp, a contusion of the shoulder, and nothing else, and expressed the opinion that he would be ready to go to work in a couple of weeks. In reliance, settlement was made; but the release was rescinded, owing to mutual mistake, upon a showing that his skull was then fractured, necessitating the removal of a part of his skull, which was pressing on the brain.

See, also, *Lumley v. Wabash R. Co.*, 22 C. C. A. 60; *Nelson v. Chicago & N. W. R. Co.*, 111 Minn. 193 (20 Am. & Eng. Ann. Cas. 748).

In *Tatman v. Philadelphia, B. & W. R. Co.*, 10 Del. Ch. 105 (85 Atl. 716), the test is said to be:

"Is the evidence in this case clear and convincing that the complainant was induced to compromise her claim and to execute her release by a mistake of past or present fact material to her contract?"

The distinction between a mistake in opinion or prophecy as to the future and one of past or present fact is pointed by Judge Sanborn in *Chicago & N. W. R. Co. v. Wilcox*, 54 C. C. A. 147, in saying:

"* * * It is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief, relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and, in the nature of things, are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may

turn out to be mistaken, and assumes the chances that they will do so."

All that was said by the physician related to the present condition of plaintiff,—to him as he then was,—regardless of the future; and we are of opinion that his statements were of matter of fact, made as such by him, knowing that they would be considered as such in negotiating a settlement between the parties; and that, in making settlement, both parties relied thereon, as indicating permanent restoration to the condition of health previous to the injury.

2. RELEASE: release at law.

II. The issue as to whether the release was the result of mutual mistake, was triable at law. *Reddington v. Blue*, 168 Iowa 34; *Seymour v. Chicago & N. W. R. Co.*, supra.

III. The consideration paid for the release was \$450, and this was not returned to the defendant or tendered to it, prior to the commencement of the suit or at any other time. Ordinarily, as a condition precedent

3. RELEASE: return of consideration.

to rescission, an offer to return the consideration received is essential to the maintenance of the action. *See v. Carbon Block Coal Co.*, 159 Iowa 413. But where the amount paid was for some specified injury, or for loss of time or the like, and it is sought in the action to recover for some additional injury not contemplated in the contract of release, or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment was for loss of time only, or specific items other than injuries on which the action is based, then and in any such event, tender of return of the consideration is not essential to the maintenance of the action. This is for the reason that, as to the amount paid, there has been no mistake of fact, and the releasee has the benefit of what he has paid for, and the releasor may not recover therefor again.

The vice is in the release, in that the parties, through

or by the mistake of fact, have been misled in recovering, by the terms of the release, damages consequent on injuries not taken into account in making the adjustment, and such damages alone may be recovered, in the absence of a return of the sum received by the releasee. This appears from *Reddington v. Blue*, 168 Iowa 34; *Meyer v. Haas*, 126 Cal. 560 (58 Pac. 1042); *Lumley v. Wabash R. Co.*, 22 C. C. A. 60; *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447; *Wabash W. R. Co. v. Brow*, 13 C. C. A. 222.

The plaintiff testified that, on June 16, 1915, the day the release was executed, he told the superintendent of the company that he was all right, and Dr. Saunders had so stated to him; and that the superintendent responded that the doctor had so reported to him; and that they then "went into the superintendent's office and out to the yard office, and he figured out my time. He showed me what time I had lost, and wrote out a check for it, and I signed a receipt; and that was all there was to it. We figured it out by the hours * * * I was getting 37 cents per hour, and the amount was arrived at by figuring it at 37 cents an hour." He was to resume work July 1st, following, but was not allowed to do so. This was all the evidence bearing on the issue as to what the \$450 for which the release receipted was paid, and the fair inference to be drawn therefrom was that the payment was for loss of time. This being so, there was no occasion for tendering the return of the same, as a condition precedent to the maintenance of the action for personal injuries suffered by complainant. Though the release is general, covering injuries of every kind and nature, and extending until doomsday, inquiry concerning the nature of the consideration and for what computed was permissible, and, as we think, was not precluded by the terms of the release, based as it was on a mutual mistake. Having reached the conclusion that on this ground it might be rescinded, the investigation related solely to what must

be done to accomplish this, and therefore it was pertinent to the issue to ascertain precisely how and for what the consideration was measured. Such was our conclusion in *Reddington v. Blue*, supra, and we are content therewith, though decision may be found to the contrary.

IV. The reply was in two counts, one pleading that the release was procured by fraud, and the other that it was based on mutual mistake; and appellee contends that,

4. APPEAL AND
ERROR: be-
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tion to
pleading.

for this reason, neither may be proven. A sufficient response is that the reply was in no manner assailed, and all exacted was that the evidence be sufficient to carry either issue to the jury. Nothing appears to the contrary in *Seymour v. Chicago & N. W. R. Co.*, supra. In that case, no failure to attack pleading is passed upon. Whatever it decides on the consequences of pleading both fraud and mutual mistake, it does not hold that such inconsistency may be urged on appeal for the first time.

We conclude that the court erred in withdrawing the issues from the jury. It must not be inferred from what we have said that we question the sufficiency of the evidence to carry the issue of fraud to the jury. Dr.

5. RELEASE:
fraud: jury
question.

Saunders was the company's surgeon, and examined complainant as such. He made the statements with knowledge that what he said would be made the basis of the settlement about to be made. The complainant relied thereon in executing the release, and was deceived into signing the same when he would not otherwise have done so. His statements were untrue, and, under the rule laid down in *Haigh v. White Way Laundry Co.*, supra, it would seem that the evidence was sufficient to carry the issue of fraud to the jury. See, also, decisions to the same effect collected in a note to that case as reported in 50 L. R. A. (N. S.) 1091. See, also, *Davis v. Central Land Co.*, 162 Iowa 269; *Oestreich v. Chicago, St. P.*,

M. & O. R. Co., (Minn.) 167 N. W. 1032. There was no motion to require plaintiff to elect on which of the issues he would stand, that of mutual mistake or fraud; and therefore, as the evidence sustaining either was sufficient to carry it to the jury, there was error in directing the return of a verdict for defendant.—*Reversed*.

EVANS, GAYNOR, PRESTON, and STEVENS, JJ., concur.

M. S. MOATS, Appellee, v. STRANGE BROS. HIDE COMPANY, Appellant.

SALES: Postponing Delivery and Payment. A contract of sale may be complete, and therefore pass title, even though *delivery* and *payment* are postponed. Whether the title does so pass is, in its last analysis, a question of intent; and in determining this intent, the conduct of the parties may afford illuminating light.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

JANUARY 27, 1919.

ACTION to recover a balance due on the sale of certain wool. Opinion states the facts. Verdict and judgment for the plaintiff in the court below. Defendant appeals.—*Affirmed*.

Shull, Gill, Sammis & Stilwill, for appellant.

Strong & Struble and *Burke & Tamisiea*, for appellee.

GAYNOR, J.—Plaintiff brings this action to recover a balance claimed to be due on the purchase price of certain wool.

On or about the 16th day of October, 1916, plaintiff had 3,000 pounds of wool in bales stored in his barn. He had also 270 head of sheep, from which the wool had not

been clipped. Plaintiff claims that, on said day, defendant purchased all of said wool, clipped and unclipped, at 29½ cents per pound, and paid down, at the time, \$25 to apply on the purchase price. The unclipped wool was subsequently clipped, and netted 1,613 pounds. It is apparent, then, that plaintiff claims he sold to the defendant wool totaling 4,613 pounds, at 29½ cents per pound, amounting to \$1,360.83. It is conceded that defendant has paid to plaintiff, on the purchase price, only \$604.16. The plaintiff claims, therefore, that there is still due him \$756.68, and for this he asks judgment.

Defendant admits that plaintiff owned and had in his possession 3,000 pounds of wool, and that the same was stored in plaintiff's barn substantially as claimed by plaintiff; admits that he owned 270 head of sheep, from which the wool, though ready for clipping, had not yet been clipped; and says that, on said date, plaintiff offered to sell said wool, clipped and unclipped, at 29½ cents per pound, and that defendant agreed to purchase it at that price, and paid \$25 down; but says that the stored wool was to be sacked by plaintiff and delivered to defendant at the railway freight station at Missouri Valley, and, when so delivered and weighed, and the amount ascertained, the unclipped wool was to be clipped by plaintiff, sacked and delivered, and paid for the same as the stored wool; that it was to bind this agreement that defendant paid to plaintiff the sum of \$25; and further says that defendant has always been ready and willing to receive the wool and to pay plaintiff for the same, whenever delivered and received by defendant, as contemplated in the contract; that, at divers times, plaintiff was requested to deliver the wool, but had neglected and failed to do so, except as hereinafter stated; that, some time prior to the commencement of this action, the wool in storage, while in storage in plaintiff's barn, was partially destroyed by fire, and plaintiff was un-

able to, and never did, deliver more than 435 pounds of the same, and never did deliver to the defendant, at Missouri Valley or any other place, more than 2,048 pounds, in all, of said wool, which, at 29½ cents per pound, amounts to \$604.16; that this sum defendant has paid, and there is nothing, therefore, due plaintiff.

To recapitulate, the contract, whether made as alleged by plaintiff, or as alleged by defendant, was made on the 16th day of October, 1916. The fire that partially destroyed the wool occurred on the 10th day of November, 1916. There were 435 pounds saved from the fire. Immediately after the fire, the defendant's agent came to plaintiff's farm, and directed plaintiff to haul to Missouri Valley the wool saved from the fire. It was so hauled, and received by the defendant at Missouri Valley, there weighed by defendant, and shipped by defendant's agent to the defendant at Sioux City. Defendant's agent testifies that, after the fire, he went to plaintiff's place, and arranged to have the 435 pounds of wool which had been saved from the fire brought to Missouri Valley, and it was there weighed, and shipped to the defendant at Sioux City, and paid for at the contract price, but not at the time it was received and weighed. The 270 sheep were sheared on the 10th day of January, 1917, and 1,630 pounds of wool secured from the shearing. This was shipped by defendant to its place of business at Sioux City, and there received and paid for, but not at the time it was received. Therefore, of all the wool that plaintiff had at the time the contract was made, 2,048 pounds were shipped to the defendant, received by the defendant, and paid for by the defendant, as hereinafter more fully explained, after the fire occurred. All the wool received by defendant was paid for by the defendant at the contract price.

The controversy, therefore, is over the difference between the total amount of the wool, 4,613 pounds, and the

amount received by the defendant, 2,048 pounds, making a difference, represented by the burned wool, of 2,565 pounds; and it is to recover for this that plaintiff brings the action.

The real question presented by this record is: Who was the owner of this 2,565 pounds at the time it was burned? Had the title passed to the defendant, or was the title still in the plaintiff? Whose wool was burned?

If, under the arrangement and agreement between plaintiff and defendant, the title passed from the plaintiff to the defendant, and was in the defendant at the time of the fire, then defendant must sustain the loss. If the title had not passed from the plaintiff to the defendant at that time, and it was plaintiff's wool, then he must stand the loss. This question was tried to the jury. The jury returned a verdict for plaintiff for the amount claimed, or for the wool burned, on the theory that plaintiff had sold it to the defendant with the other wool, and that it was defendant's wool at the time it was burned. The only question submitted to the jury, and the only question that it was required to determine, is: Was there such a completed sale of the wool in question that the title to the wool in storage had passed to the defendant before the fire? If it did, it was defendant's wool, and defendant's loss.

Plaintiff's testimony tends to show that Joseph Strange, a member of defendant's firm, came to his house on or about the date named, and said that he had seen plaintiff's wool; that it was good wool; that he would like to buy it. Plaintiff said, "I will sell you the wool." Strange asked, "What do you want for it?" They agreed on 29½ cents. Strange said he would take it, and would furnish the sacks for it gratis. Strange asked how much wool plaintiff had in storage, and the plaintiff told him. Strange said:

"I will make settlement for 3,000 pounds, and if there is any more, you will get it." He said he would weigh it at

Missouri Valley. He asked me if I would haul it to Missouri Valley. I told him I would. That was after he said he would take it, and would give me 29½ cents a pound. Thereupon, he wrote out and delivered to me the \$25 check. He said, 'Will you haul it to Missouri Valley?' and I said, 'I will. You will get all the wool. It is yours. The wool is yours, even that on the sheep's back; but I cannot clip it until I get some man to clip it for me.' I said, 'When will you take it?' and he said, 'Next week, and I will ship the sacks right down.' He shipped the sacks, but he never came. I never received any word from him as to when he wanted the wool hauled to Missouri Valley, before it was burned. I was ready to bring in the wool at any time I received word from Mr. Strange to haul it in. I hadn't sacked the wool at the time of the fire. I was ready to sack it, but the reason I had not sacked it is that I was afraid something might destroy it,—pigs or something,—so I kept it cased up. I had it cased up nicely, so that nothing could get at it. At the time of the fire, it was all in the barn, in the place where it was when Strange bought it. After the fire, one of defendant's agents came down to my place, and we sacked the wool that was saved from the fire, amounting to 435 pounds, and hauled it in for them under the direction of this agent. He was at the farm, and directed that it be hauled in. It was hauled in. He was at Missouri Valley, and he had it weighed and shipped to Sioux City. It was weighed by this agent. It was not paid for at the time. I afterwards clipped the other sheep I called up Mr. Strange, and told him the wool was ready, and for him to come down. He said he could not come down,—they were busy; but said he would instruct the weighman of the Northwestern depot to weigh it correctly, and we should haul it in there. We hauled it in, and turned it over to the agent of the railway company. The first instructions I had to haul in any of the wool was after the fire. The 435

pounds saved from the fire, and the 1,630 pounds secured from the shearing were settled for and paid at the contract price. At the time I first talked with Strange, I told him I hadn't time to show him the wool. He said, 'I have looked at it with your son.' I think he said, the Saturday previous. He promised to take the wool that was in the barn away before the clipping was done. He said he would take that the next week. I didn't know how soon, and didn't tell him how soon the clipping would be done. He fixed no date when the wool was to be hauled in. After the shipments were all made, I came to Sioux City, and made a contract with Mr. Strange as to the payment for that which had already been received."

The contract was as follows:

"This agreement, made and entered into this 14th day of February, 1917, by and between M. S. Moats, of Missouri Valley, party of the first part, and Strange Brothers Hide Company, of Sioux City, Iowa, party of the second part, witnesseth:

"That whereas there is now pending between said parties a controversy relative to a certain sum due from the second party to the first party on account of wool sold to the second party by the first party, which was destroyed by fire; and,

"Whereas, there has been shipped by the first party to the second party a certain amount of wool aggregating 2,048 pounds, at the price of 29½ cents per pound; and

"Whereas, a certain amount of said wool has been delivered to the second party, for which there is due the first party 29½ cents per pound:

"It is hereby agreed, by and between the parties hereto, that the second party will, and does, upon the execution of this agreement, pay to the said first party the sum of six hundred and four dollars and sixteen cents (\$604.16), said payment being made without prejudice to the rights of

the first party against the second party as to any claims he may have or allege to have against the second party on account of the wool destroyed by fire, as hereinabove set forth, and without prejudice to any defense that the second party may have against said alleged claim.

"Executed in duplicate the day and year first above written.

"M. S. Moats, Party of the First Part.

"Strange Bros. Hide Co.,

"By Fred Strange, Treas., Party of the Second Part.

"Cash\$25.00

"Ck 577.96

"Storage 1.20

\$604.16"

Defendant's testimony tends to show that, on the 14th of October, Mr. Strange went to plaintiff's home, looked over the wool, and looked over the sheep.

"On the 16th, went again, saw the plaintiff, and said. 'Are you ready to sell the wool?' Plaintiff said, 'No, not yet.' 'What is your reason?' 'It is not all sheared.' 'Well,' Mr. Strange said, 'sell me the wool that is sheared.' Plaintiff said, 'No, I don't want to sell anything until it is all sheared.' Mr. Strange said, 'What is your reason?' Plaintiff replied, 'I want to take all of the wool together, and make but one trip.' After a little talk, Strange said, 'How many sheep have you to shear?' Plaintiff stated the number. Strange said, 'When do you expect to shear?' Plaintiff said, 'Right away. I am waiting for the shearer now.' Strange then said, 'I will tell you what I will do. I will make a contract with you for all the wool, immediate delivery at Missouri Valley, at 29½ cents for the wool.' Plaintiff said, 'All right. Send me some sacks right away.' Strange said, 'When the lambs are sheared, I want the wool put right in the sacks, as soon as they are sheared. I want

the wool immediately. The market is strong.' Plaintiff said, 'All right, I will phone you when we shear.' When I was there, I looked at the lambs. I saw the wool the first day I went up there. I saw the lambs that hadn't been sheared both times."

Philip Sein, defendant's agent, who was with him at the time the sale was made, testified:

"We went to the barn and looked at the wool. Took samples back to Missouri Valley. Told the boy we would be back the next day. We drove out the next day."

He then detailed the conversation between the plaintiff and Strange substantially as Strange gave it, and then says:

"We never shipped full cars out of Missouri Valley, only local rates, not carloads. We shipped full cars out of Logan. I asked Mr. Moats whether he would rather haul his wool to Logan; that we intended to load a car there; that we would save money on freight: and he said it was too far, and I said, 'All right, haul it to Missouri Valley. I was not out to the place again until after the fire. After the fire I was there. Plaintiff showed the damage, showed me what little wool they had saved. I said 'I will watch for you at the station, and any time you want to haul it in, I will weigh it up for you. I waited all day, and called him up three or four times, before he brought his wool down. That was after the fire. I weighed up the wool saved from the fire, and gave him a memorandum of the weight. I wanted to pay him for it right there, and he said to let it go until he got the rest of the sheep sheared and got pay in full. I weighed it up at the time I gave him the memorandum. When we were there on the 15th or 16th of October, we were there for the purpose of buying wool in and around Missouri Valley and Logan. We had business at numerous places around there, both before and after we were at plaintiff's, and bought quite a bit of wool,

—all that we knew of. We were anxious for the wool and all the wool that plaintiff had, and such other wool as we could get in the vicinity.”

Plaintiff, on cross-examination, testified:

“I was to haul the wool to the station at Missouri Valley. It was to be weighed there and paid for when it was delivered there. Whenever I hauled it in, I was presumed to get my money.”

The court instructed the jury that the only controversy between the parties in this action is as to the wool that was destroyed by fire, and instructed it that:

“If the plaintiff has proved that, at the time plaintiff and defendant had the negotiations with reference to said sale, it was the intention, understanding, and agreement of the parties that the defendant was not to become the owner of said wool, and was not to have the title thereto, until the same was delivered at the freight station at Missouri Valley, or if you find that the agreement between the parties was that the said wool was to be paid for upon delivery, and only upon delivery at Missouri Valley, then the plaintiff cannot recover. The fact, however, that plaintiff was to deliver said wool at Missouri Valley would not defeat his right of recovery, unless the delivery was to be made before title passed, and such was the understanding, agreement, and intention of the parties.”

No objection is urged to any of the instructions.

It is the claim of the defendant that plaintiff was not entitled to recover, under the evidence and under the law as given to the jury by the court; that the evidence shows that it was not the understanding or agreement of the parties that the title should pass at once upon the making of the contract and the payment of the \$25, but was dependent upon delivery at Missouri Valley; that there were two things which were essential to make a completed sale,—delivery at Missouri Valley and payment. These questions

were before the jury for their determination, and the determination was adverse, as is apparent, to defendant's claim. We think there was a fair question for the jury, though very close upon the facts.

It will be noted that the unclipped wool was clipped, shipped to the defendant, received by the defendant, and paid for by the defendant, without any controversy, and long after the making of the contract,—days after the fire occurred. It will be noted that, after the fire, the stored wool was taken by the defendant's agent to Missouri Valley, weighed, and shipped to defendant at Sioux City. The jury could well find that, after the fire, defendant recognized the contract, came to plaintiff's place, examined the wool that remained, took it, had it shipped to Missouri Valley, weighed, and from there shipped to the defendant at Sioux City, without making any question at the time as to its liability for the burned wool. This could well be construed by the jury into an admission that the wool belonged to the defendant. The conduct of the parties subsequently is quite in keeping and harmony with the plaintiff's claim that the wool in storage was purchased by the defendant, and a completed sale made of it, at the time the \$25 was paid; that nothing remained to be done but to ascertain the quantity or quality; that all that was to be done was for the plaintiff to haul it to Missouri Valley, whenever directed to do so by the defendant. As to the wool in storage, nothing was to be done between the parties in relation to the thing sold. Nothing remained to be done between the buyer and the seller, touching the property. So far as they were concerned, the sale was completed. The seller agreed only to haul it to Missouri Valley,—that is, the jury could well find this,—whenever directed to do so by the defendant. It is for the jury to determine, under these facts, whether there was a completed sale or not. The title does not pass until the sale is completed. As long as it remains executory, the

title does not pass. We are talking now only of the wool in storage. The other unclipped wool was delivered, accepted by the defendant, and paid for. As to this wool in storage, there was nothing to be done to put it in a condition for sale; nothing to be done to identify it; nothing to be done to discriminate it from other things. It was there—an entity—examined, samples taken, the price fixed, part of the price paid, with directions to the plaintiff to haul it in whenever the defendant should direct it to be hauled in. The claim of the plaintiff is that he had it ready for delivery; that he was ready to haul it in any time when directed to by the defendant; that he received no direction until after the fire; that, after the fire, he received directions to haul what was saved. It was hauled in, taken by the defendant, weighed, and shipped to the defendant at Sioux City. As said in *Allen v. Elmore*, 121 Iowa 241:

“The fact that weighing or measuring still becomes necessary to determine the price, will not indicate an intention that the title shall not pass until such acts are done; it being assumed, of course, for the purpose of applying this rule, that the specific goods are definitely ascertained and agreed upon.”

Here, the wool was in existence. The number of pounds was ascertained and agreed upon. The price was agreed upon. Part of the price was paid. All that remained to be done was for the plaintiff to haul it in to Missouri Valley, when requested to do so by the defendant, and there the defendant agreed to have it weighed and shipped to itself at Sioux City.

In *Harris v. Beebe*, 144 Iowa 735, a case similar in its facts to the one before us, the court said:

“The record clearly shows that the potatoes were at the time of the sale in the bin; that they were inspected by defendant’s agent; and that nothing was necessary, to complete the transaction, but delivery of the potatoes on

the track, and the ascertainment of the quantity contained in the bin in question. All the potatoes in that bin were sold to the defendant. * * * the jury was fully warranted in finding that there was, in fact, a completed sale of the potatoes at the time in question."

In *Welch v. Spies*, 103 Iowa 389, 392, this court said:

"But the title to property which is the subject of a contract of sale may pass at once, even though something remain to be done to ascertain and fix the rights of the parties,—as to weigh or measure the property sold. The intent of the parties is of controlling importance."

We think this case controls the rights of the parties in the instant suit. It is true that the actual manual delivery of the property and the payment of the purchase price places the situation more outside the pale of cavil and doubt than where there is not a manual delivery or payment of the purchase price in full; but these are not, under our present holdings, essential to passing of title. Though the thing remain in the possession of the seller, if it is in existence, the quantity is ascertained, and the price fixed, and a part of the purchase price paid, the fact that it is left in the possession of the seller, and the manual or physical delivery of the property postponed to a later date, or to a time designated by the buyer, will not take from it the character of a completed sale. What is done may or may not show a completed sale; but if what is done or said shows an intention on the part of the purchaser and seller to pass the title to the thing to the purchaser, immediately, the requirements of the law as to what is essential to a completed sale may be met, although the thing remains in the possession of the seller, and the actual physical delivery is, by agreement, postponed to a later date. Intention is an act of the mind. The intention of the parties is to be gathered from all that they said and did with relation to the passing of title, and the purchase and sale of the property. It is from

this that the jury must determine what the intention of the parties as to the passing of title was, at the time of the transaction. The sale is completed when everything is done that the seller is required to do, even though the seller retain possession, with an agreement, as in this case, that, when requested to do so by the buyer, he will make a manual or physical delivery of the property at a point designated by the defendant, or then agreed upon.

We think there was a fair question for the jury here; and whether their decision is right or wrong, it has support in the evidence, and we are bound by that finding. The case is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

NISHNABOTNA DRAINAGE DISTRICT No. 10 et al., Appellants,
v. LANA CONSTRUCTION COMPANY et al.,
Appellees.

DRAINS: Engineer as Interpreter of Contract. A mutual agree-
1 ment between the parties to a contract for the excavation of a
public drainage improvement that the engineer shall interpret
the intent and meaning of the contract and accompanying spec-
ifications, and issue estimates accordingly, is binding, and pay-
ments made under estimates furnished by the engineer, in ac-
cording with his bona-fide and permissible understanding of the
contract, especially when confirmed by the public authorities,
are final and non-recoverable, even though, under another per-
missible construction, the payments largely overpaid the con-
tractor.

PAYMENT: Payments under Agreed Interpreter. Bona-fide pay-
2 ments under a contract, in accordance with the interpretation
of one mutually and specially chosen for that purpose, are final
and non-recoverable.

CONTRACTS: Agreed Interpreter of Contract. Parties may validly
3 agree that a named party shall interpret the intent and mean-
ing of a contract, and in such case, the interpreter's bona-fide
decision, confirmed by the parties, is beyond recall.

DRAINS: Impeaching Acceptance of Contractor's Work. The acceptance, by the public authorities, and in the manner provided by law, of the work of the contractor as a full performance of the contract, poisoned by no fraud of the contractor's, is a finality.

Appeal from Pottawattamie District Court.—O. D.

WHEELER, Judge.

JANUARY 27, 1919.

ACTION to recover a certain amount of money which it is claimed was overpaid to the contractor for the construction of a certain ditch in Drainage District No. 10, of Pottawattamie County. Demurrer to the petition sustained by the court. Plaintiffs appeal.—*Affirmed.*

John P. Organ, for appellants.

Killpack & Northrop, for appellees.

GAYNOR, J.—On the 7th day of April, 1911, the board of supervisors of Pottawattamie County, acting on behalf of the plaintiff the Nishnabotna Drainage District No. 10, let to the defendants the work of constructing a drainage ditch in said district. Before the bids were made, the board, acting for the district, appointed a competent engineer to prepare and file plans and specifications for the ditch, setting forth the starting point, the route, and the terminus or termini of the ditch, with a plat and profile showing the ditch and the course and length of the drainage, together with an estimate of the number of cubic yards necessary to complete the work, and the probable cost. These plans and specifications, plat, and profile were on file at the time defendant submitted its bid, and on this, the bid was made. The contract entered into by the defendant made the plans and specifications a part of the contract, and provided that, in all respects, the defendant should comply with the plans

1. **DRAINS:** engineer as interpreter of contract.

and specifications, and further said that, should there be any difficulty between the parties to the contract as to the construing of any of the terms or provisions of the agreement relating to the work to be done, the difficulty should be referred to the engineer employed by the first party, and his decision should be final and conclusive upon both. The compensation for the work was to be paid at the rate of 5.99 cents per cubic yard, "measured in the excavation only." The contract and specifications further provided that the board of supervisors should have general supervision of the work, but the details of the entire work were to be in charge of E. E. Spetman, civil engineer, of Council Bluffs, to whom all questions relating to plans of construction or carrying on the work, or construing the intent or meaning of these specifications, should be referred, and that his decision should be final and binding upon both parties. The contract further provided:

"The work will be inspected frequently by the engineer in charge, who will make an estimate on the first of each month, of the amount of work done during the preceding month, which, when properly certified, shall entitle him to payment of eighty per cent of the amount earned, and upon final completion of the work as a whole, * * * the engineer shall report to the board of supervisors, who will thereupon inspect the work, and if satisfactory, shall finally accept the same and order payment in full to the contractor."

After making the contract, the defendant entered upon its work, and as the work progressed, it was furnished from time to time with estimates of the same by the engineer in charge, and received 80 per cent of the compensation as fixed by the contract, based upon the estimates given by the engineer. On the 6th day of August, 1912, upon the final estimate of the engineer in charge of the work, the board of supervisors ordered the payment to the defendant of the

20 per cent that had been withheld upon the estimates aforesaid, less the sum of \$500. On the 20th day of December, 1912, the board ordered the payment of this \$500, and the same was paid by the auditor, as directed. This action was begun on December 21, 1914.

In the first count of the petition, plaintiffs seek to recover a certain sum of money, which they claim was overpaid to the defendant. It is claimed that the estimates given by the engineer, upon which defendant received payment, were not based on the amount of earth actually removed in the construction of the ditch, but were figured and made as though said ditch, from the point of its commencement to the point of termination, was excavated through solid earth, whereas the ditch, at many places, intersected the Nishnabotna River, and little or no excavation was required there; that the defendant, as a matter of fact, did not excavate as many cubic yards of earth as shown by the estimates upon which it received payments; that, by reason of the method adopted by the engineer in making the estimates, the defendant received payment for more cubic yards of earth than were actually removed.

In the plans and specifications, it was provided that the ditch should run from a point called Station 1, in the center of the Nishnabotna River, to a point called Station 600, in the Nishnabotna River, as shown by plats and profile now on file with the county auditor of Pottawattamie County, which were made a part of the specifications.

The engineer, in making the estimates upon which payments were made, measured the space within the excavation, and determined the number of cubic yards, as it appeared after the ditch was dug, for which defendant was entitled to receive payment by that method, it appearing that he was authorized, by the contract, to interpret and construe the intent and meaning of the specifications, and to make the estimates on which payments were to be made. The origi-

nal estimate of the number of yards necessary to be excavated to complete the ditch, as made by the engineer and set forth in the plans and specifications, was approximately 711,000 cubic yards. Defendant was paid for approximately 712,000 cubic yards. If the method contended for by the plaintiff should be adopted in making final estimates of the work done, then the plaintiff paid for 82,686 cubic yards more than was actually removed by the defendant. If the method pursued by the engineer in making estimates is to control, then the defendant has not been overpaid. The question, then, presents itself:

2. **PAYMENT:**
payments un-
der agreed
interpreter.

Is the contract susceptible of the interpretation given to it by the engineer? Are the interpretation and construction placed upon the contract by the engineer binding on these plaintiffs? The simple question is: Does the construction placed upon the contract by the engineer bind the plaintiffs?

This case was disposed of on demurrer. The petition discloses the fact that the engineer, in estimating the number of cubic yards for which defendant was entitled to receive compensation from the plaintiff, measured the number of cubic yards appearing in the excavation at the time the estimate was made. The contention of the plaintiff is that the engineer should have based his estimate upon the number of cubic yards of earth actually removed by the defendant. The engineer was acting for and in behalf of the plaintiff, and was by the contract given the right to construe the contract. The plans and specifications were a part of the contract. The engineer evidently construed the agreement to mean that all the work should be paid for by the cubic yard, at 5.99 cents a cubic yard, measured in the excavation only. It is not claimed that any mistake was made in the measurement, or that any fraud was practiced by the defendant or by the engineer, in making the estimates, when made in this way. The only mistake, if a mistake at

all, is in the construction of the contract, and in the method pursued by the engineer in estimating the number of cubic yards for which defendant was entitled to receive pay. The question is this: Are the plaintiffs bound by the interpretation of this contract made by the engineer, on which the estimates and the payments were made? The engineer had no power to determine the compensation of the contractor, or to make the compensation other and different than the contract called for; but, by the terms of the contract itself, the right was given to the engineer to construe the contract and to make the estimates according to the construction placed upon the contract by him. Evidently, the engineer construed the contract to mean that the number of cubic yards, for which payment was specified at so much per yard, should be determined by measuring the excavation. The defendant had nothing to do with making the estimates. The estimates were made by the one appointed by the board, to whom the board had given authority to construe the intent and meaning of the specifications, both parties agreeing to be bound thereby. It was the engineer's duty to inspect the work and make the estimates of the work done during the preceding month, on the first day of each month thereafter. If the board gave the engineer power to construe the contract in making the estimates, and he did construe it as alleged, and made the estimates under the construction so placed upon it by him, and gave those estimates to the defendant, as evidence of its right to receive compensation for work done, and the board of supervisors accepted his estimates, and paid to the defendant, upon the estimates so made, then, upon payment, it became bound by the action of the engineer, both in the construction of the contract and in the method of estimating the work, and it is without remedy, though the construction placed by the engineer was, in fact, wrong. It is not for us to inquire whether the construction placed

upon the contract by the engineer was right or wrong, for the reason that the construction placed on it was a construction made by the one appointed, to whom the right to determine the intent and meaning of the contract was given, and to make the estimate; and plaintiffs agreed to be bound by his construction. It does not appear, nor is it claimed, that any intentional fraud was perpetrated by either the defendant or the engineer in making the estimates, or in securing the money which it is sought now to recover.

The wording of the plans and specifications, on which the bid was made, is as follows: "All work shall be done and paid for by the cubic yard, measured in the excavation only." It was the duty of the engineer to make monthly estimates showing the work done the preceding month, and these estimates were made the basis of compensation, by the contract. The estimates indicated the number of cubic yards for which defendant was entitled to receive pay. The contract fixed the amount that it was entitled to receive for each cubic yard, as shown by such estimates. The contract provided that the board of supervisors should have general supervision of the work, but that the engineer appointed by the board should have charge of it in detail; and it was provided that all questions relating to plans of construction, or carrying on the work, or construing the intent or meaning of the specifications, should be referred to him, and that his decision should be final and binding on both parties. The contract was made on April 7, 1911. It appears that defendant immediately entered upon the work; that, as the work progressed, he was furnished, from time to time, with the estimates of the same by the engineer, and upon these estimates, payments were made. Prior to August 6, 1912, the defendant had been paid, upon the estimates furnished by the engineer, 80 per cent of the total amount shown to be due upon the estimates. On August 6, 1912, the final estimate of the engineer was made, and

the balance, 20 per cent, was ordered paid by the board upon this final estimate, except the sum of \$500. For some reason, which does not appear, the board retained \$500, and on the 20th day of December following, ordered the payment of the \$500 which was withheld, and the same was paid by the auditor to the defendant.

Certain facts are apparent from this record: The engineer, in making his estimate of the amount of earth necessary to be removed, to consummate the contract, figured on the same basis pursued by him when making the final estimates of the work done. The original estimate of the amount of earth to be removed, and the monthly estimates of the amount of work actually done under the contract, totaled practically the same. Before the engineer made his estimates of the amount of earth to be removed within the limits of the ditch designed, the course and distances had been determined upon and marked out, and defendant had before it, at the time it made its bid, the course and direction of the ditch, and all that the plans and specifications showed. In the proposal, it was recited that the defendant had examined the specifications and the form of the contract proposed by the plaintiffs, and he agreed to do the work on the sections designated, in all respects in accordance with the contract and specifications annexed. So we have both parties familiar with the course and length of the ditch, its location, the territory through which it passed, and that some of the ditch lay within the limits of the Nishnabotna River. Defendant had before it the estimates of the engineer as to the number of yards to be removed. Of course, this estimate did not limit, or control, or determine in advance, the number of cubic yards for which defendant was to be paid; but it indicated, before the contract was let, the method adopted by the engineer in estimating the number of cubic yards within the limits of the proposed ditch.

In *Herrick v. Belknap*, 27 Vt. 673, the contract provided that the engineer should be the sole judge of the quantity and quality of the work, and from his decision there should be no appeal. It was held that this stipulation in the contract bound the parties, and constituted the engineer an arbitrator between them.

It is apparent that, if parties, competent to contract, do contract with reference to a subject-matter in which the compensation depends upon final determination of the

2. CONTRACTS :
agreed inter-
preter of con-
tract.

amount of work done by the party contracting to do the work, the parties to the contract may, in the original contract, agree upon some definite person, skilled in the matter of ascertaining the amount, to determine the amount, and bind themselves to accept his computation as final and determinative of the amount of work done, upon which compensation must rest. So it follows that, where parties, competent to contract, select a third person to fix the price, amount, or quality of the material, his finding, when made, is binding upon both the parties to the contract, and cannot be impeached for mistake which is found only in error of judgment, or that rests in conclusions drawn from the facts submitted to the party for judgment. The finding of an arbiter chosen by the parties at the time of making the contract, though the method is not the same, so far as the conclusion of the same is concerned, is, in its effect, the same as an award under a submission to arbitration. So it would follow that, when the parties have agreed to give to another the right to construe and determine the intent and meaning of the contract, and he, in good faith, exercising his best judgment and skill, construes the contract, and estimates the amount in accordance with the construction placed by him upon the contract, and it is then acted upon by the parties, and it is made further to appear that the contract is reasonably susceptible to constructions

placed, negating any intentional fraud or purpose to wrong, the parties must abide by his judgment, just the same as if the parties themselves had construed the contract to mean just what this arbiter had construed it to mean, and had made the estimates in accordance with such construction. These parties were capable of making the contract. The contract is not unreasonable, or against public policy. Since they had power to make the contract, its provisions bound both parties. In this case, both parties agreed to be bound by that construction which the engineer, selected by the plaintiff, should place upon the contract. As bearing upon this question, though not directly in point, see *Gustavson v. McGay*, 12 Daly (N. Y.) 423; *Palmer v. Clark*, 106 Mass. 373; *Green & Coates St. P. R. Co. v. Moore*, 64 Pa. St. 79; *Willingham v. Veal*, 74 Ga. 755.

We hold, therefore, that, inasmuch as the parties had a right to make the contract in question, and did, in the contract, provide that the engineer selected should have charge of the detail of the work, and the power to construe the contract and to make the estimates according to the construction placed upon the contract by him, his construction and estimates, in the absence of fraud, are binding upon the plaintiffs, and the demurrer was properly sustained. We further find that the contract was susceptible of the construction placed upon it by the engineer. We therefore find that the demurrer was rightly sustained.

As to the second count of the petition, to which demurrer was interposed, we have to say that no basis is laid in the allegations of the petition for recovery on that ground. The claim is that the defendant did not dig down to the bottom, as required by the plans and specifications; that, below the bottom of the ditch as constructed by the defendant, there was rock not removed, which would cost a considerable sum to remove, to bring

4. DRAINS: impeaching acceptance of contractor's work.

the ditch to the depth provided for in the plans and specifications; but it does not appear that the defendant has been paid for more than it has excavated. The ditch, as constructed, was accepted by the plaintiffs as completed work, within the terms of the contract. It was the duty of the board to inspect the work before making final payment. The statute imposes this duty upon them. The contract provided for it. There is no doubt that they made the inspection. No fraud or deceit was practiced,—no concealment,—so far as this record shows. They accepted the work as fulfilling the contract, and paid for it. They are not now in a position to insist that the contract was not completed, nor to lay a claim for damages, based upon the fact that the ditch was not sunk to the depth required by the plans and specifications. As to this part of the petition, the demurrer was also rightly sustained. The judgment of the court is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

MARTIN M. PETERSON, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

RAILROADS: Reasonable Crossings Per Se. A railway crossing
1 with planks extending three inches above the dirt approach of
the public highway is *per se* a reasonably safe crossing.

RAILROADS: Neglect in Crossing Maintenance. Railway crossings
2 which are reasonably safe for travel in the usual and ordinary
way are all-sufficient, and on a fact issue as to negligence in
maintaining such crossing, it is error for the court to fail to
explain to the jury the nature and extent of the company's duty.

NEGLIGENCE: Undisputed Facts. Undisputed facts bearing on
3 negligence present questions of law for the court.

Appeal from Clay District Court.—N. J. LEE, Judge.

JANUARY 27, 1919.

ACTION to recover damages for injury to property. The opinion states the facts. Verdict and judgment for the plaintiff in the court below. Defendant appeals.—*Reversed and remanded.*

Hughes, Sutherland & O'Brien and *J. W. Cory & Son*, for appellant.

R. F. Mitchell and *Cornwall & Cornwall*, for appellee.

GAYNOR, J.—On the 15th day of December, 1915, the plaintiff was driving a Buick automobile on a public highway. This highway crossed the tracks of the defendant company at right angles. Defendant's tracks run east and west, and the highway, north and south. Plaintiff approached the track from the south, and, when within about 200 feet of the track, he saw the head-

1. RAILROADS:
reasonable
crossings per
sec.

light of a train approaching from the east. He did not, however, stop his car, but proceeded at about 10 miles an hour, keeping a constant lookout for the train, and saw the train just as he went upon the track. It was then about a mile and a half away. He says that, as he was in the act of crossing the track, his engine died, and left him with the front wheels over the far rail, and the hind wheels up against the first rail. He claims that, after his engine died, he made an effort to start it by cranking, but failed, tried to push it from the track, and failed, and then went 75 to 80 feet towards the approaching train, and flagged it with a red handkerchief; that, notwithstanding this, the train continued on until it reached the point where the automobile was, struck the automobile, pushed it off the track, and greatly damaged it. It is to recover this damage that he brings this action. The negligence charged is:

(1) That the defendant failed to maintain a safe highway crossing at the place where the injury occurred; that the crossing planks on either side of the rails were several

inches above the level of the highway, and rendered the crossing dangerous and unsafe for one traveling in an automobile; that, as a proximate result of this negligence, his car received a sudden jolt or jar in attempting to cross, which caused the engine to die, and remain upon the tracks.

(2) That the servants of the defendant in charge of the train failed to keep a proper lookout, in approaching the crossing, to discover plaintiff's automobile upon the crossing, and failed to stop the train in time to avoid the injury; that, if they had kept such a lookout, they would have discovered plaintiff, and the peril in which his car was placed, and could and would have avoided the injury.

(3) That they knew, or by the exercise of reasonable diligence should have seen and known, that plaintiff's automobile was standing upon the crossing, in a place of danger, in time to have stopped the train and avoided the collision, and failed to exercise reasonable care, after discovering plaintiff's peril, to stop the train.

At the conclusion of the evidence, the defendant moved to withdraw the first charge of negligence from the consideration of the jury, on the theory that there was no evidence that the crossing was defective, and, therefore, no basis for the charge of culpable negligence on account of the construction and then condition of the crossing. This motion was overruled, and the court proceeded to submit the same to the jury.

After the instructions were prepared and submitted to counsel, counsel for the defendant again objected to the submission of the claim that the crossing was defective, or that the defendant had failed to maintain a safe and sufficient crossing, for the reason that there was no evidence tending to support a claim of negligence predicated on that issue. The court, however, ignored this objection also, and proceeded to say to the jury, among other things, that the plaintiff claimed that the defendant railway company and

its employees were negligent in the following particulars:

"(1) In that the defendant failed to maintain a safe highway crossing at said place, because of the fact that the planks of the crossing and the rails of defendant's track at said crossing were several inches above the level of the approach to said crossing.

"(2) In that the servants, agents, and employees in charge of the train failed to keep a proper lookout in approaching said crossing, and in failing to stop said train in time to avoid the collision.

"(3) In that the agents, employees, and servants of the defendant company in charge of said train saw or knew, or by the exercise of reasonable diligence should have seen and known, that plaintiff's automobile was standing upon said crossing and in a place of danger in time to have stopped the train and avoided the collision and injury to said car; and that the said agents, employees, and servants of the defendant at that time knew, or by the exercise of reasonable care should have known, that said automobile would be destroyed unless the train was stopped before striking the same; and that they failed to stop said train in time to avoid said collision with the said automobile.

"The plaintiff alleges that, in attempting to cross over said crossing, his car and engine became stalled because of the jar it received from the said uneven condition of said crossing and approach; and the plaintiff alleges that the said negligence of the defendant, as aforesaid, was the proximate cause of the collision with said automobile and its destruction.

"The defendant admits that it is a corporation, but denies each and every other claim and allegation made by the plaintiff, and especially denies that it was guilty of any negligence as claimed by the plaintiff."

In the next instruction, the court said:

"In the foregoing instruction I have given you the matters in dispute between the parties which you are required to decide;" and in the 13th instruction said that, if the servants of the defendant company were guilty of *any acts* of negligence complained of by the plaintiff, then the defendant would be guilty of negligence."

We set out so much of the court's charge to the jury, because it is strenuously contended by plaintiff that the court did not submit, as a basis for recovery, the charge that the crossing was defective, and for the further reason that defendant bases error on its submission.

It is apparent, although it is controverted, that the court did submit to the jury negligence predicated upon the unsafe condition of the crossing, and did say to the jury

that, if the defendant was negligent in respect to the crossing, its unsafe condition, etc., and this negligence was the proximate cause of the injury, then the plaintiff could recover. Nowhere, in the instructions given, did the court tell the jury what the duty of the defendant was with respect to maintaining a crossing. Nowhere, after stating the issues, did the court again refer to this particular claim of negligence as a claim upon which they could predicate negligence, nor did the court inform the jury in any way as to what the duty of the company was, with respect to the maintenance of crossings.

Negligence presupposes a duty, a duty owed to the public generally, or a duty owed to the individual complaining. It is the violation of the duty that constitutes the negligence. The duty is imposed by law in this case. Section 2054 of the Code of 1897 provides that every railway shall construct, at all points where such railway crosses any public road, good, sufficient, and safe crossings.

When the facts upon which negligence is predicated are proven, and these may or may not establish negligence,

2. RAILROADS:
neglect in
crossing main-
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then it becomes the duty of the court to instruct the jury fully as to what the law is, applicable to the facts proven, so that the jury, in considering the facts, may know whether, under the law, negligence can be predicated upon the facts proven. This is not always true, because some acts, when proven, are in themselves such a gross violation of duty known and appreciated by all men that the sense of the jury will readily see the relation between the facts proven and the duty existing. But where the duty is imposed strictly by law, as in this case, by statute, then it becomes the duty of the court to tell the jury what the law is, applicable to the facts proven, so that the jury may know whether or not the party charged has, by doing or omitting to do the things charged, violated any duty which he owed to the complaining party or to the public generally. Even if this issue, under the evidence, was one upon which the jury could properly predicate liability, yet there was palpable error in the manner of its submission. Assuming, in the first place, that this issue was an issue which, under the record, the jury might consider in determining the liability of the defendant as for negligence, we have to say that, in its submission, the court committed palpable error, in this: that it failed to state to the jury, in any way, what the law is, touching the obligation of the defendant in the building and maintenance of public crossings. If negligence is to be predicated upon this act, upon the manner in which the crossing was constructed and maintained, it is important to know what duty the defendant owed with respect to the construction and maintenance of these crossings. If it owed a duty to the traveling public, a failure to discharge the duty, followed by injury as a proximate result of such failure, would lay a basis for recovery. But what was the duty it owed to the traveling public? Nowhere in the instructions does the court tell the jury what the duty was. It is the duty of the court to instruct the

jury as to the law which, applied to the facts found by the jury, may or may not justify them in saying the defendant was culpably negligent.

It is true that, as to some of the instructions we have referred to, no exceptions were taken by the defendant before the instructions were read: that is, no objections were taken to the instructions specifically; but, inasmuch as counsel for the defendant requested the court to withdraw this issue from the consideration of the jury, excepted to its refusal to do so, and objected to the court's submitting it to the jury, in its instructions, as an issue upon which negligence could be predicated, we think that the whole question as to the action of the court in submitting this as an issue, and the manner of its submission, is properly here for consideration.

This brings the question before us, Was the evidence sufficient to justify a jury in saying that the defendant had failed in the construction of this crossing to make it a sufficient and safe crossing, such as the statute requires?

There is no evidence as to when this crossing was constructed. There is no evidence as to its condition at any time prior to this accident. There is no controversy in the evidence as to the condition of the crossing and the manner of its construction at that time. All the witnesses agree, so far as they testified on this point, that there was but a slight grade, as you approached the tracks; that the crossing was fully planked between the rails and outside the rails with planks from two to three inches thick. The negligence in the construction is predicated on the fact that the top of the highway on the north and south of the planks was just the thickness of a plank below the top of the planks, whether this plank be two or three inches.

While it is true that, under this statute, a duty rested on the company to construct a good, sufficient, and safe crossing, and that a neglect to discharge this duty would

render the company liable for all damages sustained by the neglect, yet we have to say that a railway company is not bound, even under this section, to make the crossing absolutely safe. All that is required of the company is to make it reasonably safe for travel. It has the right to cross the highway with its tracks. It is bound not to unreasonably interfere with the safe travel upon the public highway, in the use of it for its own purposes. To that end, it becomes the duty of the company to make the crossing, over its track, reasonably safe for travelers upon the highway who use it in the usual and ordinary way. That there was an attempt to do this, the record concedes. That the planks used were proper planks to be used for that purpose, must be conceded. That the company had planked between its rails and on either side of its rails with planks from two to three inches thick, the record in this case shows. An accident occurred, and, we may assume, occurred because the engine struck the edges of these planks, and died upon the track. The fact that plaintiff's engine died because of contact with the edge of these planks, from the jolt or jar received from the planks, does not establish that the crossing was negligently constructed. The most that it does prove is that the roadbed on the south side of the planks was from two to three inches below the top of the planks. There being no dispute as to the condition of the crossing, it becomes a question of law whether the defendant violated any duty that it owed to the traveling public in the construction and maintenance of the crossing. It cannot be said to be negligent, unless it owed a duty to construct and maintain a crossing different from what it was at the time of the accident. The defendant's roadbed is a permanent structure. It is laid there to carry heavy loads. It is solid. It must be solid, to perform the purposes for which it is intended. The ties that support the rails extend out on either side of the rails. These

ties are embedded in the ground. These planks were placed upon the ties, the bottom of the planks being on a level with the ground. The ground on either side is necessarily looser and softer than the planks, and more easily worn down. An elevation of from two to three inches between the road surface and the top of the planks does not tend to show negligence, either in the construction or maintenance of the crossing. If we should so hold, then there is scarcely a public highway in the state of Iowa that is in a reasonably safe condition for travel. The company owes only the duty to keep the highway in a reasonably safe condition; to put it in as safe condition as highways usually and ordinarily are kept for travel. It is not bound to make the highway more safe than highways usually and ordinarily are made and kept for travel. The condition shown here did not render travel upon the road greater or more dangerous in its effect upon the traveler than the inequalities of surface found in all the ordinary roads and highways of the country, which no one would claim renders those highways not reasonably safe for ordinary use by the public. From our common observation, we all know that, in nearly every mile of the highways of the country, there are to be found depressions or ridges or other inequalities of surface which do not interfere with the safe use of the highway, when traveled over in the usual and ordinary method, but which are sufficient to jolt vehicles passing over them. The severity of the jolt would depend, of course, largely upon the speed at which the vehicle is moving at the time it passes over. There is no duty resting upon a railway company to keep the surface of the road, at the crossing, so smooth and free from all inequalities that no jar or jolt will be caused by vehicles passing over the crossing. We think the evidence as to the condition of the crossing does not establish such inequality in the surface of the crossing as to interfere with the safe

use of the crossing, when used in the usual and ordinary way. If this is not so, then the railroad company, in the maintenance of crossings, owes a higher duty, in respect to crossings, than anyone ever dreamed was due the public in the maintenance of public highways. In *Taylor v. Long Island R. Co.*, 16 App. Div. 1 (44 N. Y. Supp. 820), the court said:

"The claim is that the plank which formed the approach to the crossing was raised above the surface of the ground about the thickness of the plank itself. * * * The planks themselves were firmly set, and were solid and in good condition. The rise in the plank above the surface of the soil was slight, and we think that the fact that the soil did not come up even with the plank * * * was not such a defect in the approach to the crossing that negligence can be predicated upon it, or that the defendant owed any further duty in this regard to persons making use of the crossing or others. Extraordinary care would hardly suffice to keep the surface of the ground even with the plank, and ceaseless vigilance in precaution would scarcely foresee that an accident would happen from such a cause."

On the question of negligence, and the right of the court to determine whether the act proven constituted negligence, where there is no dispute as to what the facts are

which, it is claimed, caused the negligence, the question is for the court. The question of negligence is a mixed question of law and

fact, when there is no controversy as to the facts. In such case, it is the duty of the court to instruct the jury whether the facts which the testimony tends to prove will, if found true, constitute the negligence which will sustain the action. *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 36. It is always within the

8. NEGLIGENCE:
undisputed
facts.

power, and it is the duty, of the court to instruct the jury whether or not a certain fact, if established, constitutes negligence.

We hold, therefore, that the showing made does not, as a matter of law, establish that the defendant failed to exercise reasonable care in the construction and maintenance of this crossing, and fails to show that the crossing was not in a reasonably safe condition for travel at the time plaintiff received his injuries; and further, that a finding to the contrary would not have support in this record. The court should have sustained defendant's motion to withdraw this issue from the jury at the conclusion of all the evidence, and erred in submitting it to the jury as a basis for recovery.

As to the sufficiency of the evidence to sustain a verdict on the other grounds, we do not now determine. We have no way of determining on which of the issues tendered the verdict is predicated. There was a controversy in the evidence as to the facts upon which the other grounds of negligence are predicated. The jury may have found liability resting upon this ground. They were without a guide as to the duty of the defendant, touching the construction and maintenance of the crossing.

Other matters discussed may not arise in another trial, and we do not discuss them here.

For the error pointed out, in submitting the issue predicated liability on the construction and maintenance of this crossing, the case is reversed.—*Reversed and remanded.*

LADD, C. J., PRESTON and STEVENS, JJ., concur.

SANDEN & HUSO, Appellant, v. N. A. AUSENHUS et al., Appellees.

BROKERS: Compensation and Lien—Finding Purchaser on Stated

1 Terms. A broker employed to find a purchaser on stated terms must, in order to earn his commission, where no sale is made, (a) take from his proposed purchaser a binding obligation to buy on such stated terms, or (b) bring the proposed purchaser and owner together, or into such relation with each other that the owner can exact such binding obligation.

BROKERS: Compensation and Lien—Sale on Terms Different from

2 Those Exacted of Broker. A broker whose sole authority is to find a purchaser on definitely stated terms may not recover a commission for finding a purchaser to whom the property is in good faith sold, on terms materially different from those specified in the broker's contract.

BROKERS: Compensation and Lien—Burden of Proof as to Fraud-

3 ulent Sale. A broker has the burden to show that the seller, in order to avoid the payment of a commission, fraudulently sold the property to the purchaser whom the broker produced, on terms materially different from those exacted of the broker.

Appeal from Worth District Court.—F. M. EDWARDS, Judge.

SEPTEMBER 21, 1918.

REHEARING DENIED JANUARY 27, 1919.

ACTION to recover commission for the sale of real estate. Directed verdict for the defendants. Plaintiff appeals.—*Affirmed*

T. A. Kingland, for appellant.

M. H. Kepler, for appellees.

GAYNOR, J.—This action is brought on an expressed oral contract, to recover commission claimed to be due for services rendered under the contract, in effectuating a sale

1. BROKERS: compensation and
lien: finding
purchaser on
stated terms.

of certain lands belonging to the defendants. The petition is in two counts. The first count alleges an oral contract between the plaintiff and the defendants, by the terms of which defendants engaged the plaintiff to sell for them, as their agent, certain lands then owned by the defendants. The contract, as alleged, provides that the plaintiff should have the exclusive agency to sell the premises at \$100 an acre, and should receive \$5 an acre, as commission for its services in effectuating the sale; that this contract of agency should continue until the first day of August, 1913; that the verbal contract so entered into was renewed and continued, by mutual agreement of the parties, from time to time. Plaintiff alleges that, in pursuance of such contract, it procured a purchaser ready, able, and willing to purchase the premises at the price stipulated; that it secured and introduced to the defendants one Ohma, who was willing to pay substantially the price asked by the plaintiff, which price was agreed upon as the price at which the plaintiff might sell; that thereafter, the defendants sold the premises to the said Ohma for less than \$100 an acre; that they did this for the fraudulent purpose of preventing the plaintiff from collecting its commission.

The second count alleges substantially the same facts, with the additional fact that, after plaintiff had entered into negotiations with Ohma, and had introduced him to the defendants as a prospective purchaser, the defendants wrongfully entered into a conspiracy to defeat plaintiff in its claim for commission, and, in pursuance of such conspiracy, made a contract of sale, ostensibly to a third person, though in fact to Ohma: that is, the contract, as written, was made with a third person, though the sale was in fact made to Ohma, and the written contract so entered into assigned to Ohma, in pursuance of such conspiracy. Plain-

tiff says that, in fact, the land was sold to the said Ohma as a result of plaintiff's efforts under this contract.

The answer was a general denial as to both counts.

Upon the issues thus tendered, the cause was tried to a jury, and at the conclusion of plaintiff's evidence, the court directed a verdict for the defendants. Judgment being entered upon the verdict, the plaintiff appeals, and assigns as error: (1) That the court erred in directing a verdict for the defendants on both counts of the petition; (2) that the court erred in the admission of evidence.

To entitle plaintiff to recover in this action, it must prove all the material allegations of its petition. It alleges that the defendants engaged them to sell the premises, and gave them the exclusive agency to sell; that the price at which they were authorized to sell was \$100 per acre; that this agreement of agency was to continue until August 1, 1913; that it was renewed thereafter, from time to time; that, in pursuance of such contract, and while the agency continued, it actually sold the premises, or procured a purchaser who was ready, able, and willing to purchase the same at the price fixed in the contract of agency; that they introduced him to the defendants, or brought him to defendants, and informed them of the fact that the purchaser was then ready, able, and willing to buy, at the price stipulated; that the purchaser so procured expressed himself as ready, able, and willing to buy; and that nothing remained for the defendants to do but to consummate the purchase by executing the deed. As said in *Johnson Bros. v. Wright*, 124 Iowa 61:

"The agency was to find a purchaser on certain terms, and, in order to earn the commission, it was incumbent upon plaintiffs to furnish a person ready, able, and willing to buy on the terms fixed. To accomplish this, where no sale is actually made, either a valid obligation to buy must be procured and tendered to the principal, or the vendor

and proposed purchaser must be brought together, so that the vendor may secure such a contract if he wishes to do so. It is not enough that a parol offer to buy be made to the agent. The proposition should be to the principal, to the end that the statute of frauds may be obviated by reducing the agreement to writing."

In *Beamer v. Stuber*, 164 Iowa 309, the rule so announced was approved and followed, citing *Flynn v. Jordal*, 124 Iowa 457; *McDermott v. Mahoney*, 139 Iowa 292; and *Nagl v. Small*, 159 Iowa 387. In this *Beamer* case, *supra*, the court said, referring to the rule announced in *Johnson Bros. v. Wright*, *supra*:

"This does not necessarily mean that the offer shall be made in person by the purchaser to the seller, but that it shall be made in such circumstances that the latter may then exact the execution of a binding contract, if he so elects. There is no reason why the agent of the seller may not communicate to him an offer of purchase, and, if the proposed purchaser is immediately accessible, so that a written contract may then and there be executed, and he is ready, willing, and able to consummate the deal, this is enough."

Applying these rules to the situation we have here, it is apparent that the plaintiff could not recover in this suit if no sale had ever been made by the defendants to Ohma, for at no time did the plaintiff inform the defendants that it had found in Ohma a person who was ready, able, and willing to buy the land on the terms on which the plaintiff had a right to make the sale. They procured no valid obligation from Ohma to buy, nor did they bring Ohma and the defendants together, so that the defendants could secure such a contract if they wished to do so. At no time did they inform the defendants that Ohma was ready, able, and willing to buy at the stipulated price, nor did Ohma ever communicate that fact to the defend-

ants. The nearest that plaintiff ever came to informing the defendants that Ohma was a possible purchaser is in saying to the defendants that Ohma was interested in the land. Ohma never proposed to this plaintiff or expressed to it a willingness to buy at the price stipulated.

It is claimed, however, that the plaintiff did interest Ohma in this land, and that Ohma in fact purchased it from the defendants; that they were the efficient procuring cause of the sale; that, though these agents

2 BROKERS:
compensation
and lien: sale
on terms dif-
ferent from
those ex-
acted of bro-
ker.

were not parties to the transaction in the consummation of the sale, it was through their services, rendered under the contract, that the sale was made effectual. On this theory, however, to entitle the plaintiff to

a commission it must affirmatively appear that the sale was made on the terms on which plaintiff was authorized to procure a purchaser. This is not claimed to be the fact in this case, for the property was sold for less than \$100 an acre. It is claimed, however, that the reduction was fraudulently made, and for the purpose solely of defeating the plaintiff in its commission. Fraud is never presumed. He who asserts it has the burden of proving it. That defendants were anxious to sell this land is apparent. To this end, they not only placed it in the hands of this plaintiff, but reserved in themselves a right to sell it, themselves. While plaintiff asserts that, if the defendants had not sold it for less than \$100 an acre, they could have induced Ohma to take it at \$100 an acre, it nowhere appears in the record that Ohma ever agreed to take this land at \$100 an acre. It nowhere appears that this plaintiff ever procured a purchaser who was ready, able, and willing to take it at the stipulated \$100 an acre. Ohma, when called by the plaintiff on cross-examination, testified that he was never willing to pay \$100 an acre for it. We may omit this testimony;

3. **BROKERS:**
compensa-
tion and lien:
burden of
proof as to
fraudulent
sale.

for the burden was on the plaintiff to show that Ohma was willing to pay \$100, and this it has failed to do. In the absence of such proof, plaintiff has not made out a case. This is not a case in which the duty rested upon the agent only to procure a purchaser who was ready, able, and willing to buy, on terms satisfactory to his principal. Here, the plaintiff undertook to make a sale of defendants' land at \$100 an acre. Its contract did not authorize it to sell for less, or on time or on credit. The presumption is that the sale was to be for cash. There is nothing in the record to show an agreement that the sale should be made on time or on credit. The sale made, which plaintiff claims was a consummation of their effort, was the sale made by the defendants themselves, who reserved the right to sell, and for less than \$100 an acre, with deferred payments, secured by a mortgage upon the land.

We find no error in the ruling of the court in sustaining defendants' motion for a directed verdict, and the case is, therefore,—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

ISABEL ALDEN et al., Appellees, v. JOHN T. MELING et al..
Appellants.

WILLS: Fee with Enjoyment Postponed. A will which "gives and bequeaths" all of testator's property to named children, "share and share alike," with direction to the executor to take possession and manage the same for a named number of years, conveys a fee, with possession and enjoyment postponed.

Appeal from Marshall District Court.—JAMES W. WILLETT,
Judge.

FEBRUARY 17, 1919.

ACTION in equity to construe a will. The trial court construed the will in accordance with plaintiffs' contention, and defendants appeal.—*Affirmed.*

F. E. Northup and J. R. Caldwell, for appellants.

Struble & Stiger, for appellees.

PRESTON, J.—The will, after providing for the payment of debts and funeral expenses, provides:

"Second. I hereby give and bequeath to my eight children namely, Lewis Meling, Ellen Thorsen, Matilda Sampson, Isabel Alden, John T. Meling, Pauline Thorsen, Gifford Meling and Clara Meling, all of my property, both personal and real, of every kind and description, share and share alike.

"I hereby direct my executor herein and afternamed, to take charge of my property at my death, to control it, manage it, and keep it together for five years, from the date of probating of this will. At the expiration of five years I direct him to distribute my property equally among my children, with one exception.

"One, Matilda Sampson, the executor, is to take charge and control her share for (15) fifteen years from the time stated above for the distribution of said estate, and, at the said time, pay the same to her, or her legal heirs.

"Third. It is the intention of this will, that the executor may use from the proceeds, of this property, such an amount as will be necessary to carry on the farm, and care of the property, such as taxes, repairs, and labor, during the five years directed above."

Paragraph 4 appoints his son John T. Meling sole executor, without bond. The contention of plaintiffs is that, by the second clause of the will, an absolute devise and bequest was given to each of testator's children, and created a fee in the donees in the real estate, and an ab-

would vest the fee in the real estate, and the title in the personal property. It was so held in *Channell v. Aldinger*, 121 Iowa 297; *Bills v. Bills*, 80 Iowa 269, 270; *In re Estate of Proctor*, 95 Iowa 172, and cases cited; *In re Estate of Condon*, 167 Iowa 215, 217; and other like cases. There is nothing in later provisions of this will to divest such title, if, indeed, it could be done. The subsequent limitations of the will postponed the enjoyment, as found by the trial court. It may not have been accurate for the court to say in the decree that the real estate was devised absolutely, and in fee simple. Strictly, the children took the fee to the real estate and the title to the personal property, subject only to the postponement of enjoyment. Appellees cite, at this point, *Elberts v. Elberts*, 159 Iowa 332. Cases are cited by either side defining the word property, and holding that it includes real and personal property; also definitions of "distribute" or "distribution," as being applicable to money or personal property, and definitions of the word "pay." These have some bearing, but are not controlling. We are of opinion that the trial court rightly decided the matter, and the decree is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

ROSE BASS, Appellee, v. E. SHERR et al., Appellants.

WORK AND LABOR: Value of Services. The value of services becomes wholly immaterial, when such services are rendered under an understanding in advance that they shall be gratuitous.

Appeal from Woodbury District Court.—W. G. SEARS,
Judge.

FEBRUARY 17, 1919.

PLAINTIFF has verdict and judgment for the alleged reasonable value of labor performed in the bakery of defendants. They appeal.—*Reversed and remanded.*

Edward E. Baron and Henderson, Fribourg & Hatfield, for appellants.

SALINGER, J.—I. Defendants pleaded affirmatively that it was agreed, when the partnership business began, that the partners and their respective wives would give their time and attention to the business without compensation. The trial theory of the defendants was that, while plaintiff rendered some service, she did so under this understanding or agreement. It was that of plaintiff that there was no such agreement; that she was to receive reasonable compensation for services rendered; that such services were reasonably worth the sum of \$860; and that she had been paid nothing. The sole complaint on this appeal is of one instruction given upon this controversy. In that instruction, the court rightly charged that defendants had the burden of proving said affirmative defense. But the jury was told that, if defendants did prove there was an agreement with the wives of the parties to devote their time and attention to the interests of said business without compensation, they should have the verdict if they proved further "that, in pursuance of said understanding, the plaintiff performed some duties on a few occasions during the continuance of said partnership relation under the arrangement and agreement above referred to;" that, if it be proved plaintiff performed some duties on a few occasions during the continuance of the partnership relation, and that she did this under said arrangement and agreement, "then the plaintiff will be bound by such agreement, and will not be entitled to compensation for her services rendered in pursuance of said agreement." The only way of giving effect to all that was charged is to hold there was a direction that defend-

ants should not prevail, unless they established: First, that there was an arrangement for gratuitous service; second, that the services claimed for by plaintiff were rendered under that understanding; third, that these services consisted of the performance of "some duties on a few occasions." The court had told the jury that defendants were liable unless they proved the agreement they pleaded, and proved that the services rendered by plaintiff were performed under the agreement. There was no occasion for adding that defendants must further prove that the services under said agreement consisted of doing "some duties on a few occasions," unless it was intended to charge that it was not sufficient to prove the contract and that whatever services were given were pursuant to that contract, but that defendants could not have the verdict unless they proved that these services were of little value—consisted of nothing but performing "some duties on a few occasions." If the services were of no value, they could not be recovered for, though there was no agreement that they should be rendered gratuitously. If they were of value, plaintiff was entitled to be paid that value, unless it was established that she had contracted not to make a charge therefor. The only possible way of making all of the instruction effective, then, is to construe it into a charge that, even if there was an agreement that the services should be without pay, and though whatever was done was done under this agreement, still, plaintiff was entitled to recover, unless defendants established that the services were of trifling value. If it was proved that the services rendered were performed under such an agreement as defendants pleaded, it is immaterial that, instead of being of trifling value, such services were of substantial value. No services under said contract could be recovered for, no matter how valuable. The very object of the alleged contract must have been that valuable services should be given

without compensation. In our opinion, the instruction was misleading, and enabled the jury to return a verdict for the plaintiff if it found that the service of plaintiff was more than the performance of some duties on a few occasions, even if it also found that the alleged contract was made, and all services claimed for rendered thereunder.—*Reversed and remanded.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

C. W. BECK, Appellant, v. J. P. SCOTT et al., Appellees.

ASSAULT AND BATTERY: Permissible Force. "No more force
1 than a reasonably prudent man under the circumstances would think necessary," and "only such force as reasonably appears to defendant to be necessary," are practically identical in meaning.

APPEAL AND ERROR: Mistake in Assuming Burden of Evidence.
2 A plaintiff who mistakenly frames his pleadings and fully tries his case on the assumption that he has the burden of evidence to establish a certain fact, may not have the mistake corrected on appeal. So held where plaintiff, in an action for assault, assumed the burden of showing that defendant did *not* act in self-defense.

PLEADING: Waiver of Insufficiency. A pleading which has been
3 treated in the trial court as sufficient will be regarded as sufficient on appeal.

ASSAULT AND BATTERY: Offensive Language as Justification.
4 Offensive language will not justify an assault.

Appeal from Ringgold District Court.—H. G. EVANS, Judge.

FEBRUARY 17, 1919.

ACTION at law to recover damages from defendants, for assault and battery. Trial to a jury, verdict for the defendants, and judgment against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

Ferguson, Barnes & Ferguson, O. B. Hudson, and L. W. Laughlin, for appellant.

Fuller & Fuller, and Spence & Baird, for appellees.

PRESTON, J.—Plaintiff and defendants are farmers. The controversy arose over the construction of a partition fence. It is alleged that, while plaintiff was peaceably constructing the fence, pursuant to the request of defendant J. P. Scott, the defendant Lorn Scott, without any provocation or excuse, upon the suggestion, advice, and order of his father, J. P. Scott, did assault plaintiff, and throw him upon the barbed wire fence, causing plaintiff painful injuries and mental anguish; that the assault was accompanied with threats to kill, and the use of vile language. The answer was a general denial; but, at the conclusion of the trial, and before the jury was instructed, the defendants, by amendment, and as a second count of their answer, alleged that all the things complained of were done in self-defense, and to protect defendants from the unlawful assault of plaintiff, and that all they did was done in reasonable self-defense of their persons, against the assaults of the plaintiff. No objection was made by plaintiff to the filing of such amendment, and it was not assailed by motion, demurrer, or otherwise, and no objection was made to the introduction of evidence by the defendants, tending to establish the assault by plaintiff and self-defense by the defendants.

1. The evidence was in such conflict that it was a question for the jury as to who first made the assault, and which was the aggressor, and whether defendants acted in self-defense. Plaintiff's testimony tends to show that the defendants were the aggressors; the defendants' testimony is to the effect that, after defendant Lorn Scott called Mr. Beck, the plaintiff, a liar, plaintiff hit Lorn over the

1. ASSAULT AND
BATTERY:
permissible
force.

head with a pair of pliers, and continued striking at him, when Lorn caught plaintiff and tried to hold him, to prevent further injury. Instruction No. 2 is complained of. The exception taken to this instruction at the trial is that, in effect, the court erroneously instructed the jury that the defendant had made out the defense of self-defense, if the evidence showed that he had used no more force than would have been used by a reasonably prudent man, in resisting the assault of plaintiff, instead of instructing the jury that the defendant would be justified in using, in self-defense, only such force as reasonably appeared to him to be necessary at the time, to protect him from imminent injury. There is another objection to this instruction, which will be referred to later, in the order of counsel's argument. The instruction in full follows:

"2. As to the first essential, to wit, that the defendant Lorn Scott wrongfully assaulted the plaintiff, you are instructed that, if you find from a preponderance of the evidence that the defendant Lorn Scott wrongfully assaulted the plaintiff by violently and wrongfully seizing and striking him, without legal excuse or justification, then the plaintiff is entitled to recover from the defendant Lorn Scott. In this connection, you are instructed, however, that the defendant Lorn Scott claims that the plaintiff first wrongfully assaulted him with a pair of pliers or pincers, and that he acted in self-defense; you are instructed that, if you find from the evidence that the plaintiff first wrongfully assaulted and struck Lorn Scott with pliers or pincers, and that Lorn Scott, for the purpose of self-defense, and to protect himself from the alleged wrongful assault of the plaintiff, resisted, then plaintiff cannot recover unless the defendant used *more force than a reasonably prudent man, under the circumstances would think necessary*, in view of all the facts and circumstances as they appeared at the time. But, even if the plaintiff first assaulted the de-

fendant Lorn Scott, the defendant would not have a right to use *more force in repelling the assault than a reasonably prudent man would believe reasonably necessary* under the circumstances, and if the defendant Lorn Scott did use excessive and unreasonable force in repelling the alleged assault of plaintiff, then the said Lorn Scott would be liable for any damages which the evidence shows plaintiff suffered by reason of such excessive force."

The portions we have italicized, are complained of. Appellant cites *Moran v. Martinson*, 164 Iowa 712, and *Mill v. Roulliard*, 168 Iowa 162, to the proposition, as appellant states it, that the defendants were only permitted to use such force as to them then appeared reasonably necessary, to protect themselves from imminent injury, and that the test was not what another reasonable man would have thought, at the time. Appellant argues that the rule, as stated in the *Moran* case, is that:

"The right [of self-defense] arises when one has been assaulted; and he is permitted to use such force, and no more, as to him then appeared reasonably necessary, to protect himself from imminent injury."

In the *Mill* case, the instruction on self-defense was claimed to be erroneous, because it was claimed that the court instructed that the amount of force permissible was such as the defendant honestly believed was necessary, etc. The criticism was that it was not the force the defendant honestly believed was necessary, but the force that reasonably appeared to him to be necessary, etc. In some of the other instructions in that case, it was stated that defendant cannot, under the claim of self-defense, use more force than appears to him to be reasonably necessary, etc. The court held, in that case, that, in the light of the evidence, the instructions to the appellant furnished no ground of complaint, even though they departed somewhat from the language used in other cases. The argument in the instant

case is that the rule as to the amount of force one can use in making his defense depends upon what is in the mind of the person who is defending himself,—what he himself thinks,—what he himself believes,—not what somebody else might have believed, under the circumstances, reasonable or unreasonable. The defendant is not here complaining, and it seems to us that the instruction is as favorable to plaintiff as he can ask. We think the language of the instruction given is equivalent to the rule contended for by appellant. A defendant claiming self-defense may not arbitrarily claim, without any reasonable basis, that he himself thinks or believes a certain amount of force to be necessary, but he may use such force as he, as a reasonable man, under the circumstances, believes necessary, or as to him appeared reasonably necessary. We think the instruction is in harmony with the rule announced in *State v. Sterrett*, 68 Iowa 76, and other cases. Without expressly approving the precise wording of the instruction, we think there is no error at this point of which plaintiff may complain.

2. The instruction above set out is further criticized for the reason that it placed upon the plaintiff the burden of proving that the assault of the defendant Lorn Scott was not made in self-defense. The conten-

2. APPEAL AND
ERROR: mis-
take in assum-
ing burden
of evidence.

tion is that the burden was upon the defendant. Counsel for appellant cite, to sustain their proposition, the case of *Sweet v. Boyd*, (Iowa) 98 N. W. 601. The appellees argue that a defendant may, in different counts of his answer, plead inconsistent defenses, and the effect of a general denial is not nullified by the colorable confession alleged in connection with the avoidance (citing Code Section 3620; *Barr v. Hack*, 46 Iowa 308; *Rudd v. Dewey*, 121 Iowa 454). As before stated, in the instant case defendants did plead the matter of self-defense in a separate count of their answer,

and after the evidence was all in, without objection. They say, too, that where, as here, a petition is filed, claiming damages for alleged assault and battery, in which plaintiff alleges that defendants, without provocation on plaintiff's part, or any cause or excuse therefor, assaulted plaintiff, and that plaintiff was not guilty of any conduct that would justify such assault, a general denial in defendants' answer puts all the matters alleged in plaintiff's petition in issue, and before plaintiff can recover, he must show that there was no justification for defendants' alleged assault; that plaintiff was free from blame; and that defendants were not acting in self-defense (citing *Phelps v. Chicago, R. I. & P. R. Co.*, 162 Iowa 123; *Gilbert v. Baater*, 71 Iowa 327; *State v. Morphy*, 33 Iowa 270; *State v. Porter*, 34 Iowa 131; *State v. Donahoe*, 78 Iowa 486; *State v. Shea*, 104 Iowa 724, 726).

Some of the above-mentioned cases are not assault and battery cases, and some of them are criminal cases. In a criminal case, the burden is upon the State. The plaintiff seems to have tried his case on the theory that it was necessary for him to allege and prove that there was no justification or excuse for the defendants' making the assault. He did so allege in his petition, and testified that the defendants and others came to where plaintiff was, and that defendant J. P. Scott asked plaintiff where the rock was, and the plaintiff answered that he didn't know; that thereupon, defendant Lorn Scott called plaintiff a name, threatened to kill him, and assaulted him; and that defendants came down there to lick him. The evidence for the defendant, tending to show self-defense, went in before the amendment to the answer was filed, and without objection as to its relevancy. In 16 Cyc. 926, the author, referring to the ambiguity in the phrase "burden of proof," says that this ambiguity lies in the word "proof," when used indifferently as representing either the effect of in-

roducing sufficient evidence, or the means employed or required to obtain this result. He treats burden of proof as meaning the necessity of establishing the existence of a certain fact, or state of facts, by evidence which preponderates, and calls it burden of evidence, where it refers only to the necessity which rests on a party, at any particular time during a trial, to create a *prima-facie* case in his own favor, or to overthrow one when created against him. He states the general rule as to burden of proof, properly so called, to be that whoever has the affirmative of the issue, as determined by the pleadings, or, where there are no pleadings, by the nature of the investigation, has the burden of proof; and that, where a party erroneously assumes the burden of proof as to a particular allegation, or the burden of evidence as to a particular fact, the mistake will not be corrected in the appellate court. It would seem as though this was the situation in the instant case, because of plaintiff's assuming the burden, both as to the burden of proof and the burden of evidence, as before indicated.

Going back, now, to some of the cases before cited. In the *Sweet* case, cited by appellant, there was a directed verdict in favor of defendant, at the close of all the evidence. There was no question of instruction as to the burden of proof. Mr. Justice Bishop, the writer of the opinion, did say that an assault and battery is presumptively wrongful, and just cause or provocation, if such exists, is defensive, and the burden of making such appear must rest on the defendant. It was also said that:

"Two other grounds are assigned, each of which is based upon the thought that it was incumbent on plaintiff to prove, not only that an assault was made, followed by a battery, but that such was without just cause or provocation. As to these latter grounds, we need say no more than that, a battery thereby being, in effect, conceded, it

was not for the plaintiff to establish a want of cause or provocation."

We apprehend that the real question in that case was whether, under the evidence, there was a jury question, the court stating that:

"Who was the aggressor, who struck the first blow, who was worsted in the encounter, and, if the plaintiff, how much, if at all, he was damaged, were questions which, we think, should have been answered by the jury."

No reference is made to the pleadings, either for plaintiff or defendant, in the *Sweet* case. The *Phelps* case, supra, cited by defendants, is quite like the instant case, except that, in that case, the answer was a general denial only; while, in the instant case, such was the situation until after the evidence was all in, when the amendment to the answer was filed. In that case, Mr. Justice Withrow, writing the opinion, said:

"In his petition, the plaintiff charged that the assault was committed by the conductor, without excuse, provocation, or justification. In stating the issues to the jury, the trial court copied the substance of the petition, including the averment above noted, and in a following instruction, charged thereon that the burden of proof was upon the plaintiff to establish his alleged cause of action, by a preponderance of the evidence. The answer was a general denial, without any averment of excuse or justification. Whatever evidence may have been introduced, either in direct or cross-examination, which tended to show excuse or justification, was, so far as is shown by the record before us, entirely without objection to its competency or relevancy. The point of the objection of appellant to instruction No. 1, the statement of the issues, and No. 3, as to the burden of proof, is that they required a greater degree of proof than was necessary to plaintiff's recovery, as, by the statement of plaintiff's plea that the act was without

justification or excuse, the burden of proof, although stated in general terms, was placed upon him to negative such facts. The trial court adopted plaintiff's claim, as it had the right to do, in stating the issues. It could not have said less as to the burden of proof, and have correctly stated the law; and, as appellant made no request for an instruction remedying or withdrawing that particular claim in his petition, he is not now in a position to claim error."

There is this further similarity between the *Phelps* case and the instant case, and that is that appellant made no request for an instruction remedying or withdrawing that particular claim in his petition. The trial court seems to have adopted plaintiff's theory, and submitted the case to the jury on such theory. This being so, we think that, under the authorities, appellant has no just cause of complaint.

The foregoing are the main grounds relied upon for reversal. Some other matters of less importance are argued, and they will be referred to as briefly as may be.

3. Appellant cites *Morris v. McClellan*, 154 Ala. 639 (45 So. 641), to the proposition that, in pleading self-defense, every element or fact necessary, under the law, to constitute self-defense must be averred. App-

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waiver of
insufficiency.

pellee's answer to this is that, where a pleading is filed before a submission of the case to the jury, and such pleading is not assailed by motion or demurrer, the sufficiency of such pleading is admitted, and becomes the law of the case, and, if sustained by evidence, will defeat the plaintiff's action (citing *Roberts v. Ozias*, 179 Iowa 1141, 1143; *Pace v. City of Webster City*, 138 Iowa 107, 109; *Coleman v. Coleman*, 153 Iowa 543). Without determining the sufficiency of the defendants' amended answer, had it been attacked, it is quite clear that they sought to raise the issue of self-defense. The plead-

ing was not attached in any manner, nor was there any objection made to its being filed.

4. Appellant refers us to cases from other jurisdictions, to the proposition that the plea of self-defense is not available to one who uses language that a reasonable man would

4. ASSAULT AND
BATTERY: offen-
sive language
as justification.

expect to bring on an encounter. The trial court instructed, in substance, that the use of offensive language would not be a justification for an assault. We understand this

to be in harmony with our decisions. Among others, the following case may be cited: *Nesbit v. Chicago, R. I. & P. R. Co.*, 163 Iowa 39, 58.

The foregoing discussion disposes of all questions which are at all controlling. We have examined the record as to the minor questions, and, finding no error, the judgment is—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

FLORENCE BENEFIEL, Appellant, v. HARVEY SEMPER, Appellee.

NEW TRIAL: Discretion of Court. An order for new trial on a ground clearly justified by the record is quite conclusive on the appellate court.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

FEBRUARY 17, 1919.

ACTION for damages for assault and battery. There was a verdict for the plaintiff for \$200. On motion of the defendant, the trial court ordered a new trial. The plaintiff appeals.—*Affirmed*.

C. R. Metcalfe, for appellant.

H. W. Walling and *T. F. Griffin*, for appellee.

EVANS, J.—The plaintiff is a married woman. She and her husband were tenants at will, in possession of certain residence property owned by the defendant. The defendant went to the house for the purpose of serving upon his tenants a notice to quit. His attempted reading of the notice was interrupted by the plaintiff. Concerning this, she testified as follows:

"When Mr. Semper came to my house, he started to read the notice, and I told him he could not read any notice to me. I took the mop and swiped the notice off the table and out of the house,—he had laid the notice on the table,—and told him if he did not get out, I would scald him. I took some water,—it was not hot, had just been put on, partly warm,—and I threw it on him, and he finally left the house; and I stepped to the door and picked up the ball bat,—I never attempted to strike him,—I picked it up to get it out of the way * * *."

There was, however, no lack of evidence on her part to the effect that the defendant struck her several times in the melee. The jury fixed her actual damages at \$100, and allowed exemplary damages in the same amount. The record discloses that the trial court thought that the defendant had not had a fair trial, and that the verdict was the result of passion and prejudice. A new trial was, therefore, ordered. It is true that the trial court offered the plaintiff an opportunity to remit \$75 of the verdict, and avoid a new trial. This condition offered by the court purported to deduct the \$75 from the exemplary damages. Appellant's argument is addressed to the particular point that, if she was entitled to \$100 actual damages, a like amount as exemplary damages was not excessive. There is merit in the argument, if it could be deemed decisive

of the case. Even if the trial judge gave a bad reason for his ruling, this will not necessarily result in a reversal of the ruling. The ruling itself must yet be considered on its merits under the record. If good reasons in support of the ruling are apparent in the record, this is sufficient to sustain it. The trial court has a large discretion in the matter of granting a new trial. It is seldom, indeed, that we interfere with an order granting a new trial. We think it was fairly within the discretion of the court, upon the record in this case, to grant a new trial on the ground that the verdict had been influenced by passion and prejudice. In so holding, we are not to be understood as intimating any opinion on our part as to the ultimate merits of the case. The order granting a new trial is, therefore.—*Affirmed.*

LADD, C. J., PRESTON and SALINGER, JJ., concur.

ANDREW BRODD, Appellee, v. ADAM CRILE, Appellant.

TRIAL: Jury Question. A fair conflict of testimony on an issue presents a jury question.

Appeal from Jefferson District Court.—D. M. ANDERSON,
Judge.

FEBRUARY 17, 1919.

ACTION for personal injuries to plaintiff, while in the employ of the defendant, in operating a stump puller. There was a trial to a jury, and a verdict for plaintiff. Defendant appeals.—*Affirmed.*

Ralph H. Munro, and Leggett & McKemey, for appellant.

Thoma & Thoma, for appellee.

PRESTON, J.—Prior to the time of the happening of

the matter in controversy, defendant had purchased from plaintiff a 20-acre tract of land, and, by the contract of purchase, defendant had the right to work on the land prior to the time the deed was to be made. During this time, plaintiff worked for defendant; he had worked for him off and on for a couple of years, doing various odd jobs. In December, 1916, plaintiff helped defendant pull trees, stumps, and brush on the land. Plaintiff had helped defendant at this work for about two days. Until the day of the accident, defendant had used but one horse on the power lever of the stump puller, and plaintiff would walk ahead and lead the horse. On the morning of the accident complained of, defendant directed that two horses, instead of one, be used on the power lever, and instructed plaintiff to walk behind them and drive. While doing this, the clevis on the doubletree gave way, the team came loose from the power lever, and the lever flew back and struck plaintiff, breaking his leg. After the accident, the clevis was found where it belonged, but the clevis pin was not found at that time. The claim is that the clevis was an ordinary one, with a screw pin, and that the cause of the accident was the failure to screw the clevis pin securely into the clevis, which failure resulted in the bending of the pin and clevis, sufficiently to permit the doubletree's pulling through the opening thus created.

This was the ground of negligence submitted to the jury, the court stating:

"The only ground of negligence submitted to you, and the only ground of negligence charged which the plaintiff's evidence tends to support, is that, in hitching the doubletrees to the power lever stump puller of the defendant, the defendant failed to properly fasten the clevis pin into the clevis bar."

It seems not to be disputed that such failure would constitute negligence. The principal controversy is as to

whether the plaintiff or the defendant screwed the pin in the clevis. Plaintiff contends that this was done by the defendant, and the defendant contends that plaintiff did it. The defendant further contends that, because of some supposed contradictions in the testimony of plaintiff in regard to this, there was no substantial contradiction by plaintiff of defendant's testimony, and that, therefore, the evidence was not sufficient to take the case to the jury.

No complaint is made of the instructions. The only errors assigned are that the court erred in overruling the defendant's motion for a directed verdict, and in overruling the motion for a new trial. Appellant cites cases to the proposition that verdicts must have evidence to support them, and that a motion to direct a verdict should be sustained, when, considering all the evidence, it appears to the court that the verdict will not be permitted to stand; and that a mere scintilla of evidence does not require the submission of a case to the jury. On the other hand, appellee cites authorities that, where there is a fair conflict of evidence, there is a jury question, and it is conclusive on appeal. These propositions are so well understood that we shall not cite the cases.

In the opinion of the trial court, he stated:

"In his testimony, plaintiff, after being on the stand for some time, made some statements contradicting his testimony that defendant had fastened the doubletrees to the clevis; but at no time did he say that he did so himself. The plaintiff is a Swede, of little education, and had considerable difficulty in understanding questions propounded to him and in making intelligent answers thereto. The clevis produced upon the trial, it is claimed by defendant, was the same clevis that was on the doubletrees, and the same that was shown at the bank when plaintiff and defendant were settling in the farm sale. The plaintiff thought it was not the same clevis, or the one shown at the

bank, and a number of his admissions against his claim that defendant fastened the clevis are easily explained upon the theory that defendant's counsel was trying to get him to admit that was the clevis which was used on the double-tree. From his testimony, his manner of testifying, his apparent candor and truthfulness, the jury may well have found, as they did, that the defendant fastened the double-trees to the power, as claimed by plaintiff, and that plaintiff did nothing, when hitching the team on, except to hitch the tugs to the singletrees."

The trial court and the jury saw and heard this witness, and all of them, and were in a better position than we can be. We shall set out enough of the examination of plaintiff to show that the observations of the trial court, above set out, were based upon and sustained by the record. The plaintiff testified in chief:

"Q. Did you hitch up the team that morning as he directed you to? A. I put the tugs on. He had fixed the rest of it. Q. Just explain to the jury what you mean. A. Put the tugs on, and he fixed the rest of it. Q. Just give the jury the acts you did, in fastening that team to the power lever of the stump puller. A. Well, we just hitched them up,—that is all I knew. Q. What do you mean by 'just hitched them up?' A. Put the tugs on. Q. Put the tugs on what? A. On the doubletree."

On cross-examination, he was asked if defendant did not drive the team to drag away the trees on the morning in question, and brought the team back with the double-trees hitched to the team; and plaintiff said that it was not done that way, that he knew of; and he was then asked if he would say that he didn't; and the answer was: "I can't say it; I don't recollect it." But from the entire examination, we are satisfied that the jury were justified in finding that he meant that he couldn't say it that way: that is, as indicated in the questions. He also testified:

"Q. You would not say that is not the clevis that you fastened to the doubletree? A. It don't look like the same clevis. Q. You would not say that, when you put the pin in that clevis, that you got the threads fastened? A. If I had put the clevis pin in. Q. If you had put the pin in the clevis, and screwed it in, it would not have fallen out, would it? A. How do I know that is the clevis? Maybe it is not the clevis. Q. You would not swear that you put the threads—put the pin in the clevis? A. It does not look like the same clevis that we had down at the bank, anyway. Q. You hitched up the team to the stump puller, didn't you, that morning? A. I put the tugs on. Q. Didn't you put the clevis on,—put the doubletrees on that morning? A. I don't think I did. Q. You don't remember, do you, about that, very distinctly? A. I did not put it on."

There is much more of this testimony, as the examination in chief and on cross-examination and re-direct was quite extended. That which has been set out indicates the thought of the court, as we have before stated. Though it may be conceded that plaintiff's testimony was somewhat weakened on cross-examination, he did say, during the examination, that he did not put the clevis on, and that the defendant did. It seems quite clear to us that it was a question for the jury. It follows that the judgment of the district court must be, and it is,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

NELLIE CARTER, Appellee, v. MARSHALL OIL COMPANY,
Appellant.

WITNESSES: Impeachment by Showing Indefinite and Remote
1 Transaction. A witness may not be impeached, as to certain facts testified to by him, by a showing of other facts which are indefinite and uncertain, both as to the nature thereof and as to the time when they occurred. So held where a party tes-

tified as to certain facts in defense of an action for the negligent intermingling of inflammable oils, and plaintiff sought to impeach by a showing of another indefinite and unidentified transaction.

INTEREST: Past, Present, and Future Accruing Claims. Interest ² may not be allowed from the *date of an injury*, when the verdict represents past, present, and future accruing damages: i. e., past, present, and future pain, suffering, and humiliation arising from an injury.

TRIAL: Confirming Quotient Verdict Agreements. The invalidating ³ effect of a definite agreement by jurors to do that which would render their verdict a "quotient" verdict, is not avoided by the subsequent action of the jury, after arriving at such verdict, in taking another vote and unanimously agreeing on the amount thereof, or by the addition thereto of interest from a certain date.

Appeal from Cerro Gordo District Court.—JOSEPH J. CLARK, Judge.

FEBRUARY 17, 1919.

ACTION for damages consequent on being burned as the result of an explosion, resulted in judgment against the defendant, from which it appeals.—*Reversed.*

C. H. E. Boardman and *Henry Curvo*, for appellant.

Senneff, Bliss & Witwer, and *E. B. Stillman*, for appellee.

LADD, C. J.—The defendant was engaged in the sale and delivery of kerosene, gasoline, and naphtha, with headquarters at Marshalltown, and had established an agency at Clear Lake, with B. C. Belding as agent. On December 5, 1914, A. E. Carter directed the agent or representative of the defendant company to place in a galvanized, unpainted can on his farm 50 or 60 gallons of kerosene. Fred Gentry had requested him to deliver gasoline at the same place, and Belding loaded in his motor truck such an

amount of gasoline and kerosene as seemed sufficient to fill the two orders. In the afternoon, he drove to Carter's place, where Gentry was working his tractor, and poured 115 gallons of gasoline in the tank, which was empty, and then filled two 10-gallon milk cans with gasoline for Gentry, at Carter's house. This took all the gasoline off the truck, and Belding then took 60 gallons of kerosene from the truck in 2-gallon pails, and poured same into Carter's kerosene tank. There is some controversy as to how the kerosene was purchased, and how much there was. After the oil had been delivered, Mrs. Carter took a small can, then empty, and drew kerosene from the oil tank in it, until three fourths full, and poured enough into three lamps, which were not empty, to fill them, and also filled an oil burner. She then placed the small can, which still had oil in it, in the kitchen, about six feet from the stove, and went to Clear Lake in the evening, to attend church services. In the morning following, Carter arose, and, before dressing himself entirely, started a fire in the kitchen stove. He filled the fire box with cobs, which were rather damp, and then poured oil from a gallon can on them, and applied a match. This was done by removing the lid, which was replaced after starting the fire. In touching the match to the oil, he had noticed no flash or explosion. He put no coal into the stove, and returned the can to the place whence he obtained it. When dressed, he went out to attend to his chores, first calling the plaintiff, who was 15 years old, and her sister, 13 years of age, to get breakfast. From a half to three quarters of an hour after he had started the fire, his daughters came running to the barn, in flames. The plaintiff had looked into the stove, and thought the fire had gone out. She testified that it "looked black, like it always does when cobs burn or are blackened * * * I saw the cobs there. I did not see any fire; I don't know whether the stove was very warm. It was not very hot.

I don't know whether I thought the fire had been started or whether it had not, or whether it had gone out. The fire box of the stove was filled with something black." She replaced the lid, and her younger sister took it off again, got the kerosene can, and, holding it about a foot above the stove, began to pour the contents into the stove. Plaintiff was then standing three or four feet back, and, as the oil reached the cobs, there was a blaze, a noise like that of a shot, and the can itself exploded, throwing its burning contents over both girls. The top of the can and the sides were burst open, and the bottom of the can was blown entirely out. The injuries suffered by the younger daughter, Frances, resulted in her death. The plaintiff recovered, though she was seriously and permanently injured. No fuel or cobs appear to have been thrown from the stove, and Carter testified that he observed no fire therein, immediately on coming into the house. A curtain near the stove was burned, and some of the paint on the woodwork was blistered.

Most of the errors assigned are not such as will be likely to arise on another trial, and for that reason, are not reviewed. Because of the errors necessitating a reversal, we express no opinion on the sufficiency of the evidence to sustain the verdict.

I. One Knudtson testified to having been employed by M. Olson & Company during two years prior to September 25, 1915, and that he remembered when some oil was

put in the corner tank, and that he made some test of it, on complaint; that this had occurred about a year previous, the trial having begun on February 7, 1915. He was then asked, "Did it flash up or not?" An objection that "it would be immaterial, attempting to contradict immaterial testimony," seems to have been sustained, and he was asked:

1. WITNESSES:
impeachment
by showing
indefinite and
remote trans-
action.

"Well, Mr. Knudtson, you say 'about a year ago.' I find here in this order book that, on the 4th day of December, 1914, that M. Olson & Company got 50 gallons of Search-Light kerosene. What would you say as to whether this instance you speak of was around about that time, or whether it was not?"

An objection as leading and suggestive was overruled, and the witness answered:

"I think it could be that time. Q. Well, is it your judgment that it was around somewhere that time? (An objection as leading and suggestive was sustained). Q. Well, what is your best judgment as to whether it was in the neighborhood of that time? A. Well, my judgment of the time, I would believe it fall, rather than spring, because at that time in testing it, there was little or no snow on the ground,—usually in the spring, there is lots of it. Q. What is your best recollection as to whether it was around December 4, 1914? A. I recollect the instance of this, this oil instance, but not the exact dates. Court: Now he wants you to give the nearest date you do recollect of that occurrence. A. Well, the nearest recollection I could state would be late in the fall,—I could not give any other dates. Q. Well, it is in the late fall of 1914,—of course, it would be impossible for any witness—The Court: You say it was right the next day after he had been to Carter's? Mr. Senneff: No, it would be the day before. The Court: The day before he went out to Carter's? Mr. Senneff: Yes. The Court: Well, he may answer this question, under those circumstances. (Defendant excepts.) Question read by the reporter as follows: Q. Mr. Knudtson, did you, the next day after the tank was filled, see Mr. Belding remove it from the tank? A. He did the next day."

The ruling was erroneous and prejudicial. Evidently, the court accepted Senneff's suggestion that all this happened the day before the explosion in question, but the wit-

ness had not so stated, and the ruling permitted evidence of a distinct transaction, wherein Belding had put oil in the corner tank, and afterwards it was tested by the witness, and some of it was removed on the next day. No connection with the hauling or sale of the oil in question was shown, nor that the time was nearer to December 5, 1914, than late in the fall of that year. This did not tend to contradict Belding's testimony that he could distinguish gasoline from kerosene from the faucet, or that he had heard no complaints as to oil taken from certain carloads, or that he had not removed anything from a tank of the M. Olson Company which had contained gasoline. All appearing was that, after a test, something was removed from the tank. The testimony of Knudtson did not tend to impeach Belding in any material fact, and was objectionable as an attempt to inject into the record evidence that sometime, somewhere, oil of some kind reached M. Olson Company, and, after a test, was, for some undisclosed reason, removed. The evidence should have been excluded.

II. The jury voted to allow the plaintiff \$8,666.66, exclusive of interest, and the foreman was directed to sign the verdict for the amount above named, it to draw interest from the time of the explosion. The verdict returned was as follows:

2. INTEREST:
past, present,
and future
accruing
claims.

"We, the jury, find for the plaintiff in the sum of \$8,666.66, *with interest at 6 per cent from December 6, 1914.*"

The portion in italic was in the handwriting of the foreman. That preceding was the typewritten form submitted by the court. The jury had not been instructed to allow interest. An important element making up the claim for damages was the pain and suffering in body and mind reasonably certain to be suffered in the future, together with the inconvenience and disfigurement of body resulting from her injury. The rule is well settled that, in

such a case, interest may not be allowed *eo nomine*. *Jacobson v. United States Gypsum Co.*, 150 Iowa 330. See *Cochran v. City of Boston*, 211 Mass. 171 (Ann. Cas. 1913B, 206). Where plaintiff's damages are complete at a given time, interest may be allowed from that date; but where the damages were not complete at any specific date, and were accruing up to the time of the trial, interest from the date of the injury is not to be included in the verdict. Pain and suffering were endured by plaintiff long after the injury, and that for the future might also have been allowed, as well as the humiliation resulting from the disfigurement. Manifestly, damages were accruing up to the time of the trial, and were to be measured as of that time; and the court erred in computing interest from the date of the injury.

III. Another ground for new trial is that a quotient verdict was returned. Three jurors made affidavits which were attached to defendant's motion for new trial. Two of

these, Male and Christiansen, swore that,

3. TRIAL: confirming quotient verdict agreements.

failing to agree upon the amount to be allowed plaintiff as damages, the jurors agreed that each juror set down some

amount between \$7,000 and \$10,000 he was willing the verdict should be for; that these several sums should be added, and the total amount be divided by 12, and the quotient should be the verdict to be returned; and that this was done, and \$8,666.66 was the quotient. This sum, with interest at 6 per cent from December 6, 1914, was the amount allowed in the verdict. The affidavits of Christiansen and Jones disclosed that, subsequently, a vote was taken to see if all were satisfied, and the quotient obtained was unanimously agreed upon as the verdict; and Male added that, subsequently, interest from December 6, 1914, was, by agreement, added. Later on, all the jurors made affidavit that, after some hours of deliberation, the jury had so nearly agreed upon an amount of a verdict that the lowest

amount voted for was \$7,000, and the highest amount \$10,000; that, at this time, one of the jurors suggested that the respective amounts voted for be averaged, to see if such an average would equal an amount upon which all of the jurors could agree; that thereupon, the said respective amounts voted for were set down and averaged, and the average amount equalled \$8,666.66; that thereupon, the said amount of \$8,666.66 was discussed, and a vote taken by the jurors as to whether or not that amount should be the amount of the verdict; that thereupon, one of the jurors raised the question as to whether or not that amount should include interest, or interest should be added thereto from the time mentioned in the instructions; that thereupon, a vote was taken by the jury, and it was determined that said amount should be the verdict of the jury, exclusive of interest; and the foreman was directed to sign the verdict for the amount above named, it to draw interest from the time mentioned in the court's instructions. This affidavit was attached to the plaintiff's resistance to the motion for new trial.

It will be noted that the affidavit of all the jurors does not controvert the affidavit of Male that the quotient or average obtained by the computation "should constitute our verdict, and should constitute our verdict in the case," or that of Christiansen, that "we were to be bound by this amount as our verdict." This being so, there is no escape from the conclusion that, unless obviated in some manner, the verdict thus reached was what is known as a "quotient verdict." *Gutfreund & Co. v. Williams*, 172 Iowa 535. The jury, however, had the right to retrace their steps and repudiate their improper conduct if they chose. *Thompson v. Perkins*, 26 Iowa 486. Thereafter, interest on the average sum was agreed to be added, and the jurors then voted "according to our agreement made in advance," which was carried unanimously, as sworn to by Christiansen; and Jones swore that "another vote was taken to see if every

juror was satisfied with the former agreement of determining the amount of the verdict, and every juror voted unanimously in favor of the prior agreement for reaching the verdict, and the manner in which it was obtained."

The affidavit of all the jurors was that, after the average amount had been ascertained, it (\$8,666.66) was discussed, and a vote taken as to whether that amount should be the amount of the verdict. This was no more than a ratification of what had preceded, and the average amount stood on another vote to add interest. The illegal conduct in reaching the amount of the verdict to be returned was not repudiated or abandoned, but rather confirmed, by what followed. The evil of a quotient verdict cannot be cured by agreeing thereafter to a slightly different verdict, if it appears that the agreement made in advance entered into or induced the result; nor can a quotient verdict be cured by the jury's subsequently adopting it or its equivalent as their verdict, if the agreement entered into or controlled the subsequent adoption of the verdict returned. *International Agri. Corp. v. Abercrombie*, 184 Ala. 244 (49 L. R. A. [N. S.] 415). A subsequent assent to the verdict is not sufficient to purge its illegality. *Sylvester v. Town of Casey*, 110 Iowa 256.

There was no subsequent reconsideration of the amount of the damages to be allowed. The later votes on the verdict, without any review on the merits, adopted the result attained by the illegal process of adding the several amounts and dividing by the number of jurors, in pursuance of an agreement to be bound thereby. No one could tell in advance the damages so measured to be allowed. These were fixed by chance, through an arbitrary, self-imposed rule, instead of a conscientious and deliberate consideration of the merits by each juror. Such a verdict is by chance, for no juror is apprised what sum his fellows will set down, and the verdict is not the product of his judgment. Had there

been no agreement in advance to abide by the result of the computation as the amount of the verdict to be returned, the matter would have been left open to choice, and each juror left free to accept or reject the result, and the outcome regarded as the conclusion of each juror. As there was an understanding in advance that the verdict was to be reached in the manner described, and no evidence of its repudiation, as must have been clearly proven (*Thompson v. Perkins*, supra), and the subsequent finding of a sufficient verdict, the court erred in not granting a new trial. —*Reversed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

FARMERS ELEVATOR COMPANY, Appellant, v. CHARLES REDDIX et al., Appellees.

CONTRACTS: Oral Followed by Written Contract. An oral contract of sale of a certain subject-matter is wholly merged by a subsequent written contract of sale of the same subject-matter, and such merger excludes all oral evidence of such former contract.

ESTOPPEL: Sale of Lien-Encumbered Property. A landlord is not estopped to assert his right to his rent share of the tenant's crop, nor is a mortgagee of the tenant's share of the crop estopped to assert his lien, by consenting to or authorizing a sale which was never consummated. Such consent or authorization cannot be held to attach to a subsequent, unauthorized, and unknown sale by the tenant, and especially so when the contract governing such subsequent sale was quite indefinite as to its subject-matter.

Appeal from Monona District Court.—W. G. SEARS, Judge.

FEBRUARY 17, 1919.

ACTION in replevin to recover the possession of 4,000 bushels of corn. The right of possession was claimed by virtue of a contract of purchase of same from defendant

Reddix. Reddix had a three-fifths share of the corn, as the tenant who raised the same. The defendant Henning had a two-fifths share thereof, as the landlord of Reddix. The defendant Turin Savings Bank had a mortgage on the three-fifths interest of Reddix. The defendants denied the alleged contract of purchase. At the time of the service of the writ of replevin, the mortgagee and the landlord gave a delivery bond, and took possession of the property. By cross-petition, the mortgagee asked the enforcement and foreclosure of its mortgage. At the close of the evidence, the trial court directed a verdict against the plaintiff, and awarded possession to the mortgagee and to the landlord. The plaintiff appeals.—*Affirmed.*

Oliver & Allen, for appellant.

Prichard & Prichard and *C. E. Cooper*, for appellees.

EVANS, J.—The plaintiff alleged that, on January 26, 1917, it purchased the corn in question by oral contract; that it was so purchased for future delivery, on or about July 1st; that, in April following, the contract was reduced to writing, and that the written contract was made to bear the date January 26, 1917. It claimed its right of possession by virtue of both the oral and the written contract. The defendants filed separate answers. Reddix filed a general denial, but admitted that he had orally contracted to sell the property on January 26th, for immediate delivery, and within ten days, and averred that the plaintiff failed and refused to receive the same within such time. He admitted the execution of the written contract pleaded, but denied its validity, and averred a want of consideration. He also pleaded, in effect, that, at the time of the beginning of the suit, the right of possession of the corn was in his codefendants, the mortgagee and the landlord, and

1. CONTRACTS:
oral followed
by written
contract.

that he had no control over the same. Henning, by answer, set up his claims as landlord, and the Turin Savings Bank, defendant, set up its claim as mortgagee. There was also a plea of the statute of frauds.

On the trial, the plaintiff called the defendant Reddix as a witness, and undertook to prove by him the oral contract pleaded. The testimony thus elicited from Reddix was in accord with his pleading, already noted. Thereupon, the plaintiff introduced other oral evidence tending to support the allegations of its petition as to an oral purchase. It also introduced oral evidence to the effect that, in April following, the said oral contract was reduced to writing. The writing was introduced in evidence, and was as follows:

"This agreement witnesseth: That I have this day sold to Farmers Elevator Company, of Onawa, Iowa, 4,000 to 4,500 bushels of good, sound, dry, merchantable No. 3 yellow or No. 3 white shelled corn. To grade No. 3 w or 3 y or better, at 91 per bushel, the same to be delivered by me to it in its cribs, bins or elevator at Onawa, Iowa, as they may direct. The said grain to be in a good merchantable condition, free from snow or rain, and delivered on or before the first day of July, 1917, at their option. I agree that this contract may be either extended or canceled at its expiration by the buyer, if the grain herein specified is not delivered in the specified time. I further state that I am the sole owner of said grain, and that the same is now located on the land known as the ——— farm in ——— Township, ——— County, Iowa, and that same is free from and clear of all liens and incumbrances whatsoever.

"I make this statement for the purpose of obtaining credit and securing whatsoever sum of money may be advanced upon this contract, either at this date or at any time between this date and the delivery of said grain. If default be made in the delivery of said grain the said

Farmers Elevator Company or its representative may, without suit, take possession of same wherever found, and market the same at my expense, and after paying all expenses, moneys advanced with interest, etc., the balance if any, shall be paid to me.

“[Signed] Charles Reddix.

“Accepted:

“Farmers Elevator Co.

“By A. D. Post.

“Dated this 26th day of January, 1917.”

The plaintiff also introduced evidence tending to show that, in January, the defendant Henning had written Reddix, his tenant, directing him to sell his corn immediately; also, evidence tending to show that, in February, the Turin Savings Bank had called the plaintiff by phone, and had inquired whether the plaintiff had bought Reddix' corn; that the plaintiff answered such question in the affirmative; that the bank officer then advised the plaintiff that the bank had a mortgage, and that he there consented that the consideration might be paid to Reddix, and that the bank would trust Reddix to bring the same to it.

The plaintiff takes the unique position of claiming under its alleged oral contract of January 26th, and under its written contract of April. It goes without saying that, if it had a good written contract, it had no need to rely on the oral contract. It goes without saying, also, that, if the oral contract was reduced to the writing which was introduced in evidence, then the oral was merged in the written, and the existence of the written contract would exclude evidence of the oral. There was no competent evidence of the oral contract of January 26th, except the evidence of Reddix. Under that evidence, the sale was for immediate delivery within ten days, and the plaintiff proved unable to receive such corn at such time, for want of cars in which to ship the same. Under the undisputed

2. ESTOPPEL:
sale of lien-
incumbered
property.

competent evidence, therefore, the oral contract of January 26th had fully terminated, by reason of the default of the plaintiff itself. Such oral contract having terminated, plaintiff's plea in estoppel against the defendant mortgagee and the defendant landlord falls to the ground. The landlord had directed an immediate sale. The contract of January 26th, as testified to by Reddix, was such. Such direction by the landlord to his tenant, however, did not authorize the tenant to enter into an executory contract for long delayed delivery. There is no other evidence that tends in any manner to bind the landlord to any other contract than that of January 26th. It does not appear that he had any knowledge of the written contract entered into in April. The same may be said as to the mortgagee bank. Being informed by the plaintiff in February that it had bought Reddix' corn, it assented to the sale. If that contract of purchase had been performed by the plaintiff, it might well claim its conversation with the mortgagee as an estoppel; but such conversation, had in February, as to a purchase already made, would not be effective to subordinate the right of the mortgagee to the subsequent contract, entered into in April.

Turning now to the writing which was entered into in April, and which is above set forth, it cannot be enlarged or qualified by oral evidence. Oral evidence was introduced by the plaintiff, to the effect that this contract was intended to reduce the former contract to writing; but such oral evidence was no more admissible after the execution of the writing than it was before. The writing is its own evidence, and speaks for itself. It will be noted that the writing does not purport to be in confirmation of any other contract. Furthermore, it does not purport to describe the particular property possession of which is claimed herein, nor does it purport to identify or describe any particular property. No location is specified. A delivery by

Reddix of 4,000 bushels of corn from whatever source would fully answer the call of the written contract. This is doubtless the reason why the plaintiff has found it necessary to attempt proof of its oral contract, notwithstanding the existence of its written one. Upon the record before us, the plaintiff must stand upon its written contract, and upon that alone. Even if we assume that, as between it and Reddix, and in the absence of superior claims of the mortgagee and landlord, it were sufficient to give the plaintiff the right of possession, yet Reddix is himself without right to deliver possession. As to two fifths of the property, the landlord has a superior right. As to the other three fifths, the mortgagee has the superior right. Such was the holding of the trial court. The judgment below is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

IRENE A. HILDENBRAND et al, Appellants, v. IRA CURTIS et al., Appellees.

CONTRACTS: Combined Contract of Sale and Lease. A contract
1 in the dual form of a contract (1) of sale of lands, and (2) of a lease of the premises at a stipulated rental per month, will be construed as applying the rent payments to the purchase price, when such is the purpose of the contract when construed as a whole.

COSTS: Cost of Transcript. No authority exists for the making of
2 a transcript of the evidence during the trial and taxing the cost thereof as costs in the case and making such costs a lien on the property involved.

Appeal from Johnson District Court.—R. P. HOWELL,
Judge.

FEBRUARY 17, 1919.

THE material facts are fully stated in the opinion.—
Reversed and remanded.

Milton Remley, for appellants.

O. A. Byington, for appellees.

STEVENS, J.—I. On January 22, 1910, plaintiffs and defendants entered into a contract in writing, by the terms of which defendants agreed to sell and convey the east one half of Lot 3, Block 2, Berryhill's Addition to the city of Iowa City, Iowa, to the plaintiff Irene A. Hildenbrand, in consideration of \$1,250, \$240 of which was paid shortly before the contract was executed. The contract provided that title should remain in the first parties until the full sum of \$900 had been paid, at which time a deed conveying the property to plaintiff, free and clear of all liens and incumbrances, was to be executed, and plaintiffs were then to execute a note to Mary Curtis for \$350, due in three years, with interest at 6 per cent, and secure the payment thereof by mortgage upon the property conveyed. The parties concede that the cash payment of \$240 should be credited upon the \$900. The contract further, in terms, leased the premises to plaintiffs for ten years and one month, the term commencing January 22, 1910, and ending on the 22d day of February, 1920, at a monthly rental of \$8.50, payable on the 18th of each month in advance; gave defendants the right to demand and recover possession of the premises upon giving three days' notice, in case plaintiffs failed or refused to pay the rent as agreed; and provided that, in case of default in payment of the rent, and the forcible removal of plaintiffs from the premises, the \$240 payment should be treated as liquidated damages, and forfeited to defendants. The defendants further agreed to pay 6 per cent interest per annum on all sums received under

1. CONTRACTS :
combined con-
tract of sale
and lease.

the terms of the agreement, to be computed annually on the 22d of January each year, and allowed as a credit on the next month or month's rent accruing after its computation. The contract contained no specific provision for the payment of the balance of the \$900, nor was any time fixed therefor. The controversy arises over the application to be made of the monthly payments, which appellants contend should be applied on the purchase price, notwithstanding the fact that, by the terms of the contract, the same is designated as rent. As we understand the record, the contract in controversy was executed to take the place of a prior contract for the sale of the same property, which was executed more than a year prior to the latter contract. The former contract provided for the payment of the entire purchase price in four years, with the option to plaintiffs of a two years' extension, with interest at the rate of 7 per cent per annum. No explanation was offered or reason assigned for the abrogation of the former and the execution of the latter contract. It was the evident purpose and intention of the parties that no title should pass to plaintiffs until the \$900 had been paid on the purchase price. The omission from the contract of a definite provision, except the monthly payments, for the payment of the balance thereof, lends support to appellants' interpretation of the agreement. The contract provides that:

"The parties of the second part hereby agree with the party of the first part that the title to said premises and all rights incident thereto shall remain in and be her property until such time when the parties of the second part shall have paid to the parties of the first part under the conditions of this contract the sum of \$900."

Plaintiffs' right to occupy the premises and ultimately receive a deed therefor depended upon the prompt payment of the designated amount monthly. It was the evident intention of the parties that these payments should be treated

as rent, at least until the amount thereof, together with the \$240, less interest accumulations, should amount to \$900. The contract was apparently intended to be so worded that title should remain absolutely in the defendants until the required amount had been paid. The failure thereof to provide the time and manner of paying the balance of the \$900, if same was to be paid in addition to the monthly payments, may be due to oversight; but it is hardly probable that the omission of so important a matter could be thus accounted for. The consideration was to be paid "under the conditions of the contract," and the designation of the monthly installments as rent makes no difference if same were, in fact, ultimately to be credited upon the purchase price. Both parties obtain some advantage by the arrangement for monthly payments; and, while defendants agreed to allow credits upon the contract for interest at 6 per cent on all sums paid, as above stated, yet, in case plaintiffs failed to make the payment strictly according to the contract, the \$240 paid before the execution thereof was to be retained by defendants as liquidated damages. Construing the instrument as a contract of sale, and not a lease, it seems to us that all payments made thereunder were, in contemplation of the parties, to be ultimately treated as payments on the purchase price, and should be so applied. It may be that the contract under consideration is more favorable to plaintiffs than the one that was abrogated thereby, but no reason is assigned for the difference in the terms of the two instruments, and we cannot assume that defendants did not intend this to be true. It is our conclusion that the parties intended that the monthly payments should be treated as installments on the purchase price, if they were continued until the \$900 was paid.

II. The court taxed the expense of a transcript of the evidence made during the trial as a part of the costs, and made the same a lien upon the property. No authority for

this action has been called to our attention.
2. **COSTS:** cost of transcript. and it does not appear to be authorized.

The judgment and decree of the court below is, therefore, reversed, and the cause remanded, with directions that a decree be entered in the court below in accordance with the terms of the contract as interpreted herein, and that it also provide for the payment by defendants of all incumbrances on the property before same is conveyed to plaintiffs. If the parties agree upon a decree, they may have same entered in this court, if desired.—*Reversed and remanded.*

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

IN RE APPEAL OF TRUSTEES OF IOWA COLLEGE.

TAXATION: Endowment Lands. Real estate which is owned by
1 an educational institution of this state as a part of its endowment fund is exempt from taxation to the extent of 160 acres in any civil township, even though such township is coterminous with a city, and even though such real estate consists of ordinary city lots.

WORDS AND PHRASES: "Real Estate." The term "real estate"
2 includes city lots.

TOWNSHIPS: When Coterminous with City. A civil township continues to legally exist, even though its boundaries are coterminous with the boundaries of a city, and even though the ordinary duties of township officers are performed by the municipal authorities.

COUNTIES: Division into Civil Townships. It will be presumed
4 that a county has been divided into civil townships by the board of supervisors, as commanded by law.

TAXATION: Endowment Lands. On a plea by an educational institution of this state that certain endowment lands belonging to it are exempt from taxation, the burden is on the public authorities to show, if such be the case, that such institution has already been granted an exemption of 160 acres on like lands in the civil township in question.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

FEBRUARY 17, 1919.

APPEAL from an order denying exemption of certain property from taxation.—*Reversed.*

Kindig, McGill, Stewart & Hatfield, for appellant.

Schmidt & Pike, Geo. W. Kephart, and B. I. Salinger, Jr., for appellee.

LADD, C. J.—On December 2, 1916, M. C. Davis and his wife, May J. Davis, of Sioux City, conveyed to the trustees of Iowa College Lots 1 and 2 and Outlot C, to the west, in Block 6 in St. Aubin's Third Addition to Sioux City, on which there were four dwelling houses, Lot 8 in Block 1909, with house numbered 1105-1107, Lot 4 in Block 15, with house thereon, east 60 feet of Lots 1 and 15 in Block 3 in South Smith's Villa Addition, with house thereon, the east half of Lot 13 and all of Lot 14 in Block 2 in Hornick's Addition, with house thereon, and Lot 13 in Block 5 in North Sioux City.

On March 3, 1917, written application was made to the city assessor of Sioux City that the real estate above described be entered on the assessment rolls as exempt from taxation, by virtue of Section 1304 of the Supplement to the Code, 1913. The assessor refused so to do; whereupon the matter was taken before the board of review for consideration, and on April 13, 1917, the action of the assessor was approved. The trustees of Iowa College appealed to the district court of Woodbury County, where the board of review moved that the petition be dismissed, on the grounds: (1) that Section 1304 of the Supplement to the Code, 1913, does not exempt from taxation property

1. TAXATION:
endowment
lands.

such as described,—that is, city property, or property held in a city, the income of which is used as an endowment of an educational institution; and (2) for that the board of review might not exempt said property from taxation, and suit by injunction would be the proper remedy, if wrongfully assessed. The court sustained the motion on the first ground and overruled it on the second, and entered a decree dismissing the petition. From his order, the trustees appealed.

Prior to the enactment of Chapter 54 of the Acts of the Thirty-second General Assembly, there was no exemption from taxation of realty owned by colleges as part of their endowment fund. That chapter amended Section 1304 of the Code by adding, after the semicolon following the word "incorporation" in the last line of Paragraph 2 of said section, the following:

"Provided, however, that real estate owned by an educational institution of this state, as part of its endowment fund, shall not be taxed."

A public library was held to be an educational institution, within the contemplation of this provision, in *Webster City v. Wright County*, 144 Iowa 502; and, in *Ellsworth College v. Emmet County*, 156 Iowa 52, so large a body of land belonging to Ellsworth College was held to be exempt from taxation as to embarrass the public officers in the discharge of their duties. Chapter 61 of the Acts of the Thirty-fourth General Assembly repealed the above provision, and substituted therefor the following:

"Real estate to the extent of not to exceed one hundred and sixty acres in any civil township, owned by any educational institution of this state as a part of its endowment fund, shall not be taxed."

Under the first amendment to Section 1304 of the Code, there can be no doubt that "real estate" included urban property, as well as farm lands. Either, if held by an edu-

2. WORDS AND
PHRASES:
"real estate."

cational institution as part of its endowment, was exempt from taxation. Although the amendment was repealed, there is no reason for saying that the words "real estate" were employed in any other sense in the substitute enacted by the thirty-fourth general assembly. The limitation was of the area which should be exempt, and not of the kind of realty, whether urban or rural, platted or unplatted. Only the limited area in a single civil township was made exempt.

A civil township is merely a legal subdivision of the county for governmental purposes. *Township of West Bend v. Munch*, 52 Iowa 132. The several counties are di-

3. TOWNSHIPS:
when coterminous with
city.

vided into civil townships by the respective boards of supervisors, and incorporated towns and cities are either coterminous with the civil townships including them or are contained therein.

Section 551 of the Code provides that:

"The board of supervisors of each county shall divide the same into townships, as convenience may require, defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of the townships as it may deem proper; but if the congressional township lines are not adopted and followed, the board shall not change the lines of any civil township so as to divide any school township or district, unless a majority of the voters of said school township or district shall petition therefor."

The section following provides that:

"Where the boundaries of any city have been changed, the board of supervisors of the county in which the same is situated shall have power to change the boundary lines of townships so as to make them conform to the boundaries of the city, and to make such other changes in township lines, and the number of townships, as it may deem neces-

sary; but no action shall be taken affecting the boundaries or existing conditions of school districts."

Code Section 554 provides for the division of a township containing a city or town into two townships, one to embrace the territory without, and the other within, the city limits.

If not acting under special charter, and the town or city constitutes one or more civil townships, the boundary lines of which coincide throughout with the boundary lines of the township, the offices of the township clerk and trustees are abolished. Section 560, Code Supplement, 1913.

It is to be inferred that the board of supervisors performed their duty under Section 551 by separating the county into civil townships; and from the sections following it is equally apparent that the exist-

4. COUNTIES:
division into
civil town-
ships.

ence of an incorporated town or city does not obviate such division. In those municipalities where the boundaries of the civil township coincide with those of the township, the duties of the clerk and trustees are performed by the city or town clerk and the council. That the offices of a civil township are abolished, and the duties thereof performed by the city or town clerk and council, is not inconsistent with the continued existence of the civil township; and, as the board of supervisors are required to separate the county into civil townships, this is presumed to have been done, and therefore the several lots owned by the trustees of Iowa College are presumed, without other proof, to be included in the civil township, either coterminous with the city or within boundaries such as might be created by the board of supervisors.

It is argued, however, that there is no showing that 160 acres of land in the township had not previously been set apart as exempt to Iowa College as a part of its en-

6. TAXATION:
endowment
lands. dowment fund. All lands are presumed to be subject to taxation; and, in the absence of any showing to the contrary, it cannot be assumed that other lands have been exempted to the college, and the trustees were not required, in order to make out its case, to negative an inference to the contrary.

It is also suggested that the area of the several lots was not shown not to exceed 160 acres. This is true, but the real estate described was exempt up to 160 acres in area, and if it exceeded this amount, only enough to equal that area will be exempted in the decree entered in the district court.

The decree will be entered in the district court in harmony with this opinion, and the cause is remanded for that purpose.—*Reversed.*

GAYNOR, PRESTON, and SALINGER, JJ., concur.

MARTHA KIMLER, Administratrix, Appellant, v. PEOPLE'S GAS & ELECTRIC COMPANY et al., Appellees.

NEGLIGENCE: Proximate Cause. Evidence reviewed, and held quite insufficient to show that the alleged negligent condition of a street was the proximate cause of an accident.

Appeal from Des Moines District Court.—OSCAR HALE, Judge.

FEBRUARY 17, 1919.

ACTION for damages for negligence resulting in the death of plaintiff's intestate. At the close of the evidence, there was a directed verdict for the defendants.—*Affirmed.*

Hirsch & Riepe, for appellant.

J. J. Scerley, S. K. Tracy, Harold Wilson, and B. P. Poor, for appellees.

EVANS, J.—On March 12, 1916, at six o'clock in the morning, T. W. Kimler was killed upon a street of the city of Burlington by the overturning of his automobile. His companion was Smith, who was the plaintiff's principal witness, and the only witness to the events leading to the accident. Kimler, with Smith, was driving north on Leebrick Street, a paved street, 40 feet wide between the curbs, and occupied in part by the tracks of the street railway company. The railway line is laid upon the west half of the street, being 12 feet distant from the west curb and 24 feet distant from the east curb. In the course of the driving, the automobile came in contact with the curb, and then turned in a circle and tipped over. The ground of negligence charged is that there was a defect in the street, at a place about 120 feet south of the place of the accident. It appears that, for a distance of about 70 feet, some bricks had been removed from the pavement, in close proximity to the east rail of the railway. The frost had so heaved the pavement, close to the rail, that it was deemed best to remove a line of bricks next to the rail, and it was so done. The space from which bricks were thus removed was either 4 inches or 8 inches wide. The bed upon which the bricks were laid, and which was thus exposed, was a bed of cinders. The theory of the plaintiff is that Kimler drove his wheel into this groove, the depth of which would be about 2 inches, and that he thereby in some manner disabled his car and lost control thereof, and that this was the cause of his contact with the curb. It was discovered after the accident that the steering rods were badly bent. This could have occurred by the collision with the curb; but it is the theory of the plaintiff that it occurred by reason of the alleged defect in the street. Smith testified that Kimler was driving "straddle of the east rail," and that he felt some jolting at or near the place where the bricks had been removed. The bricks re-

moved were not left in the street, but were piled upon the parking. The theory of the plaintiff is that the removal of the bricks and the failure to replace them was negligence, whatever the reason therefor. The street railway company and the defendant city are joined as defendants.

We have read the record with much care. We are impressed that it furnishes a very inadequate explanation of the accident. The laying of the rails of a street railway in a paved street necessarily creates something in the nature of a groove in the pavement. There is nothing in the evidence from which it can be said that the exposure of the cinder bed next to the rails for an additional width of from 4 to 8 inches presented any additional danger to travel. Neither is there a suggestion of evidence that the wheel of the auto was traveling in such groove. The actual condition of the street in that regard was apparent to mere casual observation. The time was just after sunrise, and there was nothing to obstruct the view. No other vehicles were upon this street. The driver had his choice of place thereon. He was confessedly on the wrong side of the street. He had a perfect pavement to his right, where he belonged. Taking the evidence as a whole, therefore, and notwithstanding that the plaintiff has the benefit of the direct evidence of Smith, who was a witness to all that preceded the accident, the explanation of it is wholly inadequate, and the cause of it is left wholly to inference.

On the other hand, the history of the few hours preceding the accident is not without its significance, and furnishes a more adequate explanation of the accident than any other testimony in the record. These parties had been up all night. They had engaged in a social game. Upon the table was a supply of "sweet cider" and one quart bottle of whiskey. According to Smith, considerable of the cider was consumed, but very little of the whiskey. He testified however, that Kimler and he each took a "little glass of

whiskey" just before they started away. Under our statute, it is a misdemeanor for one to drive an automobile while in an intoxicated condition. There is no evidence, in terms, that Kimler was intoxicated. But intoxication is a question of degree, and a little glass of whiskey is the gate through which it comes.

Upon the whole record, we reach the conclusion that the evidence would not sustain a verdict that the accident was caused through any negligence of the defendants, and the judgment of the trial court is, therefore,—*Affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

MELISSA LIVASY et al., Appellees, v. STATE BANK OF REDFIELD et al., Appellants.

HOMESTEAD: Undivided Interest Held in Common. A homestead may consist of the owner's undivided interest in lands held in common. So held where the interest was an undivided one fourth of 120 acres.

Appeal from Dallas District Court.—LOBIN N. HAYS, Judge.

FEBRUARY 17, 1919.

SUIT to enjoin the sale of the undivided one-fourth interest of Melissa Livasy in 120 acres of land resulted in a decree as prayed. The defendants appeal.—*Affirmed*.

Burton Russell, for appellants.

George J. Dugan, for appellees.

LADD, C. J.—On March 20, 1912, the State Bank of Redfield obtained judgment in the district court of Dallas County against Melissa Livasy, for the sum of \$2,717.81, with costs. Execution was issued thereon, May 17, 1917, and levied on the NE $\frac{1}{4}$ of NW $\frac{1}{4}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Section 24, in Township 97 North, of Range 29 West of the 5th

P. M. This land had been conveyed by Thomas McLane to Melissa Livasy and her children, November 20, 1905. With these children, she and her husband had occupied the premises continuously from 1902, as their home, until the bringing of this suit. One of the children, Edith Hodson, was married at the time of the levy, but received one fourth of the rents and profits from the land. Another, L. D. Livasy, was a minor, but was given his share in said rents and profits. The daughter Callie, a minor, continued to make her home with her parents, her share of the rents and profits being used for her maintenance and education. The dwelling house and other buildings, occupied by the family for so many years, were located on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of the section.

The sole issue in the case is whether Mrs. Livasy may claim her undivided one-fourth interest in the land as her homestead, exempt from the levy of the execution. If such interest constituted a homestead, it was exempt from execution. Section 2972 of the Code.

"If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than 40 acres, but if, in either case, its value is less than \$500, it may be enlarged until it reaches that amount." Section 2978, Code Supplement, 1913.

It is not essential that this tract consist of any particular 40 acres. It may be made up of several adjoining tracts. *Lutz v. Ristine*, 136 Iowa 684. Nor is it essential that the claimant have the fee title. The homestead may exist in a life estate, a leasehold estate (*Wertz v. Merritt Bros.*, 74 Iowa 683), or in an equitable estate, or, possibly, partly in one and partly in another. The tenure has nothing to do with the homestead, except as a basis for its support. The homestead right is that of possession and enjoyment, use and occupancy. A tenant in common may enjoy the tenancy of property, and claim the same as a homestead.

Hewitt v. Rankin, 41 Iowa 35; *Thorn v. Thorn*, 14 Iowa 49; *Bolton v. Oberne*, 79 Iowa 278; *Fordyce v. Hicks*, 80 Iowa 272.

As pointed out in *Kaser v. Hass*, 27 Minn. 406 (7 N. W. 824) :

"A tenant in common, or joint tenant, has, by reason of his estate or interest, a right to the possession,—to the exclusive possession,—as against all the world but his cotenant. His exclusive possession is rightful, except as against the demand of his cotenant to be let into joint possession. The fact that the cotenant may, if he choose, disturb such exclusive possession, cannot affect the right to the undisturbed possession as against everyone else, nor affect the right, as against all the world but the cotenant, to occupy the premises as a homestead. We are unable to see much force in the reason assigned by some of the courts for denying the homestead right to the owner of only an undivided interest in the estate, to wit: that it would be practically impossible to set off for him any specific portion which might not, on partition, fall to his cotenant. In setting off the homestead between the claimant and his creditor, the rights of third persons are not considered; nor does it matter that a portion selected by and set off to the claimant, as between him and the creditor, may, in a subsequent controversy between the claimant and some third person, be lost to the former. The object of the statute is not to vest in the claimant an assured title to the portion set off, but to protect that portion from levies and sales under judgments. When there is the requisite ownership and occupancy of the portion selected and set off, it cannot be material that such ownership and occupancy may be subsequently defeated, as by the foreclosure of a lien already attached, or re-entry for condition broken, or the like."

In *Sieg v. Greene*, 225 Fed. 955, the United States Circuit Court of Appeals for this district construed the Iowa

statutes and applied the above doctrine, in adjudging a cotenant's undivided one-half interest in 80 acres of land exempt as a homestead to the bankrupt and his family. See, also, *Oswald v. McCauley*, 6 Dak. 289 (42 N. W. 769); *Giles v. Miller*, 36 Neb. 346 (54 N. W. 551). *Jenkins v. Volz*, 54 Tex. 636, is precisely in point; for there it was held that the homestead right would not be confined to the undivided interest in the 200 acres, including the improvements, but should extend to an undivided interest of 200 acres out of the tract of 520 acres owned in common. Like ruling is found in *Lewis v. White*, 69 Miss. 352.

In *Greenwood & Son v. Maddox & Toms*, 27 Ark. 648, the debtor was owner of an undivided one-third interest in 320 acres, as tenant in common with his two sisters; and it was held that, before the execution could be enforced, he might have the land partitioned, and have the benefit of the 160-acre exemption.

It would seem that the fact that the judgment debtor's interest is not segregated from that of the cotenant would furnish the judgment creditor no ground for complaint. Having the exclusive right of occupancy of her undivided interest, the judgment creditor is not concerned in the fact that she also has possession of that of her cotenants. In the absence of objections from the latter, she enjoys the use and occupancy of her interest quite as completely as though the land had been partitioned, and her portion set apart to her. As remarked by Mr. Freeman in his work on *Cotenancy & Partition*, Section 54:

"Why should some person having no interest in the cotenancy be allowed to avail himself of the law of cotenancy for his own, and not for the cotenant's gain? The homestead laws have an object perfectly well understood and in the promotion of which courts may well employ the most liberal and humane laws of interpretation. * * * A cotenant may lawfully occupy every parcel of the lands of cotenancy."

Such occupancy, when by the head of a family, and covering no more than the amount of land exempt from execution, may be pleaded, exempting the interest of the cotenant as a homestead, and may shield it from the claims of creditors which have accrued subsequent to the beginning of such occupancy. The case is distinguishable from *Farr v. Reilly*, 58 Iowa 399, where the court held that, on foreclosure sale, the sheriff was not bound to offer one portion of land held by tenants in common before putting up for sale the remainder, said to contain the homestead of one of the tenants. Separation of the land held in common is not involved in this case; for the undivided one-fourth interest is less than claimant might claim as exempt to her as a homestead.—*Affirmed*.

GAYNOR, PRESTON, and STEVENS, JJ., concur.

HARRY MITCHELL, Appellant, v. ADDIE M. CAVINESS, Appellee.

SALES: Non-Divisibility. One who enters into a non-divisible contract for the purchase of two articles may not demand one and decline the other.

Appeal from Jefferson District Court.—SENECA CORNELL, Judge.

FEBRUARY 17, 1919.

SUIT in replevin to recover the possession of a new Overland automobile. The right of possession in plaintiff is laid upon the alleged fact that the plaintiff had purchased and paid for the same. The defense, in general terms, was that, though it was true that the plaintiff had purchased and partially paid for the same, the contract of purchase included the purchase, not only of *one* automobile, but of *two*; and that the plaintiff repudiated his contract, as made, and refused to perform the same; and that he was not, there-

fore, entitled to claim title to one automobile, while refusing to take the other. There was a trial to a jury, and a verdict and judgment for the defendant.—*Affirmed.*

Leggett & McKemey, for appellant.

E. F. Simmons and *J. W. Lewis*, for appellee.

EVANS, J.—The record before us presents practically nothing but a fact question. The contention for the plaintiff is that the undisputed evidence discloses that he had purchased the automobile in question, and that he was, therefore, entitled to the possession of the same. There is a sense in which it is indisputably true that the plaintiff had purchased the automobile. But, if the evidence on behalf of the defendant is to be deemed true, then the plaintiff purchased the same only in the sense that, by the same contract, he purchased two automobiles, of which this was one. He demands the one and declines the other. Needless to say that, if the contract was as contended by the defendant, the plaintiff cannot repudiate it as to *two* automobiles and claim under it as to *one*.

On behalf of the plaintiff, evidence was introduced, tending to prove that the defendant was a dealer in automobiles; that she entered into an agreement with the plaintiff to deliver to him one new Overland automobile in exchange for an old automobile owned by the plaintiff and \$650 of difference; that the plaintiff then and there delivered to her his check for \$650. On behalf of the defendant, the evidence tended to prove the contract to be that the defendant agreed to deliver to the plaintiff two Overland automobiles, and to take in exchange therefor the plaintiff's old automobile and \$1,795 of difference, and that the plaintiff paid \$650 upon the contract; that, at the time of the contract, which occurred on August 4th, it was stipulated that the defendant should have 30 days' time to obtain the second automobile; that she did, in fact, obtain the same by August 7th, at which

time she was ready to deliver to the plaintiff both automobiles. The plaintiff demanded the one and refused the other. The refusal was based, not upon any objection to the article tendered, but upon the claim that he had not agreed to purchase two automobiles. The evidence was flatly contradictory. The issue went to the jury under instructions of which no complaint is made. It is claimed that the verdict of the jury was contrary to one of the instructions of the court. We do not so find it. The contradiction in the evidence as to what the real contract was, was submitted as the issue to the jury. There is a suggestion of error in appellant's argument on one or two rulings on evidence. An examination of the record satisfies us that these rulings furnish no ground of complaint. The judgment below is, accordingly,—*Affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

MICHAEL E. MOCKLER, Executor, Appellant, v. MAY L. LOHMAN, Appellee.

PLEADING: Sufficiency of Denial. An allegation by plaintiff that
1 defendant was a principal on a promissory note need not necessarily be met by a general denial,—is properly met by an allegation by defendant that he was a surety only.

PRINCIPAL AND SURETY: Non-Receipt of Consideration. The
2 fact that the signer of a promissory note received no part of the consideration may have persuasive bearing on the issue of principalship or surety.

Appeal from Cedar District Court.—JOHN T. MORRIS, Judge.

FEBRUARY 17, 1919.

ACTION in equity by the executor of a deceased surety on a note, to recover the amount paid in satisfaction of the note. Plaintiff claimed that defendant and her husband

were principals, and that the deceased was surety. Defendant claimed, and the court so found, that she was a cosurety with the deceased, and that, as such, defendant was liable to the estate of decedent for contribution only, and rendered judgment against the defendant for one half the amount claimed by the plaintiff. The plaintiff appeals.—*Affirmed.*

C. J. Lynch, for appellant.

Hamiel & Mather, and *Grimm, Wheeler & Elliott*, for appellee.

PRESTON, J.—On May 16, 1904, the defendant and her husband, and deceased, Jane M. Monahan, gave their note for \$1,000 to Anna N. Dean, payable February 15, 1907. The note is signed first by H. W. Lohman, defendant's husband, then by defendant, then by Mrs. Monahan. Anna N. Dean is a sister of the defendant's. Mrs. Monahan, deceased, was the mother of Mrs. Dean and of defendant. Mrs. Monahan died testate, in August, 1916. At the time the note was executed, H. W. Lohman was in the clothing business. The defendant, his wife, had no connection with, or interest in, such business. It is conceded that Mrs. Monahan, deceased, was surety on the note. After her death, the payee filed a claim against her estate, and the full amount of the note was paid by the plaintiff. This action is brought to recover from defendant, May L. Lohman, \$1,337.05, the amount paid, together with interest. The petition alleges that H. W. Lohman and May L. Lohman were the principal makers of said note, and received the entire consideration therefor. The answer of the defendant, May L. Lohman, states that the note set out in the petition was signed by her as surety only, and not as one of the principal makers thereof, and that said note was also signed as surety by Mrs. Monahan, at the request of the principal maker, H. W. Lohman.

1. Appellant's first point is that, under the pleadings, there is no issue as to the defendant's being surety, because

there is no general denial in the answer. It is true that there is no such general denial, but the answer does expressly aver that she was surety only, and not one of the principal makers thereof. We think this was a sufficient denial of the allegation in the petition that defendant was a principal.

2. There are other questions argued, and numerous authorities cited. Some of the questions so argued seem not to be in the case. It is conceded by appellant, in argument, that the sole question is whether deceased, Jane M. Monahan, and the defendant, were co-sureties on the note in question, as held by the trial court, or whether, as claimed by plaintiff, Jane Monahan was a surety for her daughter on such note. Appellee makes substantially the same concession. Appellee contends that the liability of the parties is determined by the fact as to who received the money borrowed, and for which the note was given, unless it be shown that one surety requested another surety to sign, as surety, with an agreement to hold such surety harmless. As we look at it, it is almost entirely a question of fact. There is but little evidence. The trial took place some twelve years or more after the execution of the note. The recollection of the defendant is quite indistinct, as to the transaction of signing the note. The defendant and her husband were first called as witnesses for the plaintiff, and testified as to signing the note, and as to the relationship of the parties, Mrs. Lohman stating that the signature was hers, but that she didn't remember signing it. She says, too, that she does not remember whether she was present when her mother signed it. In answer to this question, she says:

"Q. Do you remember about your mother signing? A. I remember mother was the one who helped get the money for me,—that is all I know."

Appellant gives significance to and relies upon the an-

swer of the defendant just given; but both the defendant and her husband testify positively that defendant did not receive any part of the money for which the note was given. The husband thinks the money was used in the store. He testifies that he borrowed the money, and that he received it; that his wife received no part of it. He doesn't remember whether his wife was present when he got the money or not; he doesn't remember the details of the transaction; says that he and his wife were in straightened circumstances financially, at that time, and, so far as he knows, his wife knew nothing of the appeal to the relatives for assistance. The wife testifies that she did not receive any of the consideration of the note; that she did not, on May 16, 1904, seek a loan for herself from Mrs. Dean. She says she doesn't know that Mrs. Dean ever assisted her husband, and that Mrs. Dean did not assist the witness much. This is the substance of all the evidence. We give some weight to the finding of the trial court, in an action of this kind. From our own reading of the testimony, we are satisfied with the finding of the trial court. There is some contention by appellant that, because of the relationship of the parties, there is a presumption that, in signing the note with the daughter and her husband, Mrs. Monahan was surety for the daughter. But if there is such a presumption, it is not conclusive, and it is overcome by the testimony. Appellee cites us to 32 Cyc. 16, to the proposition that, where two or more parties are sureties on the same instrument, the presumption is that they are co-sureties, and further, that a wife, by signing her husband's note, does not become a principal. *Sponhaur v. Malloy*, 21 Ind. App. 287 (52 N. E. 245); 32 Cyc. 22. The testimony shows that defendant received no part of the consideration, or money borrowed, and it does not show that she had anything to do with securing the signature of the other surety to this note. This being so, defendant and her mother are co-sureties, and equally liable for the amount of the debt,

and must share therein. Neither can force the other to bear the entire burden. Such is appellee's contention, and, in support, she cites 32 Cyc. 15, 16, 21, 22, and 276. Appellee also cites 21 Cyc. 1465, to the point that, where a wife signs a note for a consideration that moves to her husband, she or her estate receiving no part of the benefits, she will be regarded as a surety. Appellant cites cases to the effect that a gift made by an intestate to a daughter's husband is an advancement to her, though she had no knowledge of the transaction, and never had any benefit from the gift; and that a gift of money or other personalty to the husband by a parent of the wife will be treated as an advancement to the wife. But we think the transaction in question was in no sense a gift. The plaintiff paid the note by reason of a binding, legal obligation by the deceased to pay the note of H. W. Lohman, if he did not pay it. The deceased executed her will on May 12, 1916, about twelve years after the execution of the note, and does not mention the deduction of this obligation from the bequest to defendant.

It may be that we have gone into these matters more fully than need be, since, as said, it is almost entirely a question of fact. Without further discussion, we are satisfied with the conclusion of the trial court, and the judgment is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

JESSIE O'NEAL, Appellee, v. HAWKEYE LUMBER COMPANY, Appellant.

LANDLORD AND TENANT: *Untenantable Condition as Terminating Rent.* A lease of certain lands and all buildings thereon "owned by the lessor," with right in lessee to erect building on the premises, with proviso that rent should cease in case said premises became untenantable by reason of fire, through no fault of the tenant, does not absolve the tenant from payment of rent

in case the tenant's own buildings are destroyed by fire without his fault.

Appeal from Union District Court.—H. K. EVANS, Judge.

FEBRUARY 17, 1919.

SUIT to recover rent. Judgment for plaintiff. Defendant appeals.—*Affirmed.*

D. W. Higbee and Irving C. Johnson, for appellant.

P. C. Winter, for appellee.

SALINGER, J.—I. The leased premises were to be used only for operating a garage and amusement park. By implication, lessee was authorized to erect such buildings as, in its judgment, were required to carry on such business. When the lease was executed, lessee owned such buildings. These were burned, without fault on the part of the tenant, and this burning has made the premises untenable as a garage and amusement park. The tenant resisted the payment of rent, because the lease contract contained a printed provision that, if "said premises are untenable by reason of fire, through no fault of the tenant," then the right to receive rent should stop. The trial court held against this defense.

II. The contract signed by the parties does not invoke the rule that an agreement will be construed most strongly against the one who prepares it. This contract was a common form of printed lease.

The sole question is, How shall the words "said premises" be construed? The lessee contends it is immaterial that the leased lands became untenable because of the destruction of necessary buildings owned by the tenant; that it does not matter what made the leased land untenable, so long as it was made so from a cause not due to the neglect of the tenant. The trial court held that, upon a con-

sideration of all surrounding and attendant circumstances, and of the whole of the lease contract, it must be found the parties contracted that the right to receive rent should not be suspended because buildings owned by the tenant were destroyed by fire. We think this view is sound. The lease recites in print that the property leased is certain lots, described by number, "together with all the buildings and improvements on the same." At this point, the words "owned by me" were written in. Clearly, then, "said premises," in the clause dealing with suspension of the right to receive rent, has for its antecedent said described lots and such buildings and improvements thereon as are owned by the landlord. The landlord never leased to the tenant the buildings which the tenant had the right to erect and did erect. The "premises" did not include them. When the words "owned by me" were written in, it was clearly indicated that, whenever reference was thereafter made to words such as "said premises," such reference was to the lots and such buildings thereon as the landlord owned, if any he owned. It is fair construction, therefore, that rent should not be stopped unless the premises became untenable by the burning of any improvements the landlord had put upon the lands. The landlord had no power to restore the premises to fitness for the carrying on of a garage and an amusement park. She had neither power nor duty to rebuild buildings owned by the tenant. The tenant did have such power of restoration.

To reverse the judgment, we should have to hold, in effect, that one may enlarge his damages by refraining from what he alone can do to avoid being damaged.

We are of the opinion the judgment appealed from should be—*Affirmed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

JOHN H. PARNHAM, Appellee, v. F. R. WEEKS, Administrator,
et al., Appellants.

WILLS: Conditional Devises. A will may make a devise condition-
1 al on the surrender by the devisee of contract rights existing be-
tween the devisor and devisee. Will reviewed, and held not to
show such condition.

CONTRACTS: Equitable Reduction of Contract Right. The right
2 of a lessee of land to receive from the lessor's estate the value
of permanent improvements placed on the land by lessee, *pro-*
vided lessee is not made a devisee of the land by lessor, may not
be reduced because lessee is made such devisee of *other* lands
of lessor, but will be *equitably* reduced in case lessee becomes
a devisee of *part* of the leased land,—a ratable reduction which
will not necessarily be in the proportion that the acreage de-
vised bears to the acreage leased.

EQUITY: Abrogation of Contracts. Equity may not arbitrarily
3 abrogate contracts.

Appeal from Audubon District Court.—J. B. ROCKAFELLOW,
Judge.

FEBRUARY 17, 1919.

THE appellee made a claim upon the estate of his father,
George Parnham, for money expended in making perma-
nent repairs and improvements upon certain lands leased
to claimant by his parents in their lifetime. The trial court
allowed him less than he claimed, but he does not appeal.
Certain heirs at law have appealed from the allowance that
was made.—*Reversed and remanded.*

Mantz & White, for appellants.

J. M. Graham, Joe H. Ross, and S. C. Kerberg, for ap-
pellee.

SALINGER, J.—I. A tract of 100 acres, to which the
mother of appellee had title, was leased to him by written

contract entered into with his parents. The contract provided that he should, in certain circumstances, be repaid from the estate of his parents, or that of the parent surviving, for any permanent repairs or improvements made by him upon said lands. The mother died testate. The father refused to take under her will. Upon the death of the father, appellee filed the claim, the partial allowance of which is for review on this appeal. One defeasance provision in the contract is that payment shall not be made if the leased land becomes the property of the lessee by devise from the lessor. An interest in the leased land was devised to claimant by the will of his mother, and we gather that he has accepted the same. Appellants contend that, so, an election has been effected as between two gifts; that appellee's claim rests on the contract; that, having taken under the will, he may not assert his contract; and that, therefore, it was error to allow him anything on his claim. Of course, a will may put the owner of contract rights to a choice between the provisions of such will and the enforcement of such contract rights. A testator may say that, while he has bargained that his estate shall pay for improvements made by his son, a bequest to the son shall not become effective unless his contract rights be relinquished; and if the devisee accepts the testamentary provision, his right to recover on the contract is lost. But the question remains whether the will which appellants claim tenders such an election, does so. So far as material to this point, the will provides that claimant and his brother Charles shall have a stated interest in lands, and that claimant shall pay half of certain bequests made to grandchildren. This requirement to pay gives no support to the claim that appellee is entitled to nothing for having made permanent improvements. Touching improvements, the will declares that "the improvements which are permanent, and which have been placed on said

1. WILLS: conditional devises.

real estate by John Parnham, are his property, and shall be paid for before the division between him and his brother Charles," and "said improvements and payments to be made a charge and lien upon my real estate." Clearly, this is not a statement from which it may be deduced that the land devised should not pass unless the contract right to be paid for improvements is given up. On the contrary, it is an affirmative declaration that the contract rights shall be preserved, despite the acceptance of the devise. If it was intended that such right should end on acceptance of the lands devised, it was idle for the will to declare that such improvements were and were to be the property of John. Without the will, they were his property. And if he accepted lands upon which he had placed these permanent improvements, of course the improvements would still be his property. If testator intended that no payment for the improvements should be made, should the provisions of the will be accepted, why should the will declare that payment shall be made, and that the lands shall be charged with a lien for the payment?

We hold there was no election, and therefore overrule the claim of the appellants that nothing should have been allowed the claimant.

II. The tract covered by the contract contains 100 acres. By devise *and* by inheritance, appellee has become the owner of 88 acres, of which his mother died seized, and 40 acres of this 88 is included in the 100-acre tract with

2. CONTRACTS: which the contract deals. Appellants con-
equitable re- tend the allowance made below should be
duction of con-
tract right. scaled in the ratio that 88 bears to 100, and
that the most that should be allowed appellee, in any event,
is 12 per cent of the allowance the trial court made. It is
argued that this reduction is warranted by an application
of the maxim that equity regards substance, and not form.
This contention ignores the contract provision that the im-

provements shall be paid for unless the property "hereinbefore described shall become the property of second party, either by conveyance from first parties or by devise." Equity may not arbitrarily abrogate contracts.

3. Equity: abrogation of contracts.

Under the contract, a defeasance must rest upon the son's becoming owner of land described by the contract, and the ownership must be created either by conveyance from the parents or by devise from them or either of them. Lands other than those described in the contract are, of course, not lands "hereinbefore described" therein. A title by inheritance is not a title created either by conveyance or devise. Therefore, we hold that the allowance made appellant may not be reduced because he has become the owner of lands other than those described in his contract, nor because he has become owner of lands described in the contract, but otherwise than by devise.

III. But that does not settle that no reduction should be made from the allowance by the court. That allowance is the utmost that appellee may have, for he has not appealed. The question is whether the allowance should not have been reduced because appellee was devised an interest in the lands described in the contract. At this point, the appellant claims there should be a deduction in the proportion that the contract land devised bears to all the contract land. The contract land is 100 acres. If all of it had been conveyed or devised, then, under the contract, nothing would be due claimant. He has title by devise to one third of this 100 acres. While it is not the contract that the right to be paid for improvements should be extinguished in whole if *any* 100 acres were devised, or, *pro tanto*, if *any* fractional part of *any* 100 acres were devised, we are of opinion that, under agreement that the claim shall be extinguished "after the premises hereinbefore described shall become the property of the second party, either by conveyance from first

parties or by devise," some relief is due, even though but part of the premises in question was devised. The underlying thought of the contract is that claimant shall be paid nothing for permanent improvements if it shall transpire that the improvements have merely added to the value of what, by action under the contract, becomes his own land. Under the contract, it was within the power of the mother to prevent any of this land from becoming the property of claimant, either by conveyance or by devise from her. If she neither conveyed nor devised, the permanent improvements would be on land owned by someone other than claimant, and it was intended that, in that event, he should be paid for such improvements. If all this land became the property of the claimant by conveyance or devise from the mother, nothing should be paid him for improvements. Why was it not the intention, then, that, if part of the land became his by such conveyance or devise, that repayment for improvements should be scaled? We think that was the intention, and hold that, from the sum found due the claimant, there should be a ratable deduction, on account of the fact that an undivided third of the land in question was devised to claimant. The record does not enable us to say what would be a ratable reduction, and we are not minded to hold that it must necessarily be in the proportion that the land devised bears to the whole 100 acres. The whole tract might be in such condition, and the improvements so centered upon a part of the tract, as that obtaining such third interest would not necessarily mean that the value of the undivided third interest has been bettered by the improvements in a sum equal to one third of their cost. The cause is remanded, for the purpose of ascertaining with how much appellee should equitably be charged on account of said one-third interest. When this is ascertained, such sum is to be deducted from said allowance as it stood when the appeal was perfected. This holding is not in conflict with the rule

that a condition subsequent must be strictly performed as the contract provides (9 Cyc. 600, 601), and that part or defective performance of such condition will not suffice.

IV. The remaining contention is that it was error to allow claimant some \$121 for lumber purchased by claimant of one Weighton, because he had not paid therefor, but had made payment from funds in his hands as the executor of his mother. This is a question of fact. If claimant did not pay this bill, if someone else furnished this much of the improvements, appellee may not be allowed for it. The items in question are of date March 18, 20, 22, and 27, and April 5, 1909. The record shows an Exhibit No. 8, a claim made by Weighton against John Parnham, executor of the estate of Millicent Parnham, deceased. In substance, it sets forth the items which were allowed the claimant. The claim made by Exhibit 8 was paid and satisfied on the 18th of January, 1910, by a check made to the clerk of the courts, and signed by John H. Parnham, executor, in the sum of \$121.20. It is not denied that the bill was paid in this way; but it is claimed that funds which John H. Parnham, executor, had on hand in the First National Bank of Audubon at this time, and which were there in his name, as executor, were, in truth, his own private funds. Appellee asserts he borrowed \$1,150 with which to pay this claim, among others, and that he borrowed it on his own note. But he testifies he signed this note as executor, as well as in his individual capacity. His third annual report, as executor, shows that this \$1,150 was borrowed on December 8, 1911, but the bill in question was paid by this check on January 18, 1910. The first annual report, which covers from October, 1909, to October 24, 1910, shows that, at this time, the executor had a balance on hand of some \$318.15. This report seems to have been filed on the 14th of December, 1910. It exhibits no claim that money has been borrowed. It is all made up of cash on hand at date of death, and from

rents. And rents may be appropriated to pay debts of the estate. Code Section 3334. If it be conceded that one third of these rents should be credited to the estate of the father, yet the executor had on hand then a balance of more than \$50. We agree with appellee that an approval of an annual or intermediate report by an executor is not such an adjudication of the matters therein involved as will prevent the correction of mistakes in such report. But, though this is so, statements made in and conditions exhibited by such report may be evidence against the executor who made such report. We are of opinion that this item should not have been allowed, and direct that it be deducted from what remains after reduction made on account of the one-third interest in the contract land acquired by devise. The costs in this court will be paid by appellee.—*Reversed and remanded.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

ALICE J. RILEY, Appellant, v. CHARLES CASEY et al.,
Appellees.

WILLS: *Mistake of Fact in Execution of Will.* A will, executed by one of sound and disposing mind, may not be overthrown on a mere showing that testator, in the execution of the will, was *mistaken* as to the amount of property which an heir had received from other relatives, and by reason of such *mistake* disinherited such heir.

Appeal from Adams District Court.—HOMER A. FULLER,
Judge.

FEBRUARY 17, 1919.

CONTEST of the will of Mary Casey. The contestant is a daughter, for whom no provision was made in the will. The ground of contest was an alleged insane delusion on

the part of the testatrix. There was a verdict for proponents, and contestant appeals.—*Affirmed.*

A. Ray Maxwell, William M. Jackson, and W. Roy George, for appellant.

Meyerhoff & Gibson, for appellees.

EVANS, J.—Mary Casey died testate, in October, 1914. On January 24, 1912, she executed her will. She left surviving her six sons and daughters. The property disposed of by her will consisted of 80 acres of land. She devised her property to four of her children, excluding from participation therein her son Franklin and her daughter Alice Riley. The reason for excluding these two was stated in the will to be that they had received some benefits by a conveyance from their grandmother, many years before. It was averred by the contestant that she had not, in truth, ever received any property from her grandmother, and that the testatrix labored under an insane delusion in that regard; and that, by reason of such insane delusion, she failed to include the contestant as one of the beneficiaries of her will. On the trial, evidence was introduced bearing upon the alleged mistaken belief of the testatrix in regard to benefits received by her daughter from her grandmother. The facts in that regard appear without dispute. In 1895, the grandmother, Rachel Casey, being then the owner of 80 acres of land, conveyed 40 acres thereof to Martin Riley, the husband of the contestant, and 40 acres thereof to Franklin Casey, brother of the contestant. These conveyances, however, were not wholly without consideration. The 80 acres was encumbered for \$700. Martin Riley, and perhaps Franklin Casey, had become security for considerable sums for John Casey, the son of Rachel and the father of the

contestant, and it was the desire of Rachel to protect them on account of such liabilities. The land was worth about \$40 an acre, at the time of the transfer; and Rachel made her home with the Rileys from the time of such conveyance up to her death, 9 years later. It is argued, therefore, that Martin Riley paid full consideration for what he got, and that the contestant had not, in fact, received anything from her grandmother. It appeared further that the Rileys had continued to own the land then received, and that it had increased greatly in value, being worth, later, about \$150 an acre. They also had other land, to a total amount of 320 acres. These were all circumstances that might well receive the consideration of a mother in the distribution of her bounty among her children. They were also proper for the consideration of the jury, as bearing upon the question whether the mother's discrimination between her children was so unnatural and unreasonable as to indicate an insane delusion. Some evidence was introduced on the part of the contestant tending to show mental deterioration at or about the time of the making of the will. The issue was submitted to the jury, and the finding was adverse to the contestant. The finding has abundant support in the evidence. Indeed, if the verdict had been otherwise, it would have presented a very serious question of the sufficiency of the evidence to sustain it. It appeared that a previous will had been made by the testatrix in 1902, and the same is in evidence. That will also omitted the contestant and her brother Franklin from participation in the property, and gave the same reason for so doing as was given in the last will. At that time, the testatrix was 65 years of age. There was some effort to show mental deterioration at or about that time, but the evidence in that regard is very unsatisfactory.

Complaint on this appeal is directed to certain rulings

of the court, and to its instructions. It is complained that the court erred in withdrawing from the jury the issue of undue influence. We are unable to find in the record any evidence whatever tending to show undue influence. Particular complaint is made of Instruction No. 9, given by the trial court. It is said in argument that the trial court, by this instruction, charged the jury that it was not sufficient to prove an insane delusion on any one subject unless the contestant proved also a general mental unsoundness on the part of the testatrix. We have examined the instruction thus criticized, and do not find the criticism well taken. What the court instructed therein was that it was not enough to prove that the testatrix was mistaken in her belief pertaining to the facts attending the disposition of the grandmother's estate, "provided you find that the said testatrix was of sound and disposing mind at the time she executed the will." This was a correct statement of the law at this point. *In re Estate of Henry*, 167 Iowa 557. Proof of a mere mistake is not, of itself, proof of an insane delusion. A testator of sound mind may make a mistake, and may act upon it in the making of his will, to the detriment of a proper object of his bounty. But the proof of such mistake will neither invalidate the will nor subject it to reformation. A careful examination of this record satisfies us that no other verdict could have been fairly rendered, and we discover no prejudicial error. The judgment below is, therefore,—*Affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

ELIZABETH SCOTT, Appellant, v. ALICE C. WILSON, Appellee.

CONTRACTS: Services Not Payable in Money—Wrongful Dis-
1 charge. One who contracts to render personal service to another during the life of such other, and to receive for such services a home for life, may, on breach of the contract, recover, in money, the reasonable value of the services rendered.

LIMITATION OF ACTIONS: Continuous Services. Claims for continuous services under a continuous contract accrue on the date of the last item of services.

Appeal from Polk District Court.—THOMAS GUTHRIE,
Judge.

FEBRUARY 17, 1919.

ACTION at law for damages for the breach of an oral contract for services. The defendant's demurrer to the petition was sustained, and judgment was rendered against plaintiff for costs. The plaintiff appeals.—*Reversed.*

C. C. Putnam, for appellant.

J. L. Witmer, and *Dale & Harvison*, for appellee.

PRESTON, J.—The petition alleges substantially that, about August, 1894, the parties entered into an oral agreement, by which plaintiff agreed to come to the home of defendant, remain with her during her lifetime, and keep her house, and perform the services of a domestic servant; that defendant was a school teacher, and plaintiff was a colored girl, a seamstress, and proficient in housework, sewing, and domestic affairs, and it was agreed that the plaintiff should, by economy, and by faithfulness in managing the household expenditures for food, household expenses, and sewing, aid the defendant in accumulating more property, and that defendant would give plaintiff a home for life, and, in the event of defendant's death, she would see that plaintiff was well cared for for the remainder of her days, by always having a good home to live in; that, pursuant to the agreement, plaintiff entered defendant's home, and continuously performed all of her duties for a period of 23 years, doing defendant's housework, cooking, and domestic work, making most of her clothes, and

1. CONTRACTS:
services not
payable in
money: wrong-
ful discharge.

thus aiding defendant in accumulating a farm in Cass County, Iowa, and two city properties in Des Moines; that, during this 23 years, plaintiff received no wages from defendant, and no money, except small gifts of money as birthday and Christmas presents, not to exceed \$100; that, under this agreement, plaintiff put in the best years of her life, in the most faithful performance of her duties, and, about April, 1917, when plaintiff had reached the age of 54 years, the defendant, after having endeavored for many months to induce plaintiff to leave voluntarily, cancelled the agreement, by ordering the plaintiff out of their home, and threatened to put plaintiff out, if she would not get out; that, thereupon, plaintiff left, and is now compelled, with practically no funds, to seek employment elsewhere; that the reasonable value of the services rendered by plaintiff during these years, in addition to board and lodging, was \$4.00 per week. Plaintiff asks judgment for \$4,720, with interest. The demurrer was on the ground that the facts stated do not entitle the plaintiff to the relief demanded, nor to any relief, in this:

"Plaintiff alleges an express contract, providing for support of plaintiff during her lifetime; alleges performance thereof for a period of 23 years, at which time it is claimed defendant refused further performance. Plaintiff now sues for wages for the 23 years, during which time said contract was carried out according to its terms:

"(1) Plaintiff, under the contract pleaded in her petition, must sue for damages for the alleged breach thereof, to wit, failure to carry out the contract for the unexpired term thereof, and is not entitled to sue for wages during the 23 years she admits said contract of support was strictly performed.

"(2) The breach of the contract pleaded, if any, is failure to support plaintiff from April 26, 1917, to the end of

her lifetime, and not failure to pay wages for the 23 years that said contract was strictly performed.

"(3) If a contract was entered into, as alleged by plaintiff, for life support, 23 years of which support has been provided, it is not the province of plaintiff to ignore the terms of said contract, and make a new contract, under which she can claim wages for the years said support has been furnished.

"(4) Said petition fails to state that said alleged discharge of plaintiff was without cause.

"(5) Said petition is based upon a verbal contract 'not to be performed within one year from the making thereof.' No recovery of wages thereunder can be had, for that said contract is not in writing, signed by the defendant.

"(6) All claims of wages accrued more than five years prior to the beginning of this suit are barred by the statute of limitations.

"(7) This action is prematurely brought, founded upon breach of the contract alleged in the substituted petition, in that the furnishing of a good home for plaintiff was not to be done until the death of the defendant, and that event has not yet occurred.

"(8) A claim for a good home is too indefinite to constitute a valid, enforceable contract, and leaves the court or jury to fix what the terms of the contract should have been, while such terms can only be fixed by the parties themselves."

The demurrer was sustained. Counsel for neither party has argued all the questions raised by the demurrer. We shall consider such as are argued. It is said by counsel for appellee that, unfortunately, upon a ruling on a demurrer, facts well pleaded must be taken as true, however improbable and unreasonable the alleged facts may appear; but counsel then proceeds to argue the unreasonableness and improbability of the plaintiff's claim. Ordinarily, this

would be a question for a jury. At any rate, we must, for the purposes of the demurrer and this appeal, consider all facts which are well pleaded, as admitted. Two arguments have been filed on behalf of appellee. In the first, the following propositions only are advanced: (1) That the fundamental principle of damages is compensation to the injured party. The measure of damages is the value of the bargain to the complaining party, or the loss which a fulfillment of the contract would have prevented, or which the breach of it has entailed (citing 8 Am. & Eng. Encyc. of Law [2d Ed.] 633). (2) Plaintiff cannot recover on a petition showing an implied promise to pay for services, when it appears that they were rendered under an express agreement, and a breach thereof which would entitle plaintiff to recover on a *quantum meruit* (citing *In re Estate of Oldfield*, 158 Iowa 98; *Duncan v. Gray*, 108 Iowa 599; and other cases). (3) Unless plaintiff's discharge was without cause, she would not be entitled to recover. No authorities cited. (4) Where a demurrer is based on a number of grounds, and is sustained generally, without specifying on which ground, reversal will not be had if the demurrer is good as to any one of the points raised (citing authorities).

Disposing of these matters first, the first proposition will be disposed of later, in connection with appellant's proposition, and authorities cited by her counsel. As to the second, we do not understand plaintiff to ask a recovery on a *quantum meruit*. It often happens that there is an express contract as to the employment, but no agreement as to the amount of compensation, in which case the law implies a promise to pay reasonable compensation. *In re Estate of Oldfield*, 158 Iowa 98. This, of course, is not quite the situation here. Appellant's proposition, stated now, as briefly as may be, is that defendant promised to pay plaintiff for the plaintiff's services in a certain way, and that, because of the defendant's breach of the contract and

refusal to carry it out, the law will compel her to pay in current funds. This matter will be referred to more fully later on. As to the third point, we think the allegations of the petition are sufficient, in the absence of a motion, to show that plaintiff was without fault, and that defendant refused to further perform her contract. As to the fourth point, appellant does not dispute the proposition; but, as said, not all points raised by the demurrer have been argued. Appellee's second argument is taken up, for the most part, in answering appellant's argument, and, in addition thereto, argues that, where an executory contract has been fully performed in part by both parties, leaving the remainder wholly executory, a breach of such remainder by one party does not entitle the other to recover damages for that part of the contract already performed, and that plaintiff has been paid in full for the 23 years' services, and she may not recover a second time for the value of the services already performed by plaintiff and paid for by defendant. These last propositions will necessarily be determined by the discussion of appellant's propositions, and authorities which will be cited.

1. Appellant cites and relies on the case of *Ottoway v. Milroy*, 144 Iowa 631. In that case, some of the arguments now urged by this appellee were determined against appellee's contention. It is thought by appellee that the *Ottoway* case has little, if any, bearing on the instant case; but we are of opinion that it is quite analogous, and in point. It is true that the provisions of the contract in that case and the one at bar are not precisely the same: for instance, in the *Ottoway* case, one item that the employer was to furnish was clothing, which is not included in the contract set out herein. In the *Ottoway* case, the contract was made on behalf of a minor, and was to continue until the minor became of age. The contract was carried out by both parties for several years, when the other party abandoned

or refused to carry out the contract. This was about a year before the minor would obtain her majority. In that case, as in this, the employee, if such she may be called, was not a relative of the other party. In the instant case, as in the *Ottoway* case, an express contract is alleged. In the case cited, defendant undertook to provide board, clothing, care, and a suitable education, in return for the services that the minor might be able to render, until she attained her majority, and it was held that:

"There was a full consideration for his undertaking, and if he saw fit to abandon it, or not to perform it, according to its terms, he cannot now say that he is not liable for the benefit he received in services, because there was no express promise to pay therefor. He did promise to pay for such services in a certain way; and if he refuses to do so, the law will compel him to pay in current funds."

It was also held in that case, in effect, that, upon the breach of the contract, the defendant was liable for the services rendered by the minor child, although he may not have expressly agreed to pay therefor; but that, if he partially performed the agreement, he would be entitled to credit therefor, against the full value of the services. In the instant case, the contract was, according to the allegations of the petition, that plaintiff should enter defendant's home, and do certain things; and that defendant would give the plaintiff a home for her life, and do certain things after defendant's death. This was carried out by both parties for 23 years. Appellee contends that to compel payment by defendant upon her breach of the contract would be to require a payment again for plaintiff's services, which defendant had already once paid. This assumes that defendant has fully performed her contract, or, as they put it in argument, fully performed in part. It may be true that defendant performed her part of the contract for 23 years, but the breach of the contract by the defendant deprived plain-

tiff of the benefits of her contract, in having a home, etc., in the future. The parties were not related; plaintiff was a young woman; and we will not presume that she was to do all this work for defendant simply for her board or a home, unless the contract should be carried out for its full term. Under the contract, plaintiff was expecting additional remuneration at a later time for her services, and on the death of defendant. It is suggested by appellee that the latter part of the contract alleged, as to what defendant was to do at her death, is too indefinite to constitute a valid, enforceable contract. That is not material at this time, because plaintiff is not now seeking to enforce that part of the contract. It should have been said before that counsel for appellee seek to make a further distinction between the instant case and the *Ottoway* case, for that, in the *Ottoway* case, it is claimed that defendant had in no manner complied with the terms of his contract, and that the defendant had received the services of the minor, and had given nothing in return therefor. We do not so read that case. It is stated in the opinion:

"It is undisputed that the defendant furnished clothing, board, and some education, at least," etc.

2. The demurrer raises the question as to the statute of limitations. The petition alleges that the contract was continuous, and that the services were continuous.

2. LIMITATION OF ACTIONS: continuous services. This being so, the statute does not run. *In re Estate of Oldfield*, 175 Iowa 118; *Sullenbarger v. Ahrens*, 168 Iowa 288.

3. As to the statute of frauds, appellant contends that the contract does not show, either by express terms or by necessary implication, that its performance within the year is prohibited or impossible, and that it is, hence, not within the statute of frauds (citing *Blair Town L. & L. Co. v. Walker*, 39 Iowa 406; *Riddle v. Backus*, 38 Iowa 81; *McConahey v. Griffey*, 82 Iowa 564.

Plaintiff is not seeking to recover for anything in the future, but only for the part of the contract that has been partly performed. Whether this takes the case out of the statute, or whether the statute applies at all, we do not determine, for the reason that the proposition is not argued, and apparently not relied upon by appellee.

All questions argued have been considered, and it is our conclusion that the trial court was in error in sustaining the demurrer to the petition. It follows that the cause is reversed and remanded for further proceedings in harmony with the opinion.—*Reversed and remanded.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

JOHN B. SHAFFER, Appellant, v. FRED MILLER, Appellee.

TRIAL: *Unsupported Theory.* An instruction which presents a
1 wholly unsupported theory constitutes error.

NEGLIGENCE: *Speed of Automobiles.* The speed of an automobile
2 creates a *presumption* of negligence only in case the speed exceeds 25 miles per hour, but a driver may be negligent in driving at a lower speed, and, under proper evidence, it is error to fail to submit such latter issue.

Appeal from Taylor District Court.—H. K. EVANS, Judge.

FEBRUARY 17, 1919.

ACTION for damages consequent upon a verdict for defendant and judgment thereon. The plaintiff appeals.—*Reversed.*

Tinley, Mitchell, Pryor & Ross, and R. T. Burrell, for appellant.

Flick & Flick, for appellee.

LADD, C. J.—I. Between eight and nine o'clock in

the morning of August 19, 1916, the plaintiff was driving a team of horses, hitched to a heavy farm wagon, in a northerly direction toward New Market.

1. TRIAL: unsupported theory.

The defendant, accompanied by one Thompson, was operating his automobile in the same direction, and passed to the left of plaintiff; and in so doing, the bumper of the automobile, inside of the right spring, struck the left wheel of the wagon, and plaintiff was thereby thrown from the wagon and seriously injured. The plaintiff testified that he did not hear any warning whatever of the approach of the automobile in his rear, while the defendant swore that he blew the horn when his car was about 145 yards back of the wagon, and Thompson fixed this distance as 145 or 150 rods; and both testified that the plaintiff looked around. All agree that plaintiff did not turn his team either way, and that the wheels of his wagon continued in the beaten track, though one witness thought plaintiff "began to swing his team a little, but he stuck right to the beaten track." There was scarcely room for an automobile to pass between the left wagon wheels and embankment further to the left, and, according to Thompson's testimony, defendant's car was as far west as it could get, when it struck the wheels. The defendant testified to driving about 25 miles an hour, and others swore to his having admitted a speed of 35 miles an hour. He swore that he hugged the bank as close as he could, and that he supposed plaintiff was going to turn to the right; that he was leaving enough room to get around him.

"Q. That was the reason you started to go around him?
A. Yes, sir. Q. Did he turn out? A. He never moved his team until I was up against the wagon, and he started to pull out his team."

There was no room for controversy as to whether defendant, before undertaking to pass, was fully aware that

plaintiff had not turned his team or wagon to the right. The court, in an instruction, quoted Section 1569 of the Supplement to the Code, 1913:

"Whenever a person in any vehicle shall approach from the rear upon the public highway and desire to pass, it shall be the duty of the driver or operator of such vehicle ahead to give one half of the beaten path thereof, upon proper signal or request, by turning to the right. The vehicle approaching from the rear shall turn to the left and shall not return to such road or path within less than thirty feet of the team or vehicle which has been passed; provided, however, that such vehicle need not give such right of way when it would jeopardize the safety of the driver or operator to do so. Failure to comply with the above shall be deemed a misdemeanor and punishable as such."

This was followed by saying that:

"If defendant undertook to pass without signal or request, and the collision was in consequence of such omission, plaintiff, if without fault, was entitled to recover; but that, if signal was given, and at a time and distance from plaintiff that it was reasonable to believe the plaintiff could and did hear the same, and you find the plaintiff could have given one half of the beaten path without jeopardizing the safety of the plaintiff, and you further find that plaintiff failed, on signal of defendant, to give one half of the beaten path, and you further find defendant, from the action and conduct of plaintiff, believed and had a right to believe that *plaintiff was about to give one half of the beaten path*, but did not do so, and the failure of plaintiff to respond to the signal of defendant and give one half of the beaten path was the cause of the accident, or contributed to the accident and injury to plaintiff, then plaintiff cannot recover in this action, and your verdict should be for the defendant."

This was erroneous; for there was no evidence war-

ranting the jury to find that defendant "believed or had the right to believe that plaintiff was about to give one half of the beaten path." On the contrary, he knew that plaintiff was paying no heed to the honk of the horn, if one were sounded, and was not likely to give a part of the road to the left. Mr. Miller swore:

"I saw Mr. Shaffer's wagon in the beaten, traveled tracks of the highway during all of the time I traveled 140 yards, and knew his wagon was in the highway; and yet I believed he was going to get out of the highway."

He was well aware that plaintiff was making no effort so to do, and if he so believed, it must have had reference to the future, either with the help of his automobile, or in the natural course of events. Surely, he entertained no such belief as to plaintiff's team and wagon's vacating one half of the road before he reached the wagon with his automobile, moving at a speed of 25 to 35 miles an hour. He was in no manner misled; but, with knowledge that plaintiff had not turned his team or wagon to the right, he undertook to drive his automobile along the embankment and between it and the wagon, where there was not sufficient room within which to pass. There is no basis in the evidence for such an instruction.

II. Section 1571-m19 of the Code Supplement, 1913, declares that:

"Every person operating a motor vehicle on the public highways of this state shall drive the same in a careful and prudent manner, and at a rate of speed so as not to endanger the property of another, or the life or limb of any person; provided, that a rate of speed in excess of twenty-five miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another."

The court submitted whether the automobile was mov-

2. NEGLIGENCE:
speed of auto-
mobile.

ing at a speed exceeding 25 miles an hour, and told the jury that, if it was so moving, defendant might have been found to have been negligent. The evidence was such that he might have been regarded as negligent, even though moving at a much lower speed at the time of the collision (see *Livingstone v. Dole*, 184 Iowa 1340), and that issue also should have been submitted to the jury.

Because of these errors, the judgment is—*Reversed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. J. E. EASTER, Appellant.

EVIDENCE: Memorandum Entries in re Material Facts. Memorandum entries of material facts are admissible (a) whenever it appears that such entries so stimulate the memory that the witness is enabled to recall the facts recited therein, independently of the entries, or (b) whenever they are insufficient to so stimulate the memory, but the witness knows that, when he made the entries, he possessed the truth concerning them, and made the entries in accordance with such truth.

Appeal from Mahaska District Court.—HENRY SILWOLD, Judge.

FEBRUARY 17, 1919.

DEFENDANT was indicted for perjury, convicted, and appeals.—*Reversed and remanded*.

S. V. Reynolds, J. C. Heitsman, and Lewis & Dickson, for appellant.

H. M. Havner, Attorney General, for appellee.

GAYNOR, J.—Defendant was charged with the crime of perjury, entered a plea of not guilty, and was tried and convicted.

The alleged perjury is predicated on the following

facts. One James W. Taylor was indicted and tried on a charge of larceny. He undertook to negative the charge of larceny by showing that he had purchased the property from someone in the regular course of business, and to this end, called this defendant to testify. Just when it is claimed that Taylor committed the larceny, does not affirmatively appear. We assume it was about the 27th day of May, 1915. This defendant, called by Taylor, testified that, on the 26th day of May, 1915, he was at Oskaloosa, met Taylor there, and stayed with him that night in a tent, and was there with him on the morning of the 27th; that, on the morning of the 27th, two men came to Taylor's tent, and had in their possession the property alleged to have been stolen; that Taylor purchased the property from these men, and paid them a consideration for it. We take it that this property was found in the possession of Taylor. This testimony, therefore, was material to the issue then on trial. It is for the giving of this testimony that this defendant is indicted.

It is the claim of the State that this defendant could not have been at Taylor's tent in Oskaloosa, either on the 26th or 27th, for the reason that he was then at Moravia, a town some 50 miles distant from Oskaloosa.

It appears that this defendant began boarding with people by the name of Woodward, at the town of Moravia, on May 1, 1915. The State undertook to prove that he was at Moravia, and not at Oskaloosa, at the time he claims to have seen Taylor purchase the property. To this end, they called Woodward and his wife, who testified, in substance, that they had been acquainted with the defendant for about three years; that, since May 1, 1915, he had boarded with them; that they kept a book, showing the amounts paid and the dates when he was absent. This book was produced on the trial. They testified that, if he was absent but one meal, they made no account of it in the

book; but, if he was absent a considerable number of meals, they made entry in the book, on his return, stating the date when he left and the date when he returned, and the number of meals missed. The entries in the book, material to this controversy, are:

In account with Easter.

[First half of double page.]		[Second Half.]	
Supper Fri.		May 7-15	
Went to Oska.		May 15	
Returned for breakfast		19	
Went to Searsboro for breakfast		May 27-R	Thursday
6-10 Cr. By Cash	\$18.00	May 15 to 19-11 meal	
6-10 Cr. By Cash	9.00	May 27 to J. 3 18 meal	
171 meals		June 26 12 meal	
		July 3-7 10 meal	
Bal. Due	.85	July 3 '85 off 13	
July 20 check	9.00	Aug 14 to 181 off 13	
Aug. 7 check	9.00	Aug 21-23 off 04	
		Aug 23-26 off 05	
Bal. Due Sept. 1st.		12.36	
		Sept. 2s	22
Bal. due to date		\$11.50	

This book was offered by the State, and admitted in evidence over defendant's objection. This is one of the errors relied upon by the defendant for reversal.

The Woodward's, husband and wife, both testified touching this book. Neither testified to having an independent recollection of any matter stated in the book. Neither testified to having made any particular entry in the book. The testimony is: "We made a record of meals missed when he returned." When asked whether he went away to Searsboro on the 27th, and returned on June 3d, as shown by the book, the answer was:

"The book says he went away then and returned then.

According to the book, Easter was at our house on the 26th and on the 27th."

Neither testified to any independent recollection of the making of these entries, or that they were true at the time they were made. Both testified that they had no distinct personal recollection of the defendant on the 26th or 27th, or his whereabouts; that the entry of the date of his leaving was not made at the time he left, but on his return. They further testified that defendant settled by this book; that the defendant had this book in his hands at the time of settlement. It does not appear that his attention was called to any particular item or entry. It does not appear, affirmatively, when the settlement was made. The witness testifies:

"We do not remember when he left. We had no hotel register. Just kept a memorandum, and settled when he returned. He made final settlement some time after he left."

Some of the entries were made in the handwriting of Mr. Woodward, and some in the handwriting of Mrs. Woodward. It does not appear in whose handwriting the particular entries relied upon were made, or when they were made, or whether they were true or not at the time they were made.

Evidence is a guide to the jury in determining the existence or nonexistence of facts about which there is dispute. The evidence offered to sustain a disputed fact must have some substantial basis to rest on. Before a memorandum of this kind is admissible to prove the existence of a fact therein recorded, it must be made to appear that the fact therein recorded was correctly entered, and that the memorandum speaks the truth touching the disputed matter. It does not, of itself, prove the truth of the matters therein stated. The truth must be found in the testimony of some living witness, who knows and can say that, at the time the

record was made, he had personal knowledge of the matters therein recorded, and that he made, or caused it to be made, as a record of facts at the time within his knowledge. He may not be able to recall the transaction, by effort of memory; yet, if he knows that the matters therein recorded were, at one time, within his knowledge, and that, while so within his knowledge, he made this record,—that it was then his purpose or duty to truthfully record the facts therein stated,—then the memorandum becomes evidence of the fact, not by reason of its recitals, but because, by the testimony of the living witness, it is made reasonably certain that it speaks the truth. One called to testify as to the existence or nonexistence of a fact, may be able to recall the fact by an effort of memory, and state the fact truthfully as of memory. He is then competent to testify as to what the fact actually is. He may be called as a witness to testify to a material fact, and, when called, may not be able to recall the fact; yet his memory may be refreshed by an examination of some instruments submitted to him. If, then, he is able to speak to the existence of the fact— independent of the memorandum—as of his own personal recollection, he is competent, and is permitted to testify. This is because his mind, by the refreshing influence of the memorandum, is able to recall its existence, and he then speaks to its existence as of his independent recollection, refreshed by the instrument. This does not make the instrument competent to speak; but, by its operation on the mind of the witness, the mind becomes repossessed of the fact, and the witness is able to speak to the fact, through power of recollection. One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact; but it may be made to appear that, at some time in the past, he had a personal knowledge of the fact, and made a record of it. If, then, he is

able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded.

This memorandum was not admissible in evidence. The proper foundation was not laid, under any of the rules hereinbefore indicated. A memorandum is, at best, but secondary evidence of the facts of which it speaks. The primary evidence is the knowledge of the witness. His knowledge is the basis upon which the memorandum must rest. See *Curtis v. Bradley*, 65 Conn. 99 (28 L. R. A. 143); *State v. Brady*, 100 Iowa 191, 192. For the error in admitting this memorandum, or book, the case must be reversed.

Other errors are complained of, but they seem not to have been raised in the court below, and are not discussed here.

For the error pointed out, the case is—*Reversed and remanded*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. GOTLIEB STEINKE, Appellant.

ASSAULT AND BATTERY: Great Bodily Injury. Assault with intent to inflict great bodily injury cannot be charged, unless the pleader in some manner specifically charges that the assault was made with the intent to inflict such an injury.

Appeal from Keokuk District Court.—HENRY SILWOLD,
Judge.

FEBRUARY 17, 1919.

THIS defendant, together with Robert and Rudolph
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Steinke, was indicted by the grand jury, charged with the crime of assault with intent to commit great bodily injury. A demurrer to the indictment was overruled, and, defendants demanding a separate trial, this defendant was first tried to a jury, and convicted of assault and battery; and judgment was pronounced, by which said defendant was committed to the county jail for 30 days. He appeals.—*Reversed.*

Stockman & Baker, for appellant.

H. M. Havner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

PRESTON, J.—The prosecuting witness, Robert Shultz, and the defendant, were neighboring farmers, as was the father of prosecutor. Defendant had bought a stack of hay of the elder Shultz, and, in hauling the hay, he was using the lane on the north side of the prosecutor's 40. Defendant's two sons, Robert and Rudolph, were assisting in the hauling. There is a dispute between the witnesses for the State and the defendant, as to what occurred at the time of the controversy, the defendant claiming that the prosecuting witness did not object to the use of the lane by the defendant. The prosecutor says he told the Steinkes they could go through as many times as they wanted to, if they stayed in the road or track, but that he did not want anyone to drive over his meadow. The next day, defendant and his sons hauled hay, and again drove over the meadow; and, according to the testimony of the prosecutor, he told defendant he would rather defendant would not drive over his meadow. He further testifies that defendant said nothing, until he got close to the prosecutor; that Shultz stopped, about 20 feet from defendant, and defendant had his fork on his arm, with both hands on it, holding to it. The wife of prosecutor testified that she saw defendant make at

her husband with the pitchfork; that she then went out of the house, and heard threats that he would kill him; that Robert and Rudolph said they had been waiting for a chance to trample prosecutor on the ground; that they were all cursing, and making threats; that defendant said he would get prosecutor before daylight, and that prosecutor would never see daylight again; that, at that time, she saw Robert Steinke come up and hit prosecutor with a fork; and that Rudolph hit him with a fork. The defendant testifies that the fuss was over when Mrs. Shultz came out of the house. The defendant's version of the affair is that Shultz came out, cursing, and that defendant told Shultz to get out of the way; and that, by that time, Shultz grabbed defendant's fork,—grabbed the handle of the fork; that Shultz had hold of the fork with both hands, and tried to get the fork away from defendant; that Robert Steinke said to Shultz to let go of the fork, and Shultz kicked Robert in the stomach and lower part of the bowels; that Rudolph came up then, and told Shultz to let loose of the fork; and that, when Shultz did not do so, Rudolph cuffed him with his hand; that the blow Rudolph struck Shultz with his hand did not knock him down; and that Shultz was never down, at any time. Defendant says he had the fork in his left hand, carrying the handle first, and the tines were behind him; that, when Shultz kicked Robert, Robert hit Shultz with the handle, only once; that Rudolph hit Shultz on the forehead, and then Shultz let loose; that Rudolph hit Shultz with the fork handle; that they had been hauling hay, and defendant and his sons all three had forks. Dr. Pfannebeck saw prosecutor eight or ten times, and described his injuries: a wound on the temple, a bruise where the skin was lacerated and torn, two inches across, and almost round, and another bruise or cut above that in his hair. Another injury was found about the abdomen, and bruises over the pubic bone, with some

discoloration. Prosecutor complained of pain. Each side contends that the other was the aggressor. The evidence was such that this, and the question as to whether defendant was properly acting in self-defense, were questions for the jury.

1. To the indictment as returned by the grand jury, defendant interposed a demurrer, upon the ground that the said indictment did not charge an indictable offense, and that, therefore, the district court was without jurisdiction to try defendant for the offense charged in the indictment. The demurrer was overruled, and defendant entered a plea of not guilty, and was tried, as before indicated. The question of the sufficiency of the indictment was raised at every stage of the trial, and the rulings in regard to this are among the principal grounds relied upon for a reversal. The indictment follows. After charging that the three defendants were accused of the crime of assault to commit great bodily injury, it states that:

"The said Robert Steinke, Gotlieb Steinke, and Rudolph Steinke, at the county of Keokuk and state of Iowa, on or about the 26th day of January, 1917, did then and there, with a deadly weapon, to wit, pitchforks, the particular description of which is unknown to this grand jury, then and there in the hands of Robert Steinke, Gotlieb Steinke, and Rudolph Steinke, upon one Robert Shultz make an assault with intent then and there, wilfully, unlawfully, and feloniously, to stick, beat, cut, stab, and otherwise ill treat and abuse the said Robert Shultz, and did inflict on the body and person of said Robert Shultz, a great bodily injury, contrary to, and in violation of law."

The statute, Section 4771, as it appears in the Code Supplement, 1913, is the same as it was formerly, except as to the punishment. The contention of appellant, as they state it, is that the indictment in this case charges no crime greater than assault and battery; that it is the unlawful in-

tent to inflict a great bodily injury that the law aims at; and that no intent to inflict such injury is averred. They cite *State v. Clark*, 80 Iowa 517; *State v. Collins*, 178 Iowa 73; *State v. Harrison*, 82 Iowa 716; *State v. Malcolm*, 8 Iowa 413; *State v. Pasnau*, 118 Iowa 501; *State v. Debolt*, 104 Iowa 105; 5 C. J. 740. Appellant contends that the indictment in this case is in the wording of the indictment in *State v. Clark*, supra, and that there, the indictment was held insufficient for the reason that it merely charged an intent to strike and bruise. The State contends that the language of the indictment in the instant case is broader than the language in the *Clark* and *Harrison* cases, cited; although, later in the argument, counsel for the State concede that the *Clark* case and the *Harrison* case, supra, sustain appellant's contention; but they say that they feel the rule therein announced to be absolutely wrong. The language of the indictment in this case is, in all material respects, identical with the language used in the *Clark* and *Harrison* cases. It is true that the decisions in those cases were by a divided court, and there has been some criticism of those two cases in later decisions; but they have never been overruled. In our opinion, the reasoning in those cases is sound, and we think the indictment in this case is insufficient, in that it does not charge the crime of assault with intent to inflict great bodily injury.

The indictment in this case does charge that defendant made an assault with intent to stick, beat, cut, stab, and otherwise ill treat and abuse the said Shultz, and did inflict a great bodily injury; but it nowhere charges that these things were done with intent to inflict a great bodily injury. It is argued for the State that to stab, etc., with pitchforks is equivalent to charging an intent to commit a great bodily injury. It is true, of course, that a great bodily injury could be inflicted by stabbing with a pitchfork, and a party so using a pitchfork could be guilty of an

assault with intent to inflict a great bodily injury. It is also true that murder could be committed by the use of a pitchfork, and one could be guilty of assault with intent to commit murder in the use of the fork in that manner, even though murder was not committed, just as a man might be guilty of assault with intent to commit murder by shooting a gun or pistol at another, where the bullet did not take effect. This indictment also charges that defendants made the assault with intent to otherwise ill treat and abuse. The pitchfork could have been so used, by a light stroke with the handle, as to otherwise ill treat and abuse, etc., and the act constitute only an assault and battery. It is also argued for the State in this wise: That the defendant acted with an intent to commit something more than a mere battery, consequently that he intended to commit a great bodily injury; but does it necessarily follow that this something intended was the intent to inflict a great bodily injury, when it could have been an assault with intent to commit murder? Why not say, by this something, there was an intent to murder? As said, the indictment charges that defendants intended to stab, etc. It also charges that defendants intended to otherwise ill treat and abuse. If it be thought, as seems to be argued, that the evidence and the extent of the injuries may be considered in aid of the indictment, then a sufficient answer to this is that the extent of the injury does not necessarily govern, at least so far as the allegations in the indictment are concerned. The offense may be complete without any injury at all. Of course, the jury may consider the evidence in determining the fact as to what the intent was. The gist of the offense, in such a case as this, is the intent with which the act was done. One may have the intent to inflict a great bodily injury, without inflicting any injury at all, or he may intend only assault and battery, but go further than intended, and actually inflict a

great bodily injury. The presumption that one intends the natural result of his act, is not conclusive. Furthermore, as to the use of a pitchfork necessarily constituting more than assault and battery, the jury in this case found the defendant guilty of only assault and battery, and that, even in the use of the pitchfork in the manner in which it was used, there was no intent to inflict a great bodily injury. An indictment cannot be aided by intendment, or an omission supplied by construction. The facts necessary to constitute the offense must be, in the manner indicated, set out, and averred. *State v. Potter*, 28 Iowa 554. The offense charged in the indictment is determined by the statement of facts in the indictment, and not by the designation given to the offense in the caption. *State v. Wyatt*, 76 Iowa 328; *State v. Burley*, 181 Iowa 981. An indictment describing the offense in the language of the statute will be sufficient without naming it; but naming the offense without stating the facts constituting it will not be sufficient. *State v. Shaw*, 35 Iowa 575; *State v. Davis*, 41 Iowa 311.

It is true, as contended by the State, that we have said, in *State v. Ockij*, 165 Iowa 237, and other cases, that a great bodily injury cannot be accurately defined. This is true, of course, as to the injury itself; but there could be no difficulty in this case, or any other, in charging, in an indictment, that the acts were done and the assault made with intent to inflict great bodily injury. Nothing could be simpler or easier than that, and that is the language of the statute. The State cites us to *State v. Mitchell*, 139 Iowa 455, in which Mr. Justice McClain questioned the correctness of the majority opinions in the *Clark* and *Harrison* cases. The indictment in the *Mitchell* case charged that the assault was made with a shotgun, which defendant pointed at the person assaulted, and threatened to shoot said person, "with intent to do him great bodily

injury." This charges precisely, as we think, what the indictment in the instant case does not charge. Judge McClain said, in that case, that the intent to do great bodily injury is not left to inference from the infliction of the injury, but is specifically alleged, and held that the *Clark* and *Harrison* cases are authority for holding the *Mitchell* in dictment, which does thus specifically allege the statutory intent, sufficient, so far as allegation of intent is concerned. In the *Mitchell* case, Mr. Justice Bishop dissented, Mr. Justice Ladd concurring therein, and was of the opinion that the indictment charged no more than a simple assault. The more important question in the *Mitchell* case was as to the sufficiency of the allegations in the indictment of the ability to commit the offense charged, because there was an absence of allegation that the gun was loaded.

We are of opinion that the indictment does not charge an indictable offense. This being so, it is not necessary that we consider other errors assigned. The cause is reversed and remanded for such further proceedings as may be in harmony with the law.—*Reversed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

MARTHA J. SWIFT, Appellant, v. BOARD OF SUPERVISORS OF DAVIS COUNTY et al., Appellees.

HIGHWAYS: Where All Parties Consent and Request. An unqualified written request to the board of supervisors to establish a specified highway, signed by all the owners of land which will be taken for the highway, empowers the board to proceed to the establishment of the highway without the appointment of a commissioner, without the service of notice to anyone, and without regard to undisclosed claims for damages in favor of any petitioner.

Appeal from Davis District Court.—C. W. VERMILION,
Judge.

FEBRUARY 17, 1919.

CERTIORARI proceedings to test the authority of a board of supervisors in establishing a highway. On hearing, the proceedings were dismissed. Plaintiff appeals.—*Affirmed.*

Henry C. Taylor and *Buell McCash*, for appellant.

T. A. Goodson, for appellees.

LADD, C. J.—On February 29, 1916, a petition was filed. in words following:

“To the Board of Supervisors of Davis County, Iowa:

“The undersigned ask that a highway 60 feet wide, commencing at the center of Section 12, Twp. 69 N., R. 14 W., running thence W. along the center line of Section 12 about one-fourth mile; thence S. one-fourth mile to intersect the present highway; and terminating at or near the school-house grounds, be established.

“Martha J. Swift, Larrissa A. Adams, Hardy Richardson, R. G. Hardy, G. E. Mather, F. L. Stanford, and twenty-eight others.”

The road petitioned for was, on the 30th of December, 1916, by resolution of the board of supervisors, “established and same hereby become a public highway from the passage of this resolution, and the county will put same in traveling condition.” This was followed with a provision relating to an arrangement with one Adams, concerning connecting roads. The plaintiff was owner of the N½ SW¼ of said Section 12, except the east 6¼ acres, and this appeared on the transfer books. This land had been owned by her for many years. It abutted on the roads sought to be established and vacated respectively; but, though she had a claim for damages to file because of such establishment, she neither notified the board of supervisors thereof nor filed such claim.

Had the board of supervisors authority to establish the

highway petitioned for, under Section 1512 of the Code, or must the procedure prescribed in Code Section 1484 *et seq.* have have been followed? Appellant contends that the latter course must have been pursued. The language of the petition was that of the form set out in the above section, and counsel argue that the sections following were not complied with, in that: (1) No road answering the description in the petition was established; (2) no bond was given, as required by Code Section 1485; (3) no one was appointed commissioner, as exacted in the next section; (4) no report of commissioner was filed with the county auditor, under Code Section 1488; (5) no day was fixed when the report would be acted on, before which all objections and claims for damages should be interposed (Code Section 1493); and no notice was served or published, as exacted by Section 1495, Code Supplement, 1913. Such, ordinarily, must have been the general course of procedure, had the petition not been signed by all those owning the strip of ground proposed to be used,—though the requirement of a bond has been held to be directory (*State v. Barlow*, 61 Iowa 572); and those who signed the petition are not in a situation to complain of not being served with notice, if no damages are claimed by them. *Sullivan v. Robbins*, 109 Iowa 235. As to all others, service of notice, such as is prescribed in Section 1495 of the Code Supplement, 1913, is jurisdictional. *Moffitt v. Brainard*, 92 Iowa 122; *Chicago, R. I. & P. R. Co. v. Ellithorpe*, 78 Iowa 415; *State v. Anderson*, 39 Iowa 274; *Snyder v. Foster*, 77 Iowa 638; *State v. Berry*, 12 Iowa 58. As appellant claimed damages, she might be heard to complain of not having been served, but for Section 1512 of the Code, which declares that:

“Roads may be established without the appointment of a commissioner, if the written consent of all the owners of the land to be used for that purpose be first filed in the

auditor's office; and the board, if satisfied that the proposed road is of sufficient public importance to be opened and worked by the public, shall make an order establishing the same. If a survey is necessary, the board, before ordering the same, may require the parties asking such establishment to pay or secure the payment of the expenses thereof."

The consent contemplated in this section is unqualified, unconditional, and absolute in its nature, and, upon the filing of such a consent of all the owners of the land to be used, the board of supervisors may, but are not bound to, establish the road. If the consent is on some condition, as that a claim of damages shall be filed and considered, or on some other contingency, then it is not such as to authorize the board to proceed without the appointment of a commissioner. That "all the owners of the land to be used" signed the petition is not questioned. Did they thereby consent to the establishment of the highway? They thereby asked in writing that it be established, and how were it possible to so request without consenting that this be done? To ask necessarily implies consent that the thing requested be granted; and, in petitioning for the establishment of this road, every signer necessarily consented in writing that the board of supervisors establish the road. All are presumed to have concurred in filing the petition, and must have known that they constituted "all the owners of the land to be used;" and, having so filed a petition carrying an absolute and unconditional consent to the establishment of the highway, neither plaintiff nor any other is in a situation to object to an order establishing the highway, as authorized by Section 1512 of the Code. If not content with such course, the owner's name must have been withdrawn, or the consent qualified in a manner to render it ineffectual as consent. All owners of the land to be used having consented to the establishment of the road, the necessity of appointing a commissioner to report might be dis-

pensed with, and so doing obviated the requirement of service of notice personally and by publication. *Heery v. Roberts*, 186 Iowa — (May 14, 1919).

Under Chapter 1 of Title VIII of the Code, anyone, whether an abutting owner or not, may petition for the establishment of a highway for the public; and the procedure prescribed in Section 1484 *et seq.* is to be pursued. If "all the owners of the land to be used" for such highway join in a petition to the board of supervisors requesting such establishment, thereby giving written consent thereto, the appointment of a commissioner is unnecessary. Section 1512, Code. A day for hearing objections and claims for damages is to be fixed only upon a favorable report of the commissioners (Section 1493, Code), and only on the fixing of such day is notice, personal and by publication, exacted by Section 1495 of the Code Supplement, 1913. By implication, then, fixing a day for hearing and service of notices is dispensed with by the elimination of a commissioner, under Section 1512 of the Code.

We are not saying that the board of supervisors may not, in a case like this, appoint a commissioner, and pursue the procedure prescribed in Section 1484 *et seq.*, but that where, as in a case like this, all the owners of land to be used consent in writing, by asking the board of supervisors to establish a road, that body is authorized so to do without the appointment of a commissioner or the service of notice, personal or by publication, even though one of such owners has a claim of damages which has not been filed, and the intention to file is undisclosed.

We are of opinion that the board of supervisors acted within the authority conferred by Section 1512 of the Code, in establishing the highway. The point is made that the description of the road in the petition is too vague and indefinite to invoke action (*Yengel v. Allen*, 179 Iowa 633); but, as this question was not raised in the trial court, it

ought not be reviewed on appeal. We are content with the order of the trial court in dismissing the proceedings in certiorari, and the same is—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

TOWN OF WILLIAMS, Incorporated, Appellee, v. IOWA FALLS
ELECTRIC COMPANY, Appellant.

PARTIES: **Municipal Corporations.** A municipal corporation which
1 is a customer of a public utility corporation may maintain injunction to prevent an unauthorized or unjustified increase in rates.

INJUNCTION: **Status Quo on Proposed Increase of Utility Rates.**

2 A paper showing, by a public utility corporation (which proposes to increase existing rates for electric light, in opposition to the terms of an admitted ordinance), that existing rates are non-compensatory, furnishes sufficient basis for the dissolution of a temporary injunction against such threatened increase, when viewed in the light of the established principles of law (1) that the power to fix such rates is an exercise of the police power, (2) that such power is purely legislative, (3) that such power cannot be the subject of contract, in the absence of unmistakable grant, and that such grant has been withheld in this state, (4) that all such rates must be compensatory,—in short, that no contract, ordinance, or estoppel can stand in the way of a proper increase of non-compensatory rates,—and when it is further made to appear that such dissolution will more clearly maintain the *status quo*, pending the final hearing on such proposed increase, than would be accomplished by a continuance of the injunction.

Appeal from Hamilton District Court.—R. M. WRIGHT,
Judge.

FEBRUARY 17, 1919.

APPEAL from refusal to dissolve a temporary injunction, granted at the suit of the plaintiff town.—*Reversed*

William Chamberlain, John A. Reed, and William Smyth, for appellant.

Chase & Chase, for appellee.

SALINGER, J.—I. The defendant Electric Company is operating under a franchise and ordinance granted and enacted by the plaintiff town. Said ordinance provides that rates therein stated shall be in force for 10 years ensuing, and shall continue in force “until a readjustment of rates is demanded by the town or the grantee.” The company has notified its patrons that service will be discontinued, unless rates 10 per cent higher than the maximum rates fixed in said ordinance be paid. By a petition to enjoin this proposed action on part of the company, the plaintiff town contends that no readjustment has been demanded; that the proposed increase “is contrary to the franchise and agreement made by the defendant with the plaintiff, and is unauthorized and void,” and is without authority of law. The answer of the defendant asserts that a readjustment has been demanded and refused; that, by reason of changed economic conditions, beyond the control of either party, said maximum rates have become inadequate, and, in effect, confiscatory; and that, if the franchise rates be increased as is proposed by defendant, the new rate will still be less than adequate and compensatory. The trial court granted a temporary injunction, restraining defendant from exacting said increase in rates. A motion to dissolve this writ was denied, and defendant appeals from that ruling.

II. If the temporary injunction stands, it may happen that the final decision will sustain the proposed increase, and that some of the patrons will default in paying

1. PARTIES: municipal corporations.

the increase. And the appellant contends that the plaintiff town may not maintain this action, because, for one thing, it has no power to obligate itself what, in the supposed case, inhabitant patrons will fail to pay. Some phases of this argument will be considered in another connection. If we assume, for the sake of the argument, that the town may not so bind itself, and further assume it is not so acting as an arm of the state as that no bond is required of it, yet appellee has sufficient interest to maintain this suit. For defendant has answered that, from the date of the granting of the franchise, it has "furnished electric light and power service to the plaintiff and its inhabitants at the rates specified in said ordinance." Therefore, it appears that the *plaintiff* town itself, as well as its inhabitants, is a customer of defendant. That being so, plaintiff surely may protect itself, if an unauthorized or unjustified increase in the rates that it itself is paying as a consumer is threatened. But see *Phelan v. Boone Gas Co.*, 147 Iowa 626; and 5 McQuillin on Municipal Corporations, Section 2505.

2. INJUNCTION: status quo on proposed increase of utility rates.

III. It is fairly apparent what the final decree will have to settle. But the parties are agreed, and appellee cites decisions from this court to sustain its assertion, that these ultimate questions may not be determined on this appeal. Therefore, the sole dispute now is, What shall be done to assure effectiveness of the final decision? In *Wehrman v. Moore*, 177 Iowa 542, we hold that, in preserving such status, the so-called "balance of convenience rule" is to be applied. True, in that case, the question was whether a member of this court might, by order, preserve the status, pending appeal,—whether any order should issue. True that, in the case at bar, the question is, Which of two methods will best save the status, pending litigation be-

low? But these differences are merely adventitious; and in both cases, the ultimate question is, What is best calculated to make the final judgment effective? The "balance of convenience rule" is, as its name indicates, a test to determine what order will, with the least inconvenience to either party, assure the victorious one the fruits of his decree. It follows that no party may ask to be assured that any judgment he obtains shall be effective, if "it is reasonably clear" that the position in court upon which he seeks judgment "is altogether without any just foundation." *Wehrman v. Moore*, supra. If it may be said, on the application for such interlocutory relief, that, as matter of law, it is clear he will never have any rights to protect, it is idle to inquire what will best protect rights that will never accrue.

On this appeal, we can decide nothing save whether it may be said now that the claims of defendant have no "just foundation." We gather that these claims are the following:

a. The power to fix rates is purely governmental and legislative. So hold *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U. S. 265; *City of Tipton v. Tipton L. & H. Co.* 176 Iowa 224; 3 Dillon on Municipal Corporations (5th Ed.), Section 1325; and 4 McQuillin on Municipal Corporations (1912), Section 1729, approved in the *Tipton* case. The fixing of rates by ordinance is, in a sense, an exercise of the police force. Wherefore, a fine is enforceable for violating the provisions of the ordinance. *Tipton's* case, 176 Iowa 224.

b. The legislature can give power to a town to contract that rates fixed shall not be changed for a stated period; but authority "to regulate and fix" rates does not authorize such a contract. Power to make such a one can be given by unmistakable grant alone; and without such

grant, no contract that rates shall be unalterable is valid. That has support in *Rosecrans v. United States*, 165 U. S. 257, 263, and in *United States v. Jackson*, 143 Fed. 783, at 787, 788. This is so because enforcing such an one would, in whole or in part, extinguish an undoubted governmental power. So holds *Home Tel. Co. v. City*, 211 U. S. 265. In this state, no question can arise whether the power to make such contract has been granted; because Section 725, Code Supplement, 1913, expressly forbids making such a contract. That is the holding in *Tipton's case*, 176 Iowa 224, and in *Iowa R. & L. Co. v. Jones Auto Co.*, 182 Iowa 982. The fixing of maximum rates in a franchise ordinance is, therefore, not a contract that such rates may not be changed before the time stated in such ordinance has lapsed. It has been held that approval of such rates by the approval of the franchise on the part of the electors is merely an approval of the rates fixed by the franchise as rates temporarily settled, with distinct understanding that the council might change these rates, either upward or downward. *Iowa R. & L. Co. v. Jones Auto Co.*, 182 Iowa 982, so holds. To like effect is *Rogers Park Water Co. v. Fergus*, 180 U. S. 624.

c. The next proposition urged is that something that one party may change without the consent of the other is not a contract. To this we have to say that, in rate cases, the proposition that nothing is, in the true sense, a contract, unless there be a reciprocal obligation, and unless the alleged contract is binding on both, has the approval of numerous decisions in the Supreme Court of the United States, those of other Federal courts, and of courts of last resort in many of our sister states.

d. Next, it is urged that this is not changed by any estoppel arising from the fact that the service company has proceeded under the franchise grant. This is held in *State v. Chariton Tel. Co.*, 173 Iowa 497, and in many de-

cisions by the Supreme Court of the United States and by other courts of high standing.

e. Finally, it is said that the sole limitation upon the governmental power to fix rates, and upon the right of the service company to demand a change to higher rates, is that all rates shall be just and reasonable. This is held in *Iowa R. & L. Co. v. Jones Auto Co.*, supra, *Tipton's* case 176 Iowa 224, and in Abbott on Municipal Corporations, Section 913, approved in the *Tipton* case. The schedule fixed is presumed to fix rates that, "taking into account the entire business, would yield adequate returns in the way of profits." So holds *City of Buffalo v. Buffalo Gas Co.*, 81 App. Div. 505 (80 N. Y. Supp. 1093), approved in *Tipton's* case. It follows there is no occasion for unalterable rates, since all rates must, at all times, be reasonable, fair, adequate, and non-confiscatory,—since the municipality may not use its governmental powers to confiscate, nor the service company demand excessive rates. So holds *Rogers Park Water Co. v. Fergus*, 180 U. S. 624.

In the last analysis, the contention of the appellant, up to this point, is that no contract, no estoppel, no ordinance, nor refusal to amend an ordinance, stands, or can stand, in the way of raising the rates fixed by the plaintiff to a just rate, provided defendant can establish that the rates fixed by the ordinance of plaintiff are not now just, reasonable, and fairly compensatory. As has been shown, this position is well sustained by authority. Hence we cannot say, at this time, that it is clear that such claim should not be sustained on final hearing. The ultimate claim made by the defendant is that, if rates fixed by ordinance are not just, reasonable, and compensatory, and the municipality refuses to change such rates so that they will be that, then the defendant may exact an increase from its patrons, and, if it be attempted to restrain collection, it may successfully defend, by showing that the increase is

justly due it. We are of opinion that claiming the right so to defend is not an unreasonable deduction from what we have shown to be established by authority. Some reasons for this view will be stated in another connection. At any rate, the basis of the deduction cannot be held to be unsound, since, as said, it is well fortified by authority. And the deduction itself cannot be said to be so clearly untenable, if untenable at all, as that we should refuse to preserve the status, on the theory that defendant is clearly not entitled to relief on final hearing.

IV. The next question is: Which method proposed will, with the least possible inconvenience to either, assure each that such judgment as he might obtain shall be effective?

The appellee contends, first, that whether a temporary injunction shall be dissolved leaves so much in the discretion of the court as that we may not interfere on appeal. If that be so, thus broadly stated, the undoubted right to appeal would be of little value. Keeping in mind that the legislature has granted the right to appeal from a refusal to dissolve a temporary injunction, we hold that refusal to dissolve is discretionary only where the propriety of the ruling involves a consideration of a fact question, and that, whenever the appeal from the denial of a motion to dissolve presents questions of law only, the appellate review is as broad as it is on the review of any law question. This distinction has been so often made that we deem citations superfluous. But see *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa 312, at 343.

So we reach the question whether the method advocated by appellant is not, as matter of law, preferable to keeping the temporary injunction in force. It contends that the method it proposes best serves the "balance of convenience." Its method is defined in both its answer and its motion to dissolve, and is an offer "to deposit with some

trustee, to be named by this court, and as a fund in court, all sums collected by this defendant company in excess of said ordinance rates, said fund in court to be held by such trustee until the final determination of this action, and then either repaid to the electric consumers of the town of Williams or to this defendant, as the final equities of the case may demand;" and it offers to file with the trustee the sums paid in on the excess rates by each consumer. We find, on examination, that, on stay orders in rate contest cases, it has been the practice of the members of this court and of the court to safeguard the status by requiring such deposit as the defendant tenders, and think that the practice is justified by reason. If the temporary injunction stands, and it shall finally be found that the defendant is entitled to the increased rates, it may be compelled to bring numerous suits for small sums, and may find that many of the debtors have either removed from the jurisdiction or have become insolvent. On the other hand, if the town shall prevail finally, the fund in court will give it and its inhabitants ample protection, without any loss and without any substantial inconvenience. The doubt suggested as to the validity of the injunction bond is, as we have said, not material on the right of plaintiff to sue, but such doubt furnishes an additional reason for favoring the method proposed by defendant. We hold, therefore, that, under the "balance of convenience" rule, the temporary injunction should be dissolved, when said fund in court is substituted.

In view of the conclusions finally reached on this appeal, and of the manner in which the dispute on the appeal is narrowed by the presentation thereof, several practice points made by the parties respectively require no consideration.

The cause is remanded for action in harmony with this opinion.—*Reversed and remanded.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

JOHN F. WEISER, Appellee, v. E. E. ROWE, Appellant.

VENDOR AND PURCHASER: Abortive Tender of Performance. A

1 tender of performance by a vendor, at a time when he is wholly unable to perform, is a nullity, and therefore calls for no tender of performance by the vendee. 1

VENDOR AND PURCHASER: Mutual Failure to Tender Perform-

2 **ance.** Mutual failure to tender performance within a stipulated time limit automatically continues life of contract.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

FEBRUARY 17, 1919.

ACTION at law to recover \$500 purchase money paid upon a land contract which the plaintiff rescinded on account of alleged breach by the defendant. There was a verdict for the plaintiff, and the defendant appeals.—*Affirmed.*

F. L. Ferris and C. N. Jepson, for appellant.

Henderson, Fribourg & Hatfield, for appellee.

EVANS, J.—On January 4, 1915, the plaintiff and defendant entered into a written contract, whereby the defendant purported to sell, and the plaintiff to buy, 160 acres of land, for the consideration of \$12,800. Five hundred dollars was paid on the contract. For the remainder of the purchase price, \$6,500 in mortgages were to be assumed, and the balance, \$5,800, was to be paid at the time of delivery of deed. The defendant was to furnish an abstract, showing good and merchantable title, and to deliver a warranty deed, all to be done within 30 days. On January 13th, the defendant caused the plaintiff to be fur-

1. **VENDOR AND
PURCHASER:
abortive ten-
der of per-
formance.**

nished with an abstract of title, which was examined by plaintiff's attorney. Some formal defects in the chain of title were pointed out by the examining attorney. The defendant proceeded to amend such defects, and acquired the necessary instruments for the purpose, by the morning of February 5th. The time limit specified in the contract expired on February 3d. No place of performance was specified in the contract. The parties did not meet on February 3d or 4th; nor does it appear that any attempt to meet was made by either. On the morning of February 5th, the defendant phoned to the plaintiff that he had acquired all necessary papers, and was then able and ready to close the deal. In response to the notification, the plaintiff stated that he had withdrawn from the contract, because of the failure of the defendant to comply therewith within the time limit. The question has been considerably discussed in the briefs whether the plaintiff had the right to rescind the contract on the mere ground that the defendant had failed to tender performance within the time limit. In view

2. **VENDOR AND
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mutual failure
to tender per-
formance.**

of the fact already noted, that the plaintiff himself did not offer performance at any time prior to February 5th, the contract was thereby continued in force. Either party could put the other in default by a tender and demand. *Waters v. Pearson*, 163 Iowa 391; *Wright v. Swigart*, 172 Iowa 743; *Miller v. McConnell*, 179 Iowa 377.

On February 8th, the defendant served upon the plaintiff a written offer and demand of performance, and a notice of intention to declare a forfeiture. It appears, however, that, though the defendant said, on February 5th, that he was ready and able, and though he repeated in writing the same offer on February 8th, he was not, in fact, ready or able to perform on either date. The title to the land was not in the defendant. It was in the Levitt Investment Company. The defendant had a contract for the purchase with

the Levitt Investment Company. The terms of that contract do not appear in the record. According to the defendant's testimony as a witness, he did not receive his title until February 10th. His deed was not filed until March 2d. It could not, therefore, have appeared upon his abstract of title before that date. To add to the complication, the deed delivered to the defendant conveyed to him only an undivided one half of the property, and conveyed the other undivided one half to one Warren Sellers. Sellers was not a party to the contract, nor is his apparent connection with the title acquired from the Levitt Investment Company explained in the evidence in any manner. The result is that the tender and demand by the defendant were premature, in the sense that, at the time of such tender, he was not ready and able to perform it, and was, therefore, not entitled to make a demand upon plaintiff. It goes without saying that the plaintiff was justified in refusing the demand. Under the circumstances here indicated, he was not bound to make a tender to the defendant. *Nelson v. Chingren*; 132 Iowa 383. The defendant's false offer and premature demand amounted to a breach on his part, and the plaintiff thereby became entitled to rescind. Such was the holding of the trial court, and its judgment is—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

JUANITA WONDERLY, Appellant, v. FRANK OERTEL, Appellee.

APPEAL AND ERROR: Failure to Except. When a motion for a directed verdict is sustained on several *different* grounds, among which is one which asserts the non-existence of the *one act of negligence alleged*, plaintiff must except to the ruling on said latter ground, in order to preserve anything for review on appeal.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

FEBRUARY 17, 1919.

PLAINTIFF and appellant charged that certain negligence of appellee in driving an automobile caused a collision between said automobile and a motorcycle upon which plaintiff was riding, and that thereby she was injured. She appeals because the court directed the jury to return a verdict against her.—*Affirmed.*

Hughes, Rankin & Dolan, for appellant.

Frank Oertel and *W. C. Blood*, for appellee.

SALINGER, J.—I. From the petition as originally drawn, the plaintiff withdrew the allegation that defendant drove his automobile at a dangerous and unlawful rate of speed, and the further allegation that defendant gave no warning, either by sounding of his horn or otherwise. On the authority of *Monaghan v. Equitable L. Ins. Co.*, 184 Iowa 352, verdict was rightly directed for defendant unless plaintiff has some substantial evidence of such charge of negligence as remains in her petition after said eliminations by withdrawal. What remains of the petition declares that plaintiff, with her brother, was riding a motorcycle on the crossing of Seventh and Main Streets, on the right side of said "street;" that defendant was, about the same time, coming in an automobile down Main Street from the west on the opposite side, on the right side of said street, "and, when approaching the westerly corner of said Seventh and Main Streets, turned and angled across easterly to said left side of Main Street, and so negligently and carelessly drove his said automobile in and upon plaintiff while she was so riding upon said motorcycle * * * Defendant negligently and carelessly and knowingly ran upon and over the plaintiff." This seems to us to be a

declaration which limits the negligence alleged to turning and angling from the westerly corner of Seventh and Main Streets across easterly to the left side of Main Street. The first ground of the sustained motion to direct verdict is that there is no foundation in the record showing defendant turned and angled across easterly to the west side of Main Street, and so negligently and carelessly drove said automobile at the time and place in question. We are unable to find any complaint whatever of the sustaining of this ground of the motion. The errors relied on for reversal take sustaining the fourth ground of the motion as their starting point. We are of opinion that no other ground urged in the motion to direct verdict is, in substance, the equivalent of said first ground of the motion. It follows that, since sustaining the motion on the first ground thereof is not complained of on this appeal, that we must treat sustaining that ground of the motion as we would if no exception to the ruling had been taken below. In effect, failure to complain of this ruling makes the ruling the law of the case. In sustaining the first ground of the motion, the court necessarily held that there is no evidence which shows that defendant turned and angled across easterly to the left side of Main Street. As that is the sole negligence charged, the ruling amounted to a determination that plaintiff had no evidence to sustain her petition, and, as said, that holding has become final, for want of complaint thereof. If it be assumed that the ruling was erroneous, it is still the law of the case until duly set aside—and it may not be duly set aside unless some complaint, in manner recognized by law, is lodged in the appellate court against said ruling. As a holding that sustaining the first ground of the motion disposes of the case against plaintiff, we have no occasion to consider whether or not other grounds of the motion were tenable.

It is not amiss to add that, in our opinion, there was,

in fact, no sufficient evidence of the negligence relied on by the plaintiff. It follows that the judgment must be—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

NETTIE L. BENSON, Appellant, v. TOWN OF LECLAIRE et al.,
Appellees.

TAXATION: Undervalued but Inequitable Assessment. Assessing property at *less* than its actual value still leaves the taxpayer with a grievance, when it is made to appear that such property is assessed higher, proportionately, than other property in the same taxing district. Evidence reviewed, and held insufficient to show such inequality as to justify a disturbance of the assessment.

Appeal from Scott District Court.—F. D. LETTS, Judge.

FEBRUARY 18, 1919.

APPEAL from the judgment of the court below, affirming the finding of the town council of the incorporated town of LeClaire, sitting as a board of equalization.—*Affirmed.*

Helmick & Boudinot, for appellant.

J. A. Hanley, for appellees.

STEVENS, J.— On or about March 1, 1915, plaintiff purchased a 97-acre tract of farm land, lying within the limits of the incorporated town of LeClaire, for a consideration of \$16,490. For the year 1913, this tract had been valued, for purposes of taxation, at \$6,240, and for the year 1915, at \$9,800. Plaintiff did not know that the assessed value was raised in 1915, until she went to pay her taxes in 1916. The land was assessed in 1917 at the same value as in 1915. Plaintiff appeared before the board of equalization in 1917,

and objected to the value fixed by the assessor, upon the ground that same was inequitable, and much higher than other lands of like character, similarly situated and used in the vicinity, were assessed. The board declined to reduce the assessment, whereupon plaintiff appealed to the district court, where the assessment was also affirmed.

It is clear from the record that the value fixed upon the lands of appellant for purposes of taxation is much below its market value; but this is not controlling, if the assessed value thereof, compared with other lands in the immediate vicinity similarly situated and used, is inequitable. *Iowa Cent. R. Co. v. Board*, 176 Iowa 131; *Barz v. Board*, 133 Iowa 563; *Burnham v. Barber*, 70 Iowa 87, 90.

Some evidence was offered, tending to show that plaintiff's tract is somewhat broken, and that some of it is not suitable for cultivation. No evidence was offered of the market value of the several tracts referred to in the evidence, in comparison with which it is claimed that the assessment of plaintiff's lands is inequitable, but evidence was offered from which the inference may be drawn that the topography of the several tracts is quite similar, and that all were about equally suitable for cultivation. The land in question contained but meager improvements, and is used for agricultural purposes. The several tracts with which comparison is sought were generally of much smaller acreage. One contained but 5 acres, and the largest, 32 acres. The assessed value of the several tracts for 1913 and 1917 is shown, from which it appears that all but one were assessed upon the basis of a considerably higher value in 1917 than in 1913. Some of the smaller tracts were used principally for residence purposes, and all of them, because of their smaller area and use, may have been relatively of less market value. Plaintiff's land was assessed at a trifle over \$100 per acre; the other tracts, at from about \$60 to \$80 per acre. We may assume that none were assessed at

their full value. Presumptively, the value fixed by the board of equalization is equitable, and the burden rested upon appellant to overcome this presumption. *Frost v. Board*, 114 Iowa 103; *First Nat. Bank v. City Council*, 136 Iowa 203; *King v. Parker*, 73 Iowa 757.

It is obvious that no great inequality was shown, and there is nothing to indicate that the assessor or board of equalization did not proceed according to their best judgment in fixing the value of the land for taxation.

It is further argued by counsel for appellant that the court committed error in not permitting the assessor, who was called as a witness, to answer certain questions propounded to him. Whether the ruling of the court was correct or not, favorable answers thereto could not have changed the result. The witness did not claim to know the value of the respective tracts, and he was not asked to give his opinion upon that matter. If some inequality is shown in the evidence, it is slight, and does not justify a reversal.—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

DEMMON LOWELL, Appellee, v. WARREN LOWELL, Appellant.

DEEDS: Presumptions Attending Joint Conveyance. The presumption that joint grantees in a deed to land take *equal* interest is overthrown by a showing that such grantees paid *unequal* portions of the purchase price.

ESTOPPEL: Estoppel to Deny Presumption. The fact that two joint grantees of land shared equally in the proceeds of their joint labor in the operation of the farm, does not necessarily estop one grantee from insisting that he owns more than one half of the land, because of having paid more than one half of the purchase price.

Appeal from Buchanan District Court.—CHAS. W. MULLAN,
Judge.

FEBRUARY 18, 1919.

SUIT in equity for the partition of real estate.—*Affirmed.*

Edwards, Longley, Ransier & Smith, J. C. Murtagh,
and *R. W. Hasner*, for appellant.

Cook & Cook, for appellee.

STEVENS, J.—Nelson Lowell died in 1887, seized of 160 acres of land. He was survived by Jane Lowell, his widow, and six children, two of whom are the parties to this litigation. Forty-five acres were set off to the widow so as to include the improvements. Jane Lowell became executrix of the estate, and, as such, sold the farm to the parties hereto, except the portion set off to her, for \$3,625, the appraised value thereof. At the time of his death, Nelson Lowell was indebted to plaintiff upon a note for \$580. After her appointment as executrix, Jane Lowell executed her own note to plaintiff, to take the place of the \$580 note. She filed a claim against the estate for the amount of the note, together with another item, and a special administrator was appointed, and the claim allowed in her name. Plaintiff at first purchased the land for himself, and a deed was made out accordingly; but later, the defendant desiring to share therein, his name was inserted also.

Plaintiff and defendant worked together, farming the land in question, with other land, until after the death of Jane Lowell. The income derived from their joint operations was treated as partnership property, and used in the payment of expenses, taxes, and improvements on the land in question, and what remained when they dissolved was divided equally.

After the death of Jane Lowell, plaintiff brought this suit for the partition of the entire tract, alleging in his

1. DEEDS: pre-
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petition that he is the owner of 18/29 and defendant 11/29 thereof. The interest of the parties was not designated in the deed, but plaintiff claims to have paid \$871.75 more of the purchase price than the defendant, and this forms the basis of his claim to an undivided 18/29 of the land. Counsel for appellant argue vigorously that plaintiff failed to establish his claim that he paid more of the consideration than the defendant. One thousand dollars was borrowed jointly by the parties, and applied on the purchase price of the land. Some of the heirs receipted to the executrix for the amount due them, but were later paid by the purchasers.

Mrs. Lowell was allowed \$107 for services as executrix, and inherited the share of a deceased daughter, but allowed it all to be credited upon the purchase price. It appears to be conceded that the balance was paid jointly by plaintiff and defendant, except the disputed item of \$871.75. While the defendant professed ignorance of the fact that Nelson Lowell was indebted to plaintiff, and that he had demanded payment thereof from the estate, the evidence is quite clear that the mother took up the Nelson Lowell note and gave her note therefor, and that the claim allowed her included the amount thereof, and that same was paid by plaintiff by crediting him therewith on the purchase price. No evidence was offered from which it could be inferred that she paid the note executed by her in any other way than as claimed by plaintiff. He gave her a receipt for the amount, and same was attached to the report of sale.

The defendant's testimony was indefinite and uncertain throughout. He did not remember that his mother contributed to the purchase price, nor was he able to state definitely how the same was paid. Two of his sisters testified that they had never known of plaintiff's claim against the estate, or that he claimed to own more than a one-half

interest in the land; whereas plaintiff testified that the matter was talked over in the family, and was well understood by them. The plaintiff is corroborated as to the amount paid by him by the testimony of the attorney for the executrix. It is conceded that plaintiff and defendant worked together, and jointly paid the expenses of conducting the farm, and of such improvements as were made thereon, together with the taxes, and that they shared equally in the profits growing out of the business. It also appears that plaintiff, at one time, gave a mortgage in which his interest in the land was described as an undivided one half, and that he similarly leased the same to his brother; but defendant knew, at the time the lease was executed, that plaintiff claimed he paid more than one half the purchase price. We are abidingly satisfied, from a careful examination of the record, that the consideration for the land was paid in the proportion alleged by plaintiff; and we have now to determine the effect thereof.

Where a conveyance to purchasers of a tenancy in common is silent, they are presumed to take equal shares. *In re McConnell*, 197 Fed. 438; *Burkhardt v. Burkhardt*, 107 Iowa 369; *Bader v. Dyer*, 106 Iowa 715; *Bittle v. Clement*, (N. J.) 54 Atl. 138; *Cage v. Tucker's Heirs*, 14 Tex. Civ. App. 316 (37 S. W. 180); *Walker v. Barrow (Oxford v. Barrow)*, 43 La. Ann. 863 (9 So. 479); *Stover v. Stover*, 180 Pa. 425 (36 Atl. 921).

This presumption is, however, a rebuttable one. *In re McConnell*, supra; *Oxford v. Barrow*, supra; *Stover v. Stover*, supra; *Jenkins v. Rush Brook Coal Co.*, 205 Pa. 166 (54 Atl. 715); *Cage v. Tucker's Heirs*, supra.

It is also true that, if two or more persons advance the purchase price, and the deed is taken in the name of one only, a trust will result in favor of the others in proportion to the part paid. *Culp v. Price*, 107 Iowa 133; *McClenahan v. Stevenson*, 118 Iowa 106; *Johnson v. Foust*.

158 Iowa 195; *Shelangowski v. Schrack*, 162 Iowa 176.

But counsel for appellant seek to distinguish the case at bar from cases in which a resulting trust was declared.

"The theory of the resulting trust is that he who supplies the purchase money intends it to be for his own benefit, and not for that of another, and that the conveyance is taken in the name of another as a matter of convenience or arrangement between them." *Culp v. Price*, *supra*.

In the case at bar, the deed conveyed the land jointly, without designating the share of each, giving rise to the presumption that they intended to take equal shares. This presumption, being a rebuttable one, upon proof that they contributed unequally to the purchase price, was, in the absence of further proof, overcome, and another presumption arose: that is, that they intended to share in proportion to the amount contributed by each to the purchase price. *In re McConnell*, *supra*; *Cage v. Tucker's Heirs*, *supra*; 38 Cyc. 74.

Bittle v. Clement, (N. J.) 54 Atl. 138, is quite similar in its facts to the case at bar. In that case, the court said:

"There was no agreement between Daniel and Benjamin [the brothers named as grantees in the deed] as to their several interests in the purchase, nor any agreement whereby the one who contributed the most agreed that the other should equally share with him in the purchase. In such cases, unless the parties stand to each other in the relation of parent and child, or husband and wife, the law raises a presumption called a 'resulting trust,' whereby each party holds a share in the property purchased according to his contribution to the purchase money. * * * The payment of the proportionate shares of the purchase money by the several parties being established beyond dispute, a resulting trust, assigning to each a quantity of interest in proportion to his payment, arose, and should have effect, unless some definite act of the parties is proven which es-

establishes by equally forceful evidence some change in their relations to the property, whereby each was to hold a different share."

Counsel for appellant relies upon *Burkhardt v. Burkhardt*, 107 Iowa 369; but this case is not controlling. In the case referred to, plaintiff and his wife entered into an agreement in writing to support, maintain, and take care of the wife's mother, so long as she should live, in consideration of which, the latter conveyed certain real estate to the wife. Some time after this transaction, she became insane, and was unable to render further services under the contract; but plaintiff claims to have carried out the contract according to its terms. He asked in his petition that he be decreed to be the absolute owner of the property; and the court, in the course of the opinion, gave some consideration to the question of resulting trusts, but finally held that, as plaintiff was a party to the transaction, and fully consented that the land, which was to be the compensation for the services rendered, be conveyed to his wife, he was not entitled to have the deed set aside, or to claim the property absolutely.

Whether the doctrine of a resulting trust is applied to the case at bar, or the presumed intention of the purchasers to share in the land in proportion to the separate amounts contributed to the purchase price is allowed to prevail, the result must be the same. They will share in proportion to the amount of the price paid by each.

Counsel for appellant also relies upon an estoppel; but the argument in support thereof is not persuasive. While it is true that the brothers shared equally in the proceeds derived from their farming operations, and the taxes and improvements were paid out of the partnership funds, their earnings were the result of their joint labor and management, and no account appears to have been taken

2. ESTOPPEL:
estoppel to deny
presump-
tion.

of their respective interests in the land. The improvements do not appear to have been very extensive, and the evidence does not disclose that defendant was prejudiced by the plan pursued. If the testimony of plaintiff is true, the defendant knew from the beginning that plaintiff paid more than one half of the purchase price, and must have known that plaintiff intended to claim an interest in the land in proportion to the amount paid by him.

For the reasons indicated, the judgment and decree of the court below must be, and is,—*Affirmed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

JEAN ELIZABETH STUTSMAN et al., Appellants, v. CHARLES CRAIN et al., Appellees.

WILLS: Specific Enforcement of Contract in re Conflicting Wills.

- 1 An oral contract, under which a surviving wife agrees to waive her rights under a prior, unprobated will which is wholly in her favor, and to accept in lieu thereof assured support for life and the benefits of a later will which tenders lesser benefits to her, provided the latter will is not probated until after her death, is specifically enforceable after full execution by both parties to the contract.

WITNESSES: Agent's Testimony in re Transaction with Deceased.

- 2 An agent is a competent witness to testify to personal transactions and communications with a deceased relative in matters in which his principal is interested. So held where parents so testified in relation to matters growing out of the settlement of a will contest wherein they acted for their children, who were devisees under the will.

PRINCIPAL AND AGENT: Adopting Unauthorized Act. The au-

- 3 thority of a parent to enter into a contract for and on behalf of his children becomes quite immaterial when the said children unreservedly adopt the acts of the parent.

EVIDENCE: When Satisfactory. Evidence is always of a high

- 4 character when it produces in the mind an abiding conviction of the truth of the matter at issue.

*Appeal from Johnson District Court.—R. P. HOWELL,
Judge.*

FEBRUARY 18, 1919.

ACTION to enforce the specific performance of an oral contract. The opinion states the facts. Decree dismissing plaintiffs' petition in the court below. Plaintiffs appeal.—*Reversed.*

W. H. Stutsman, Seerley & Clark, and Wilson & Evans,
for appellants.

Milton Remley and Dutcher, Davis & Hambrecht, for
appellees.

GAYNOR, J.—The plaintiffs in this suit are minors and devisees under a will executed by one Samuel Sharpless on the 11th day of May, 1901, but never probated. The defendants are the devisees named in a certain will executed by the wife of Samuel Sharpless, on the 28th day of February, 1912. The facts out of which the controversy arises are substantially these: Samuel Sharpless, during his lifetime and at the time of his death, was the owner of a considerable estate, consisting both of real and personal property. The plaintiffs are the minor children of one Ada Sharpless Stutsman, adopted daughter of Samuel. Whether she was legally adopted or not is not material here. She was the daughter of Samuel's sister, and lived in the Sharpless family from early childhood until married to William Stutsman. She not only lived in the family, but was cared for and nurtured with all the tenderness of a natural child. On the 11th day of May, 1901, Samuel made what purports to be his last will and testament. In this will, after providing for the payment of his just debts, he devised to his wife, Priscilla F. Sharp-

1. WILLS: specific enforcement of contract in re conflicting wills.

less, all his property, for the period of her natural life; the remainder at her death to the children of Ada Sharpless Stutsman who might be living at the time of his wife's death. These children are the plaintiffs. Samuel Sharpless died soon after the making of this will, to wit, on or about June 5, 1901. This will was filed for probate on August 5, 1901. The widow, Priscilla Sharpless, appeared and contested, alleging that her husband, Samuel, was, at the time it was made, lacking in testamentary capacity. These objections were filed on September 7, 1901. At this time, there was also filed for probate a paper purporting to be the will of Samuel Sharpless, dated May 19, 1868. This paper was in due form of will, and executed in conformity with the statute, and gave to the widow, Priscilla Sharpless, all the property of Samuel, both real and personal, to have and to hold in her own right. The contest over the will of 1901 was brought to trial, and a verdict returned on December 6, 1901, finding that the testator, at the time of the making of the will of 1901, did not have sufficient mental capacity to make a will. No judgment, however, was entered upon the verdict until December 31, 1902, when a *nunc pro tunc* order was made, and judgment entered as of December 9, 1901. An appeal was taken to the Supreme Court, and the cause reversed on October 24, 1904, and remanded to the district court for further proceedings. On the 11th day of December, 1901, a few days after the return of the verdict, there was an attempt to secure the probate of the 1868 will, and a record was made duly admitting it to probate; and in December following, Peter A. Dey was appointed executor, and filed an inventory of the personal property of the estate, on or about April, 1902, and, on July 3, 1903, procured an order of allowance to the widow, Priscilla Sharpless, for her support for one year, pending the settlement of the estate. After the reversal of the judgment denying probate to the 1901 will, the matter was never

again called to trial. No procedendo was issued from the Supreme Court, and the matter stood as though no hearing had been had on the contest. It also appears, however, that nothing further was done under the pretended probate of the will of 1868. Peter A. Dey, as executor, performed no further duties as executor, and the allowance made to the widow was never paid. Priscilla Sharpless, the widow, lived until October 20, 1915. During all those years intervening between the death of her husband and her death, she used the income from the estate for her support and maintenance, but never touched any of the body of the estate, and it remained intact at the time of her death. On February 28, 1912, she made a will in which, after devising to the Ladies' Improvement League of Iowa City \$100, the income from which was to be used each year to care for her resting place in the cemetery, she devised all the rest and residue of her estate, both real and personal, of which she died seised or possessed, to certain legatees named in her will. It is under this will that the defendants claim. The thought of the defendants is that Priscilla Sharpless, the widow, took the entire estate left by Samuel at the time of his death, under the will of 1868, and under her will, made in February, 1912, they took all the property, as the devisees of Priscilla. The contention of the plaintiffs is that, as to them, the will of 1868 was never legally probated; that they were interested in the estate under the will of 1901; that it was a later will, and that proceedings in probate are now pending in the district court, undisposed of; that the attempted probate of the 1868 will was made without notice to them, and without any appearance on their part, and is not binding upon them.

However that may be, the plaintiffs must recover on the strength of their own title, and, therefore, it becomes of primary importance to know just what they claim, and what the evidence is upon which they support their claim.

It will be noted, from what has been said, that these plaintiffs are the devisees named in the 1901 will. It is admitted that this will was duly executed by Samuel Sharpless in his lifetime, and in the execution of it, compliance was had with all the forms of law to make it a valid will. It is further conceded, for the purposes of this case, but for the purposes of this case only, that Samuel Sharpless had testamentary capacity at the time of its execution. Plaintiff's claim that, after the judgment denying probate of the 1901 will had been reversed by the Supreme Court, an agreement was entered into between Priscilla Sharpless, the widow, and these plaintiffs, through their father, by which it was agreed and understood that nothing further should be done in the probate of the 1901 will during the lifetime of Priscilla; that Priscilla should accept a life interest in the estate, and that these children should take what was provided for them in the will—the remainder after the expiration of the life estate. At the time the agreement was entered into, some question appears to have arisen as to whether or not the income of the estate would be sufficient to maintain Priscilla in the same style and comfort in which she had lived during the life of her husband, Samuel. The father of these plaintiffs, acting for them, agreed that, if she would accept the income of the estate, and let the *corpus* of the estate remain untouched, he would supply her with all that was needed, over and above the income, to maintain her in the same splendor and comfort in which she had lived during the life of her husband. She agreed to this, and from that time until her death, both parties acted on the assumption that the plaintiffs should receive the remainder, while Priscilla enjoyed the income from the estate during her natural life.

There are some things suggested by this record that the mind is able to grasp clearly and understandingly, to wit: That, prior to the filing of the 1901 will, Priscilla

entertained towards the mother of these children the kindest feeling; that she considered and treated her as a daughter, and loved her as such; that she was very fond of her husband, Samuel,—admired and approved of him. She not only loved him, but had unbounded confidence in his love for her. She not only admired him and approved of him, but considered him a man with a high sense of justice. When this will was filed, she felt humiliated and distressed to find that her husband, with whom she had lived so many years, and for whom she entertained such tender sentiments, had left her a life estate only in his property. She could not account for it on any theory except that he was not in his right mind at the time of the making of the will. We think we are safe in saying that this record discloses that her purpose was not mercenary, but rather a desire to demonstrate that her husband did not purposely, wilfully, and intelligently repudiate her as having first claim upon his love. She felt that the long years of mutual love and trust and confidence entitled her to this. This is the only theory upon which her action in seeking to avoid the will of her husband, on the plea of want of testamentary capacity, can, we think, be rationally explained. She was getting along in years, at that time, and was feeble in health. The income from the property was abundant for her support, and she loved the mother of these children as a normal mother loves her own offspring. When this 1901 will was filed for probate, and she saw its contents, and saw that the father and mother of these children were urging its probate, she felt that an effort was being made to force on the record proof that she did not stand first in the love of her dead husband. She felt that these children were seeking to take precedence over her in the one great passion of her life, and she felt resentful. The contest over the will was waged with bitterness, and the feeling which it engendered extended to the mother and father of

these children. During the contest, no friendly communication passed between them. She was fighting for precedence in her husband's love. She resented the attempt to make evidence that others stood before her in his affection; so she contested the will, thinking, womanlike, that her husband could not have made her second in his affections, while in the possession of his normal faculties. The record discloses that she suffered intensely during this struggle for supremacy, and upon the reversal of the case, declared she would never pass through the same ordeal again. Immediately after the reversal, negotiations were opened between the father of these children and Peter A. Dey, the lifelong friend and counsellor of Mrs. Sharpless. So far as Mrs. Sharpless was concerned, the negotiations were conducted with great diplomacy, and with commendable tenderness for her feelings in the matter. She refused to recognize the will; she refused to talk about the will; she refused to have anything further to do with the will. In all the proceedings, the record discloses that Peter A. Dey, a most honorable and reputable gentleman, of Iowa City, acted as her *alter ego*; and an agreement was made through him, acting for Mrs. Sharpless, that nothing further would be done in the probate of the 1901 will during her lifetime, —that she would accept the income from her husband's estate, and not touch the body of the estate during her life: this upon the express promise of the father of these children that, if the income of the estate was not sufficient to support her, he would contribute a sufficient sum to maintain her in the same style and comfort in which she had been maintained during the life of her husband. At the time of this trial, Mrs. Sharpless was dead. Peter A. Dey was dead. Much that might have been told is now closed to us. One thing is certain, though: that, immediately following the time when it is said that this agreement was made, the whole relationship between the Stutsmans and Mrs.

Sharpless changed. The old love and the old fellowship were renewed, and continued to the time of her death. She wrote, requesting Mrs. Stutsman, the mother of these children, to come and visit her. That came about in this way: Soon after the reversal, the mother of these plaintiffs, Ada Sharpless Stutsman, wrote to Peter A. Dey, saying, in substance, that she had heard that the will case had been reversed in the Supreme Court, and that the very thought of a new trial, with all it implied, filled her with consternation, both for herself and her "auntie," as she called her, and suggesting that some compromise be made that would avoid further contest. Peter A. Dey replied, October 27, 1904, saying:

"If you will agree upon some proposition that will meet with the approval of the court, and furnish your aunt a liberal support during her life, I will do all I can to have it accepted."

Upon the receipt of this letter from Peter A. Dey, Mrs. Sharpless wrote to the mother of these children, Ada Sharpless Stutsman, inviting her to come down, saying that she regretted very much that there had been any trouble at all between them, in any way, and that she wanted her to come and see her; that, if she would come down and meet Mr. Dey, there might be something done to prevent another trial. Mrs. Stutsman went down to see her on the Christmas following; went directly to the Sharpless home, where she had not been for many years, and remained a week or so; brought one of these children with her; talked with Mr. Dey and Mr. Remley about a settlement. (Mr. Remley had been attorney for Mrs. Sharpless in the contest.) She met Mr. Dey two or three times. Before she talked with Mr. Dey, however, she says she had a conversation with Mrs. Sharpless, who told her that Mr. Dey represented her, and that she would never have another law-

suit,—never would stand for another lawsuit, if they took everything.

Upon the record before us, we have no hesitancy in saying that the contract was made substantially as claimed by the plaintiffs; that this contract was made between William Stutsman, acting for these children, and Peter A. Dey, acting for Mrs. Sharpless; that the contract has been consistently observed by both parties since its making; that Stutsman has performed fully his part of the contract, made by him for and in behalf of his children; that it is a contract that the parties were competent to make, and is binding upon them.

It is urged, however, first, that the contract lacked mutuality.

It seems to be the thought that Mrs. Sharpless took all this property in controversy under the will of 1868; but this is not tenable. The will of 1901 was made later. It was pending in the district court for probate. Though never probated, it was subject to probate. If it was established as the last will and testament of Samuel, all rights which Mrs. Sharpless might claim under the will of 1868 were lost to her. There was a contingency which might result in forcing her to an election to take either under the will of 1901, or her distributive share. It was to settle and dispose of this controversy that the agreement was made. The practical effect of the agreement was that she would take what was left her under the will of 1901; that the will would not be pressed for probate until after her death; that, upon her death, it might be probated; that, during her life, she would receive simply what she has received and enjoyed. It is conceded that, if the plaintiffs prevail in this case, it may now be probated. Out of consideration for Mrs. Sharpless, Peter A. Dey, acting for her, urged these plaintiffs not to press the probate of the will until after her death, for the reasons hereinbefore stated,

as we believe. Everything in this record goes to indicate that she understood fully the terms of this contract. Mr. Dey was her confidential adviser and friend. He acted for her, and we think, no doubt, with her full knowledge of the effect of the agreement on her rights. No part of the estate was touched by her, although the record discloses that, at one time, she found the income of the estate insufficient to pay the taxes upon the property. As life tenant, it was her duty to pay the taxes. Appeal was made to Mr. Stutsman, under the terms of the contract, and thereafter he paid all the taxes upon the real estate. While she was enjoying the benefits in full, her letters, introduced in evidence, indicate a clear understanding, on her part, that she could enjoy only a life interest in the property, after the making of this contract.

The fact that a contract lacks mutuality at the time of its making, does not always make it unenforceable. Equity will enforce a contract, though in its inception lacking in mutuality, when it is shown that the party seeking the enforcement of the contract has fully performed all the conditions of the contract on his part to be performed. However, we do not think that this contract was lacking in mutuality. See *University of Des Moines v. Polk County H. & T. Co.*, 87 Iowa 36; *Murphy v. Hanna*, 37 N. D. 156 (164 N. W. 32); *Burnell v. Bradbury*, 67 Kan. 762 (74 Pac. 279); *Rank v. Garvey*, 66 Neb. 767 (92 N. W. 1025); *Dickson v. Stewart*, 71 Neb. 424 (98 N. W. 1085); *Burdine v. Burdine's Est.*, 98 Va. 515 (36 S. E. 992); *Bryson v. McShane*, 48 W. Va. 126 (35 S. E. 848); *Seaton v. Tohill*, 11 Colo. App. 211 (53 Pac. 170).

Had litigation been continued, it may be conceded that there was some uncertainty as to what the final result would be, as affecting the rights of these parties. Two wills had been executed. One gave to Mrs. Sharpless the entire estate; the other gave to her only a life interest in the en-

tire estate. Under one will, these plaintiffs took nothing. Under the other will, they took a fee, subject to the life estate. The will in which these children were interested, was pending in the probate court at the time the agreement was made. The widow had the right to reject the will, and take her distributive share. It came to her as a matter of choice. Immediately after the disposition of the controversy over the 1901 will in the Supreme Court, she renewed her relations with these children. The mother love had returned, with all its dominating influence upon the mind. She was getting old, and the estate was large. She was promised that the will of 1901 would not be probated during her lifetime. She surrendered the uncertain rights coming to her under one of these wills, and these plaintiffs surrendered their right to probate at once the will that gave them all the rights they are now claiming. It is apparent that she did not want this contest. It is apparent that the thought of it was painful to her. She deliberately chose to accept what the 1901 will would give her, if probated, and claim no more, providing the will was not probated until after her death, and with the further consideration that, if the income of the property was not sufficient, the deficiency would be supplied by the father of these children. This agreement was fully carried out on both sides. The will was never probated, the deficiency was supplied, she enjoyed the income of the entire estate during her life, and the probating of the will was postponed until after her death.

It would be profitless to set out the many little incidents shown in this record which form in our minds an abiding conviction that this contract was made, substantially as claimed. It is a very old saying that "actions speak louder than words." Everything that was done, everything that was said, the personal relationships assumed, and the conduct of all the parties, emphasize the making of

this contract. The conduct of each is a logical, consistent result of the very agreement here pleaded and relied upon. All the footprints lead to the making of this contract.

It is next contended that, even though the contract seems to have been proven, yet the proof rests upon the testimony of incompetent witnesses. It is said that Mr.

2. WITNESSES:
agent's testimony in re transaction with deceased.

and Mrs. Stutsman, the father and mother of these children, were not competent witnesses, under the inhibition of the "dead man's statute," Section 4604, Code of 1897; and reliance is had upon *McClanahan v.*

McClanahan, 129 Iowa 411. In that case, the witness was held incompetent because he was a person through whom the claimant derived an interest. The holding of that case would seem to sustain appellees' contention; and yet the facts might well be differentiated. We think this case comes within the rule, rather, of *Stiles v. Breed*, 151 Iowa 86; *Horner v. Maxwell*, 171 Iowa 660; and *Bird v. Jacobus*, 113 Iowa 194. No interest in this estate came to these plaintiffs from their father or mother. The estate comes to them, if at all, through the provisions of the will of Samuel. Neither the estate in dispute nor the interest sought to be recovered by the plaintiffs was derived from, through, or under their mother or father. Neither ever had or claimed any right, title, or interest therein. "From, through, and under" have reference to the devolution of title, and not to the agency by which it was effected. Neither the father nor the mother received, or will receive, any benefit from this contract, nor do these plaintiffs take anything by, through, or under their parents. The fact that the father was acting for these children and in their behalf does not make him an incompetent witness under the statute. An agent of a party to a suit is not incompetent, under the statute. *Chicago, R. I. & P. R. Co. v. McElhany*, 182 Iowa 1035.

It is next contended that the contract is not enforceable because it is not shown that the father of these children had authority to make the contract for and in their behalf. The answer to this is simply that they have adopted the contract, and are now seeking to enforce it. There is no merit in the contention that Peter A. Dey was not the agent of Mrs. Sharpless, and that his act in making the contract was not binding upon her. We have adverted to this before. The record leaves no doubt existing as to the relationship between Mrs. Sharpless and Mr. Dey,—no doubt that she understood and consented to all that was done in the making of this contract; that he was, in the fullest sense, authorized to act for and to represent her in the making of the contract.

It is said that the contract is not proven by that high degree of evidence which is required in controversies of this kind. To this we have to say that evidence is always of a high character when it produces in the mind an abiding conviction of the truth of the matter sought to be established.

3. PRINCIPAL AND AGENT: adopting unauthorized act.

4. EVIDENCE: when satisfactory.

There is evidence of the making of this contract,—competent evidence; and every fact and circumstance, following the time when it is alleged the contract was made, support and sustain that testimony.

We think the contract is fully proven by competent evidence, and the plaintiffs were entitled in the court below to a decree as prayed. The decree of the district court is, therefore, reversed, and with direction to enter a decree in plaintiffs' favor as prayed.—*Reversed*.

L LADD, C. J., PRESTON and STEVENS, JJ., concur.

MIKE CARROLL, Appellee, v. MUNDY & SCOTT et al., Appellants.

VENDOR AND PURCHASER: Non-Necessity for Tender of Performance. A vendor is under no obligation to tender performance, when such performance is conditional on vendee's furnishing evidence of good title in the thing sold, and when vendee was wholly unable to do so.

Appeal from Emmet District Court.—N. J. LEE, Judge.

FEBRUARY 19, 1919.

ACTION to rescind a written contract for the sale and exchange of land. Opinion states the facts. Decree for the plaintiff in the court below. Defendants appeal.—*Affirmed.*

C. W. Crim, for appellants.

Morse & Kennedy, for appellee.

GAYNOR, J.—On the 7th day of November, 1913, plaintiff and defendants entered into a written contract, by the terms of which the plaintiff agreed to purchase from the defendants certain land in Emmet County, consisting of 320 acres, for the sum of \$32,000, to be paid for as follows: By delivering to the defendants a good and sufficient warranty deed to 160 acres in Aurora County, South Dakota, free and clear of all liens and incumbrances, except a first mortgage of \$2,000, and by executing and delivering to the defendants a mortgage in the sum of \$22,000 on the land purchased from the defendants, both parties agreeing to furnish abstracts showing good and merchantable title to each of their respective properties.

Some time after the contract was entered into, plaintiff took possession of the land in Emmet County, and defendants of the land in Aurora County, and each held pos-

session up to the time of the entry of the decree in this case. After the making of the contract, and before plaintiff took possession of the Emmet County land, the defendants submitted to plaintiff an abstract of title from which it appeared that the title to the Emmet County land was not in the defendants; that there was a \$9,000 mortgage on the land; and that there were other defects in the title. To induce plaintiff to take possession of the land in Emmet County, and to surrender to the defendants the land in Aurora County, the defendants promised orally to procure perfect title in themselves, and to remove all liens and cure all defects at once. The plaintiff took possession of the Emmet County land, and surrendered to the defendants the Aurora County land, in reliance on this promise.

It is reasonably certain from the record that the exchange of possession was brought about by these promises, and plaintiff's reliance thereon. From time to time thereafter, these promises were renewed by the defendants, but never fulfilled. Plaintiff was at all times ready, able, and willing to perform the contract on his part, whenever defendants performed their part of the agreement. The \$22,000 mortgage could not be made until the title to the land purchased was in the plaintiff. At the time the contract was made, plaintiff had no knowledge of the fact that the defendants were not the owners of the land, or that it was incumbered; and it was the understanding of both parties that the deal was to be closed on the 1st day of March, 1914. Nothing was said in the contract about the title to the land, but each agreed to furnish the other an abstract showing good and merchantable title.

On the 24th day of March, 1916, this action was brought in equity, to cancel the contract and to restore the parties to the same position in which they were before the contract was made. A decree was entered for the plaintiff,

cancelling the contract, and directing each party to surrender to the other the land that was the subject of the contract. No deeds to the lands had been exchanged.

It was further found by the court that the plaintiff, relying upon the promise of the defendants to convey to him a good and merchantable title, unincumbered, placed improvements upon the Emmet County land, while he was in possession, and incurred other expenses. An accounting was had between the parties, and in this accounting, the use of the land by the plaintiff during the years he was in possession was taken into consideration. The fair rental value of the Aurora County land was also considered, and charged to the defendants. The improvements put upon the land by the plaintiff were shown and considered, and, on final adjustment, the court found that the use of the Emmet County land fairly compensated the plaintiff for the improvements put upon the land, and the rental received by the defendants, for the Aurora County land. A balance was struck, leaving nothing due either upon these matters.

The defendants appeal, and claim that the court erred in cancelling the contract, and erred in allowing anything to the plaintiff for improvements upon the land while he was in possession.

So far as this record shows, plaintiff had perfect title to the land in Aurora County. At the time he surrendered possession to the defendants, and took possession of the Emmet County land, he did so with the distinct understanding that defendants would perfect title, and be ready to consummate the contract in accordance with its terms, on the 1st of March, 1914, and that an abstract would be furnished him, showing good and merchantable title, on that date. It appears, however, that, some time before the 1st of March, defendants did furnish the plaintiff with an abstract. This abstract showed upon its face that the

defendants did not have title to the land, and that it was largely incumbered. This abstract was examined by counsel for the plaintiff, and returned to the defendants on or about April 3, 1914, with objections.

Now, it may be said that, notwithstanding the fact that it was the understanding of the parties that the deal should be consummated and closed, and the contract fully performed, on the 1st day of March, 1914, the plaintiff consented to further time by returning the abstract with his objections. It appears, however, that, after the abstract, with objections, was received, the defendants never returned the same to the plaintiff, and never thereafter tendered to the plaintiff, or offered the plaintiff, any abstract showing good and merchantable title; further, that the defendants never did have a good and merchantable title to this land, either at the time the contract was made, or at the time this action was begun.

It may be conceded that, when the plaintiff returned this abstract to the defendants, with his objections, he impliedly consented not to repudiate the contract on account of the defects; but this was because of defendants' promise to immediately remedy the defects. This did not release defendants from their contractual duty to perform within a reasonable time. Where no time is fixed in the contract or by agreement of the parties for the doing, the law requires it to be done within a reasonable time. The defendants having agreed in their contract to convey this land to the plaintiff for a consideration named, the consideration named could not become due until after defendants had performed all conditions upon which their right to the consideration rested. They could not have insisted on performance, and no duty to tender a performance rested on the plaintiff, until the conditions precedent to the duty had been fully complied with by the defendants. As a condition precedent to the duty of the plaintiff to pay,

there was the duty of the defendants to present and tender to the plaintiff that which they had agreed to give him. They had agreed to furnish the plaintiff an abstract showing good and merchantable title. Until this was done, no obligation rested on the plaintiff to perform or tender performance of his agreement to pay. Defendants failed to perform on the day stipulated, and, assuming that plaintiff waived performance on that day, and consented to further time in which to perform, this did not waive performance at some time, and did not extend the time for performance beyond a reasonable time. This action was not commenced until more than two years after the time when defendants should have performed, and the waiver of performance on that day extended performance only for a reasonable time. Two years was surely a reasonable time. No performance was made or tendered by defendants. Plaintiff's right to rescind, therefore, was perfect at the time this action was commenced. Even on the trial, no tender of performance was made, or excuse offered for a failure to perform. The fact is that defendants were not able to perform. The court rightly decreed that the contract should be put at an end; that the plaintiff should be no longer bound by the contract.

The facts in this case bring it within elementary law. No authorities need be cited to support our conclusion.

As to the proposition involved in the accounting, we have to say that our attention is not called to any error committed in the computation, and it seems equitable and just, under the record made; and the decree in this respect must stand.

On the whole record, we think the judgment of the court was right, and it is—*Affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

ANNA CORCORAN, Appellant, v. B. O. JERREL, Appellee.

LIBEL AND SLANDER: Testimony Before Commissioners of Insan-
 1 ity. Nonmalicious testimony by a physician before the com-
 missioners of insanity, touching the insanity of a person under
 investigation, is privileged.

INSANE PERSONS: Notice and Personal Presence. Proceedings
 2 to determine the sanity of a person may be legally had before
 the commissioners of insanity, without the presence of, and with-
 out notice to, the person under investigation; and in such case
 it will be presumed that notice would have accomplished no pur-
 pose, and that the personal presence of such person would have
 been injurious to such person.

Appeal from Mahaska District Court.—JOHN F. TALBOTT,
 Judge.

FEBRUARY 19, 1919.

THIS is an action for damages claimed to have resulted
 from the publication of alleged libelous statements. The
 court, at the close of the evidence, sustained defendant's
 motion for a directed verdict, and plaintiff appeals.—*Af-
 firmed.*

C. W. Prince, E. A. Harris, J. N. Beery, J. E. Westfall,
 and T. R. Wilkie, for appellant.

Burrell & Devitt, and Dutcher, Davis & Hambrecht, for
 appellee.

STEVENS, J.—On November 2, 1914, Daniel Corcoran,
 brother of plaintiff, caused an information, addressed to
 the commissioners of insanity, to be filed in the office of
 the clerk of the district court of Mahaska
 County, alleging that plaintiff was insane
 and a fit subject for custody and treatment
 in the state hospital. A warrant was issued
 and delivered to the sheriff of said county, commanding

1. LIBEL AND
 SLANDER: tes-
 timony before
 commissioners
 of insanity.

him to take her into custody, and bring her before the commissioners. The return of the sheriff is not dated, but it certifies that he took plaintiff into custody. She was not, however, taken before the commissioners. Dr. J. C. Darranger, a practicing physician, was appointed by the board for that purpose, and made a personal examination of plaintiff and certified in writing to the commissioners that, in his opinion, she was a fit subject for custody and treatment at the hospital. The defendant, Dr. Jerrel, who had previously been employed as her physician, was subpoenaed, sworn, and examined upon the trial before the commissioners. His testimony was reduced to writing, and signed by him. He testified that, in his judgment, plaintiff was insane, and should be sent to the hospital for proper care and treatment. All of the above proceedings were had on the day the information was filed. On the following day, plaintiff was taken by the sheriff to the hospital at Mt. Pleasant, where she was confined for a period of about five months, when she was paroled to her mother; and later, she was discharged as cured. Plaintiff, in her petition, demands damages in a large sum, alleging that the statements uttered and signed by defendant before the commissioners were false, malicious, and libelous. The principal defense relied upon by counsel for appellee is that the statements complained of were made as a witness under oath upon the trial, and were, therefore, privileged.

Plaintiff seeks to avoid the plea of privilege upon the ground that no notice was served upon plaintiff of the proceedings before the commissioners, and that same were wholly void. It is conceded that no notice of the proceedings before the commissioners was served upon plaintiff, and that she was not taken before them. The statute does not require notice of the filing of an information alleging insanity, or of trial thereon, to be served upon the per-

2. INSANE PERSONS: notice and personal presence.

son whose sanity is to be investigated. Section 2265 of the Code provides that the accused shall be taken before the commissioners, unless they shall be of the opinion that to do so would probably be injurious, or attended with no advantage to the person alleged to be insane, in which case the hearing may be conducted without his presence. Any citizen of the county, or relative of the person alleged to be insane, may appear, and resist the application in person, or by counsel.

The record does not disclose an affirmative finding by the board that the condition of plaintiff was such that it would be injurious for her to be present at the trial, or that same would not be of advantage to her; but presumptively, such was the judgment and finding of the commissioners. While the legislature has not made provision for notice of the hearing before the commissioners, it has made ample provision for safeguarding persons thus accused. Section 2267 of the Code provides for an appeal from the finding of the commissioners to the district court, and Code Section 2268 requires that the accused be discharged from custody, pending such appeal, unless the commissioners find that his condition is such that he cannot, with safety, be allowed to go at large. Code Section 2304 provides that, upon petition to a district judge, a commission may be appointed to examine a person confined in a hospital, and determine whether he is insane; and this proceeding may be repeated every six months. Section 2306 of the Code also provides, in substance, that all persons confined as insane shall be entitled to the benefit of a writ of habeas corpus, and that the question of insanity shall be decided at the hearing thereon.

As we understand the contention of counsel for appellant, it is not claimed that the statements of defendant would not have been privileged if due notice of the proceedings had been served upon plaintiff. We held in *Chao*

annes v. Priestley, 80 Iowa 316, that the statute does not require the service of notice, and that the proceedings are not invalid without notice. In that case, the court said:

"We assume, of course, that no importance is attached to an idle form of notice in such a case; as where it would not be understood because of the infirmity, or the notice, for any reason, be merely formal. The law sometimes provides for these formal notices, but it is in anticipation of the results not to be contemplated in this class of proceedings, with the precautionary provisions of the statute under which they are conducted. The law requires that a physician shall visit the person, and examine him, and shall confer with relatives upon the subject; so that, in every case, there is actual notice to relatives, who may be present, and would be likely to take an interest in behalf of the person. Any citizen of the county, or relative, may appear and resist the application, and a full and free inquiry is permitted. The law and the courts are so jealous of the rights of persons, both as to liberty and property, that they view with distrust any proceedings that may affect such rights in the absence of notice; and to our minds this same jealousy pervades the statute in question; and the ruling consideration in allowing these proceedings, in the absence of the party and without notice, is personal to him, and designed for his interest. It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons. They are not, in such cases, 'deprived of liberty,' within the meaning of the Constitution; and plaintiff bases his claim in this respect upon the constitutional provision

that 'no person shall be deprived of life, liberty or property without due process of law.' "

We held in *County of Black Hawk v. Springer*, 58 Iowa 417, that:

"The inquest of lunacy by a board of commissioners is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are, by the law, taken into the care and custody of the state, for treatment for their unfortunate infirmity. In our opinion, whatever may be thought of the power of the legislative department of the state to provide a special tribunal for the examination of persons alleged to be insane, the safeguards and limitations provided by our laws for the correction of any abuse which may arise from the acts of the commissioners, are ample for the protection of the citizen."

There is nothing in the record to indicate that defendant was actuated by improper motives, or that he acted in bad faith toward plaintiff. He was subpoenaed, sworn, and examined as a witness, and his testimony was corroborated by that of other witnesses. Whether an action for libel could be maintained against him, if the proceedings had been, for some reason, invalid, we need not determine, as that question is not before us. The proceedings before the commissioners were, so far as the record discloses, in all respects regular and valid, and all of the statements made by the defendant were clearly privileged. There is no error in the record, and the judgment of the court below is—*Affirmed*.

LADD, C. J., GAYNOR and SALINGER, JJ., concur.

WILLIAM CUTTILL, Appellant, v. WALTER HARRINGTON et al.,
Appellees.

FRAUDS, STATUTE OF: Promise to Pay Debts of Old Partnership.

- 1 The oral promise of an incoming partner, on a consideration personal to himself, to pay the debts of the old partnership, is not within the statute of frauds.

PARTNERSHIP: Estoppel by Holding Out. He who holds himself
2 out as a partner is thereby estopped to deny liability as a partner to any creditor who relies thereon.

Appeal from Mahaska District Court.—HENRY SILWOLD,
Judge.

FEBRUARY 19, 1919.

ACTION for wages resulted in judgment, in part as prayed. The plaintiff appeals.—*Reversed.*

Edward A. Schmidt and McCoy & McCoy, for appellant.

Burrell & Deritt and Vander Ploeg & Johnson, for appellees.

LADD, C. J.—Plaintiff alleged, in the first count of his petition, that he entered into an oral contract with the Knoxville Motor Car Company, to render services as a salesman and machinist, at the salary of \$75 per month, and so did from March 18, 1913, until January 18, 1915. In the second count, the allegation was that he rendered such services at the instance and request of said company. W. H. Witt, Harry Lindsley, Walter H. Harrington, and Nate Harrington are alleged to have constituted the copartnership known as the Knoxville Motor Car Company, and judgment was prayed in the sum of \$1,271. Later, an amendment to the petition was filed, alleging that, early

in January, 1914, Nate and Walter H. Harrington entered the firm known as the Knoxville Motor Car Company; that plaintiff then informed Nate Harrington and his son, Walter H., that the company was owing him about \$600, that, unless this were paid or guaranteed, he would quit work, and not continue in the service of the company; that Nate Harrington then related that he had bought into the firm for himself and son, desired to make the business a success, and that:

"We need you and must have you, and you must go to work, and, while we are a little short on money just now, on account of the fact that we have to pay for the new machinery, etc., but you stay, and we will pay you along as you need it, and in the fall we will pay you all of it, when we get the money in, and you shall have your money that is now owing you and what you earn in the future, if you will only stay with us, because we need you, and will guarantee that you will receive all back money due."

The plaintiff further alleged that he continued in the company's employment, in reliance upon this promise, until January 18, 1915, when the sum of about \$1,700 was owing him, upon which but \$480 had been paid. In his answer, Nate Harrington denied having been a partner, and also denied having promised as alleged. In reply, plaintiff pleaded, in estoppel, that Nate Harrington had stated to the plaintiff that he was a member of said partnership; that he wished him to continue in the service of the company; and that, as a partner, he would see that plaintiff received compensation for his services; and that plaintiff, in reliance thereon, and on Harrington's being a partner, continued in the employment of said company.

I. Originally, the Knoxville Motor Car Company was a copartnership, composed of W. H. Witt and Harry Lindsey, and so continued until January, 1914. At that time, Walter H. Harrington, at least, became a partner.

The jury found that there was owing by the Knoxville Motor Car Company to plaintiff, at the time this change was made, the sum of \$595.56, but the court omitted to enter judgment against the firm, as theretofore constituted, or against W. H. Witt, who was a member of the copartnership as then constituted, and a party to the action. This was error, and judgment will be so entered against both on remand.

The past debts of the firm were not the obligations of the copartnership after Walter H. Harrington became a partner.

II. The contention of plaintiff is that recovery may be had thereon because of Nate Harrington's promise to pay the same. He denied having made such promise, but plain-

1. FRAUDS, STAT-
UTE OF: prom-
ise to pay
debts of old
partnership.

tiff testified that he had a talk with Nate Harrington, in which the latter said that he had bought a one-third interest in the company; that his money went into it; that he had signed no agreement to show himself a partner; that he was a silent partner, and assumed the back debts of the garage; that some machinery had been bought, and cars; that he (Cutstill) was good help, and he didn't wish him to quit; that they didn't have the money then to pay; and that he was satisfied to pay him \$75 per month; and that he should leave what he had coming, and he would pay interest thereon, and in the fall would figure up back wages; and he guaranteed that Cutstill would be paid the back salary, and "guaranteed me \$75 a month salary straight in 1914;" and that he (Cutstill) relied on these promises. Thereupon, the defendant moved to strike out all the conversation concerning the payment of back wages, and this motion was sustained.

Even though this were disputed by Harrington, the jury might have found that the plaintiff continued in the employment of the new firm on Harrington's promise to

pay the existing indebtedness, and the salary agreed on for future services, in addition thereto, and would not have so continued, but for such promise. If so, the consideration was sufficient to remove the bar of the statute of frauds against such proof. In other words, continuance in the employment of the new firm might have been found to have been induced by the promise to pay the "back debts," and the court erred in excluding the evidence. See Section 4625, Code.

III. The evidence was such that the jury might have found that Nate Harrington said to plaintiff that he was a member of the firm of Knoxville Motor Car Company; and that he wished plaintiff to continue in its employment, as he was very much needed; and that he would guarantee him a salary of \$75 per month during 1914; and that the plaintiff relied thereon in rendering services to said company from then on. Harrington denied having made such a statement, but this merely put plaintiff's testimony in issue; and it was for the jury to say whether Harrington so stated, and whether plaintiff, in rendering services thereafter, relied thereon, and would not have so done but for such statement. One holding himself out as a partner is estopped by his acts and conduct to deny liability as a partner to any creditor who, in reliance thereon, has rendered service or extended credit to the partnership. *Jenkins v. Barrows*, 73 Iowa 438; *Hancock & Co. v. Hintrager*, 60 Iowa 374; *Wallerich v. E. W. Smith & Co.*, 97 Iowa 308; *Sheldon v. Bigelow*, 118 Iowa 586; *In re Estate of McDonald*, 167 Iowa 582. The court withdrew this issue from the jury, as it did that of whether Nate Harrington was, in fact, a partner, and therein erred.

The judgment entered will be modified as indicated, and that in favor of Nate Harrington—*Reversed*.

GAYNOR, PRESTON, and STEVENS, JJ., concur.

2. PARTNERSHIP:
estoppel by
holding out.

JACOB M. DICKINSON, Receiver, et al., Appellants, v. INCORPORATED TOWN OF GUTHRIE CENTER, Appellee.

MUNICIPAL CORPORATIONS: Conflicting Statutes in re Special

1 **Assessments.** Section 817, Code, 1897, in so far as it provides for levy of special assessments in proportion to lineal frontage, was impliedly repealed by Section 792-a, Code Supplement, 1913, which provides for such levy in proportion to benefits.

MUNICIPAL CORPORATIONS: Presumption from Assessment. He

2 who appeals from a special assessment must overcome the presumption of legality and equitableness which attends such assessment.

MUNICIPAL CORPORATIONS: Adjacent Property. The property

3 of a railway company, when situated within 300 feet of a paved street, though not abutting thereon, may be specially assessed for the cost of paving, even though such property does not lie between the paved street and any other street.

Appeal from Guthrie District Court.—J. H. APPLEGATE, Judge.

FEBRUARY 19, 1919.

APPEAL from an assessment for the cost of paving street intersections.—*Affirmed.*

F. W. Sargent, Foster & Foster, and J. C. Gamble, for appellants.

J. E. Batschelet and Weeks & Vincent, for appellee.

STEVENS, J.—The appeal in this case is from the assessment of a portion of the cost of paving one alley and the intersections on Third and First Streets in Guthrie Center, Iowa, against the property of the Chi-

1. MUNICIPAL CORPORATIONS: conflicting statutes in re special assessments.

cago, Rock Island & Pacific Railway Company, and involves the construction of parts of the following provisions of statutes:

Section 817 of the Code of 1897. "The cost of any

street improvement or sewer at the intersection of streets, highways, avenues and alleys, or any part of it, and one half of the cost of the same at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, or any part thereof, may be paid, * * * in case of street improvements, from the city improvement fund, except that part to be constructed by, paid for by, or assessed to railways and street railways; but the cost in whole or in part of such street improvement at the places designated in this section, excluding cost of that part embraced within the foregoing exception, may be assessed against the property abutting or fronting upon that portion of the street, highway, avenue or alley so improved in proportion to the linear front feet fronting or abutting upon such improvement."

Section 792-a, Code Supplement, 1913. "When any city or town council * * * levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, and the last preceding assessment roll shall be taken as prima-facie evidence of such value."

Section 792-g, Supplemental Supplement, 1915. "Whenever, after January first, nineteen hundred fourteen, any city or town council, * * * levies any special assessment for street improvement as provided by Section seven hundred ninety-two of the Code and amendments thereto and supplementary thereof, the same shall be made in accordance with the provisions of Section seven hundred ninety-two-a of the Supplement to the Code, 1907, and shall be limited to the amount to be assessed against private prop-

erty, against all lots and parcels of land according to area so as to include one half of the privately owned property between the street improved and the next street whether such privately owned property abut upon said street or not but in no case shall privately owned property situated more than three hundred feet from the street so improved be so assessed. In case of improvement upon an alley, such assessment shall be confined according to area to privately owned property within the block or blocks improved and if not platted into blocks for not more than one hundred fifty feet from such improved alley. All property except streets, alleys, public highways, public driveways and property owned by the United States government shall be deemed privately owned property within the meaning of this section."

Section 792-h, Code Supplement, 1913. "All acts and parts of acts in conflict herewith are hereby repealed."

After the announcement of the decision of the Supreme Court of the United States in *Norwood v. Baker*, 172 U. S. 269 (43 L. Ed. 443), holding, in substance, that an assessment against private property for the cost of a public improvement in substantial excess of the special benefits conferred thereby is, to the extent of such excess, a taking of private property for public use without compensation, the so-called front-foot rule of levying assessments was abandoned, as such, by the cities and towns of the state.

The twenty-eighth general assembly, which enacted Section 792-a of the Supplement, 1907, did not specifically repeal Section 817 of the Code. Section 792-g of the Supplemental Supplement, 1915, enacted by the thirty-sixth general assembly, provided that special assessments for street improvements should be made in accordance with the provisions of Section 792-a of the Supplement of 1907, which requires that same be apportioned according to the special benefits conferred, and not in excess thereof, nor, in any

event, in excess of twenty-five per centum of the actual value of the property. The thirty-fifth general assembly enacted Section 792-h of the Supplement, 1913, repealing all acts or parts of acts in conflict with the provisions of Chapter 76, Acts of the Thirty-fifth General Assembly, of which Section 792-g is a part. That Section 792-a is in conflict with Section 817 is apparent. The latter required assessments for street intersections to be apportioned according to the linear feet fronting or abutting upon the improvement, whereas the former requires that such assessments shall be laid according to, and not in excess of, the benefits accruing from the improvement. It is, however, urged by counsel for appellant that the legislature has made no other provision for assessing the cost of street intersections; but it is quite obvious that the provisions of Sections 792-a and 792-g of the Supplement must control. These sections were evidently designed to include intersections as a part of the improvement, and treat the same as a whole. The method therein provided is in harmony with the holding of the Federal Supreme Court in *Norwood v. Baker*, supra, and is entirely fair, just, and equitable. Section 817, being in conflict with the later provisions of the statute, is clearly repealed by Section 792-a.

The exact method adopted by the council in apportioning the cost of paving the intersections and alley in Third Street against the property charged therewith is not shown by the record; but, presumptively, the statute was followed, so that the assessment would not be in excess of the actual benefits conferred. *Carpenter v. City of Hamburg*, 179 Iowa 1168. The burden rested upon appellants to overcome this presumption. *Chicago, R. I. & P. R. Co. v. City of Centerville*, 172 Iowa 444; *Spalti v. Town of Oakland*, 179 Iowa 59; *Northern Light Lodge No. 156, I. O. O. F. v. Town of Monona*, 180 Iowa 62; *Burroughs v. City*

2. MUNICIPAL CORPORATIONS: presumption from assessment.

of Keokuk, 181 Iowa 660. In our opinion, this has not been done.

The property of the railway company does not abut upon the intersection of First and State Streets, but is adjacent thereto. State Street extends east and west, and First Street, north and south. There is no street west of First Street, and counsel for appellants contend that Section 792-g does not, therefore, authorize the assessment of any part of the cost of the improvement upon property not abutting thereon. None of the property of the railway company situated more than 300 feet from First and State Streets was assessed.

Apparently, the purpose of the legislature, in providing for the levy of assessments "against all lots and parcels of land according to area so as to include one half of the privately owned property between the street improved and the next street whether such privately owned property abut upon said street or not," but in no case to include property situated more than 300 feet from the street so improved, was to enable cities and towns to assess all property benefited by street improvements; but it limited such assessment for the improvement of a given street to one half the area between the same and the next street, in order that the cost of improving both streets might be equitably borne by the abutting and adjacent property, and to protect the property owners against the danger of unfair assessments. The right to assess property not abutting upon the improvement is not made to depend upon whether there is another street beyond, but upon the special benefits accruing thereto by reason of the improvement, subject, however, to the limitations of the statute.

In the absence of a showing to the contrary, the presumption that the statute was followed in making same, and that the assessment is equitable and just, will prevail.

We are of the opinion that the judgment of the court below is right, and it is, therefore,—*Affirmed*.

LADD, C. J., GAYNOR and SALINGER, JJ., concur.

JOHN H. GLENN et al., Appellants, v. WILMETTA ANN GROSS et al., Appellees.

DEEDS: Non-Conflicting Habendum and Granting Clauses. A habendum clause which provides:

(a) That the conveyance shall be nullified as to a grantee who sells the premises prior to the death of grantor;

(b) That the grantor retains the income, use, control, and possession during his lifetime; and

(c) That a named sum shall be a charge on the land and payable to a named person by grantee after grantor's death,—is not irreconcilable with or repugnant to a general granting clause which makes no pretense of defining the estate granted.

Appeal from Dallas District Court.—J. H. APPLEGATE, Judge.

FEBRUARY 19, 1919.

SUIT in equity to quiet title. The facts are fully stated in the opinion.—*Affirmed*.

F. T. Van Liew, for appellant.

White & Clarke, for appellees.

STEVENS, J.—This is a suit to quiet title, and involves the construction of a warranty deed, executed by P. F. and Malinda Jane Glenn, husband and wife, whereby they sought to convey the following real estate, to wit: the SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$, all in Section 35; also the east $33\frac{2}{3}$ acres of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 34-79-27; also Lots 1, 2, 3, 4, 5, and the W $\frac{1}{2}$ of Lot 6 in Section 4-78-27, west of the 5th P. M., all in Dal-

las County, Iowa, to appellants and his brothers and sisters jointly, subject to certain provisions and limitations, as follows:

"This deed is made subject to a mortgage of fifty-two hundred dollars (\$5,200.00) to the Equitable Life Insurance Company of Iowa, and the grantors reserve the right to extend or renew said mortgage as often as they may desire, or to remortgage said land to raise money to pay said mortgage if the mortgagee should refuse to extend the same. After the death of both the grantors herein, the grantees herein agree to assume and pay said mortgage (if not paid).

"This deed is made with the following express understanding and reservations:

"First. If any of grantees herein shall sell or shall convey, directly or indirectly, his, her, or their interest in the land herein conveyed before the death of both of the grantors herein, then and in that case the interests herein conveyed to him, her, or them so selling or conveying before the death of the grantors herein shall be and become the property of the grantors' other children not so selling or conveying in violation of the stipulations herein, and this deed shall be null and void in so far as the conveyance to him, her or they shall be sold or conveyed before the death of the grantors as above stated.

"Second. The grantors herein reserve the use, control, and possession of and the net income from said land both from the surface thereof and from the coal or other mineral rights and the right to lease said land and make coal or mineral leases for all or any part of said land; the intention of the grantors being to use and control said land as fully as if this deed had not been made; the reservations herein to cease at the death of both grantors herein.

"Third. The grantees herein shall pay to Cora Jane Poulson and Charles Lewis Glenn the sum of eight hundred

dollars (\$800.00) each, total sixteen hundred dollars (\$1,600.00), after the death of both grantors herein, and before the title herein shall vest fully in the grantees. And if grantees fail or refuse to pay same, the land herein conveyed shall be liable therefor, and this deed hereby creates a lien at the death of both grantors herein against said land for the sum of \$1,600.00, and said Cora Jane Poulsen and Charles Lewis Glenn or either of them or their heirs may proceed to collect the same, and in that event an action in equity may be begun to foreclose said lien, which shall be treated as a mortgage on said land, and foreclosed as a real estate mortgage."

Plaintiff John H. Glenn alleges in his petition that he has opportunity, and desire to convey his interest in the land described by warranty deed, subject to the life estate of Malinda Jane Glenn, who survives her husband, but that the restrictions in said deed against alienation cast a cloud upon his title, and he asks that same be quieted against the adverse claims, if any, of the defendants, except Malinda Jane Glenn. Defendant interposed a demurrer to plaintiff's petition, which the court sustained; and plaintiff appeals.

In his argument, counsel for appellant treats the deed as conveying a fee title, subject only to the life estate reserved for the use and benefit of both the grantors, so long as either of them shall live, and the provisions, conditions, and limitations above quoted, as repugnant to the granting clause, and therefore void; whereas counsel for appellee contend that the instrument should be construed as a whole, and that, when this is done, it clearly reveals the intention of grantors to withhold title from fully vesting until their death, and the performance of the conditions named therein.

It is the settled rule of this state that deeds or other instruments of conveyance shall be construed, if possible,

so as to give effect to all parts of the instrument, and to carry out the intention of the grantor. *Beedy v. Finney*, 118 Iowa 276; *Hess v. Kernan Bros.*, 169 Iowa 646; *Bellamy v. Bellamy*, 184 Iowa 1193; *Bassett v. Budlong*, 77 Mich. 338 (43 N. W. 984). In *Beedy v. Finney*, supra, Chief Justice Ladd, speaking for the court, said:

"Where, however, the premises purport to convey without qualification or description, there can be nothing inconsistent with it in the habendum declaring the character or quality of the thing transferred, for that is not elsewhere defined. The repugnancy, to defeat the habendum, must be such that the intention of the parties either cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect. If, from the entire instrument and attending circumstances, it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the habendum will control. It is then to be regarded as an addendum or proviso to the granting clause, which will control it even to the extent of destroying its effect. In short, the modern rule requires the consideration of the deed as a whole, and not in separate and distinct parts, as was formerly done, and the finding of repugnancy avoided, whenever all the provisions of the instrument may, without ignoring the accepted canons of construction, be given force and carried into effect."

This rule has been generally adopted by the courts of this country. *Moore v. Griffin*, 22 Me. 350; *Waterman v. Andrews*, 14 R. I. 589; *Cravens v. White*, 73 Tex. 577 (11 S. W. 543); *Hubbird v. Goin*, 137 Fed. 822; *Jackson v. Myers*, 3 Johns. (N. Y.) 388; *City of Akton v. Illinois Trans. Co.*, 12 Ill. 38; *Coleman v. Beach*, 97 N. Y. 545; *Utter v. Sidman*, 170 Mo. 284 (70 S. W. 702). If, however, the habendum is irreconcilable with, and repugnant to, the granting clause, the former must prevail. Such is our hold-

ing in *McCleary v. Ellis*, 54 Iowa 311; *Kepler v. Larson*, 131 Iowa 438; *Ogle v. Burmister*, 146 Iowa 33; *Case v. Dwire*, 60 Iowa 442; *McCormick Harv. Mach. Co. v. Gates*, 75 Iowa 343.

The grantor cannot restrict or limit the right or power of the grantee who becomes the owner of the fee, or, for instance, a life estate, to sell, incumber, or otherwise dispose thereof. By parting with the fee, or vesting in another a life estate, the grantor loses all right or power to control the use or disposition of the estate granted. Nor is the relative position of clauses in a deed or other instrument of conveyance material or controlling. *Beedy v. Finney*, supra; *Utter v. Sidman*, supra; *Phillips v. Collinsville Granite Co.*, 123 Ga. 830 (51 S. E. 666); *Palmer O. & G. Co. v. Blodgett*, 60 Kan. 712 (57 Pac. 947); *Atkins v. Baker*, 112 Ky. 877 (66 S. W. 1023); *Flagg v. Eames*, 40 Vt. 16; *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. 266); *Whetstone v. Hunt*, 78 Ark. 230 (93 S. W. 979); *Chicago Lumbering Co. v. Powell*, 120 Mich. 51 (78 N. W. 1022).

The deed must be construed as a whole, and the intention of the grantor ascertained and given effect, if possible. It will be observed that the deed in question contains the usual words of conveyance, and that the clauses quoted follow the granting clause, which does not specifically define or designate the estate granted. That, however, is the office of the habendum, which may "limit, restrain, lessen, enlarge, explain, vary, or qualify, but not totally contradict or be repugnant to the estate granted in the premises." 13 Cyc. 619; Devlin on Deeds (3d Ed.), Section 213.

Taking the instrument in controversy as a whole, and construing all its parts together, the intention of the grantors to reserve the right to extend or renew the mortgage thereon from time to time, and that title should not fully vest until their death and the payment to Cora Jane Poulsen and Charles Lewis Glenn of \$800 each by the grantees,

is too apparent to require discussion. It is difficult to conceive how such intention could have been more clearly expressed, nor is same irreconcilable with, or repugnant to, the granting clause or premises. As before stated, the estate conveyed is not specifically designated in the granting clause, and the words used therein are as consistent with the conveyance of a limited estate as of the fee. In our opinion, there is no inconsistency between the respective clauses of the deed, and all may, and should, be carried out according to the expressed wishes of the grantors.

As the sole ground upon which the clauses quoted are assailed (the argument being confined to the first) is that the same are repugnant to the granting clause, further discussion of the question is unnecessary. It follows that the judgment of the court below is—*Affirmed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

G. JENSEN, Appellant, v. WM. WIERSMA, Sheriff, Appellee.

EXEMPTIONS: Debtor's Interest in Partnership Property. A partner, though a resident head of a family, may not claim his interest in partnership personal property exempt from levy and sale under execution to satisfy partnership debts.

Appeal from Sioux District Court.—W. D. BONES, Judge.

FEBRUARY 19, 1919.

ACTION for damages for the value of certain personal property, claimed to be exempt, which was sold by the sheriff upon execution.—*Affirmed*.

Hatley & Van de Steeg, for appellant.

Klay & Klay and *W. C. Leonard*, for appellee.

STEVENS, J.—The defendant, as sheriff of Sioux Coun-

ty, levied an execution upon certain hay, corn, and eight pigs, alleged to be under six months of age, and sold the same to satisfy a judgment against the plaintiff and H. D. F. Leck, in favor of their landlord, for rent. Prior to the sale, each of the above-named parties separately notified the defendant in writing, under oath, that they were married men, heads of families, and that they claimed that the above property was exempt from execution sale. As we understand the record, plaintiff and Leck were copartners in the leasing and operation of a farm, and the property in question belonged to the partnership.

The principal question for decision is whether a partner who is a resident head of a family may claim his interest in personal property, owned by a partnership, exempt from levy and sale under execution to satisfy partnership debts. While the courts are not entirely harmonious upon the question, the great weight of authority holds that such property is not exempt. A partnership is a separate and distinct entity, and holds the partnership property in trust for the payment of its debts. The property does not belong separately to the individual partners, but to the distinct entity. After the payment of the debts of the copartnership, and division of the property between the parties, the right to claim the statutory exemption exists. The question whether a member of a partnership is entitled to hold his interest in the property thereof as exempt has not been squarely passed upon in this state, but enough has been said to indicate that he cannot. *Haynes v. Kline*, 64 Iowa 308; *Hewitt v. Rankin*, 41 Iowa 35; *Drake v. Moore*, 66 Iowa 58; *Hoyt v. Hoyt*, 69 Iowa 174. As bearing upon this question, see *Cowan v. Creditors*, 77 Cal. 403 (19 Pac. 755); *McCrimmon v. Linton*, 4 Colo. App. 420 (36 Pac. 300); *Hart v. Hiatt*, 2 Ind. T. 245 (48 S. W. 1038); *Regenstein v. Pearlstein*, 32 S. C. 437 (11 S. E. 298); *Bateman v. Ed-*

gerly, 69 N. H. 244 (45 Atl. 95); *Lynch v. Englehardt-Winning-Davison Merc. Co.*, (Neb.) 96 N. W. 524.

Counsel for appellant relies upon *Sterman v. Hann*, 160 Iowa 356, but this case is not in point. The property involved in the *Sterman* case was a safe, owned jointly by the husband, who was a physician, and his wife, and was used exclusively by the former, in which he kept his instruments and other small personal effects. The property did not belong to a partnership, as none existed. The court held that the debtor, as the head of a family, was entitled to claim the statutory exemption of his interest in the safe; whereas property of a partnership belongs neither to one nor the other of the partners individually, but to the separate entity. *Cowan v. Creditors*, supra; *Goudy v. Werbe*, 117 Ind. 154 (19 N. E. 764); *Aultman, Miller & Co. v. Wilson*, 55 Ohio St. 138 (44 N. E. 1092).

If the property in question were simply owned jointly by the plaintiff and Leck, who assigned his interest therein to plaintiff before suit was commenced, and not to the partnership, the *Hann* case would be decisive. The record is short, but the facts are not apparently in dispute. We hold, therefore, that the trial court did not err in directing a verdict in defendant's favor, and it follows that the judgment must be—*Affirmed*.

LADD, C. J., GAYNOR and SALINGER, JJ., concur.

A. G. O'BRECHT, Trustee, Appellant, v. CEDAR RAPIDS OIL COMPANY et al., Appellees.

NEGLIGENCE: Performing Act in Ordinary Way. It is not negligence to perform an act in the manner in which such an act is ordinarily performed.

NEGLIGENCE: Non-Causative Connection. Negligence without causative connection with injury becomes immaterial. So held as to an explosion of inflammable oil.

Appeal from Pocahontas District Court.—N. J. LEE, Judge.

FEBRUARY 19, 1919.

ACTION to recover for the destruction of buildings, alleged to have been caused by the negligence of the defendants in handling gasoline. Directed verdict for the defendant in the district court. Plaintiff appeals.—*Affirmed.*

Healy & Thomas, for appellant.

Ralston & Shaw and Deacon, Good, Sargent & Spangler, for appellees.

GAYNOR, J.—On the 13th day of June, 1916, the defendant Cedar Rapids Oil Company was engaged in the business of wholesaling and retailing gasoline. Its place of business was located at Cedar Rapids. The defendant Barth was its local agent at the town of Havelock in Pocahontas County. On that day, the plaintiff ordered, through Barth, a barrel of gasoline, to be delivered at his garage and implement store in the town. Barth, for the company, accepted the order, and undertook to deliver the gasoline; did deliver it in a metal barrel. Plaintiff's and Barth's places of business were on the same street, and about 240 feet apart. Barth delivered the gasoline by rolling the barrel from his place to plaintiff's. When he reached the place of delivery, he undertook to empty the barrel for the plaintiff, into an underground tank provided by the plaintiff for its reception. While in the act of emptying the barrel, for some reason it became ignited, and the fire extended to and burned plaintiff's buildings. It is to recover the value of the buildings so destroyed that plaintiff brings this action.

The action is bottomed on negligence, and the negligence consists:

(1) In that the gasoline was kept in a metal storehouse.

1. NEGLIGENCE:
performing act
in ordinary way.

(2) In that Barth rolled the barrel on the street from the storehouse to plaintiff's place of business on an unusually hot day.

(3) In rolling the barrel into the implement house and there removing the bung and releasing the gas, while the usual and proper way would have been to have carried it from the store in buckets.

(4) In that the barrel was too full.

(5) That the defendant Oil Company had never instructed Barth how to handle high test gas so as to avoid an explosion.

The cause was tried to a jury. At the conclusion of the evidence, the court instructed the jury to return a verdict for the defendants. A verdict was returned, and judgment entered upon the verdict. Plaintiff appeals, and contends that the cause should have gone to the jury; that the court erred in instructing a verdict for the defendants.

To sustain plaintiff's claim, two things must appear: (1) That the acts charged constitute negligence; (2) that this negligence was the proximate cause of the fire which destroyed plaintiff's buildings.

Considering the grounds of negligence relied upon in the order in which they are presented, we have to say that there is absolutely no evidence that the defendant is guilty of any negligence in storing its gasoline in a metal storehouse. The evidence rather tends to show that it is the usual, ordinary, and safe method of storing it.

There is no evidence that this gas was high test. The evidence is that it was not high test gas. The charge in the fifth division is that Barth was never instructed how to handle high test gas so as to avoid an explosion. It is not claimed that any instructions are necessary where it is not high test gas.

The second and third may be considered together, to wit, the negligence of the defendant, predicated on the

manner in which the gasoline was conveyed to plaintiff's storehouse, and the manner in which Barth undertook to empty it into the underground tank placed to receive it. The contention of the plaintiff is that the rolling of the barrel 240 feet on a very hot day had a tendency to increase the pressure by causing the formation of gas in the barrel, which, upon opening the barrel and exposing the gas to the air, produced spontaneous combustion; that this was especially true when the weather was hot; that the acts of defendant done in this way produced a gaseous formation in the barrel, which escaped when Barth undertook to empty the barrel in the manner in which he did, and that this gas, meeting with the air, produced instantaneous combustion, from which, as a natural sequence, the results complained of followed. We may assume, for the purposes of this case, that the rolling of this barrel on this day had a tendency to, and did, in fact, increase the pressure, and cause the gaseous formation within the barrel which escaped immediately upon the opening of the barrel for the purpose of emptying it into the tank.

That the barrel was opened in the usual and ordinary way and in the proper way, is not controverted. The question is: Was the defendant negligent in opening it and attempting to empty it into the tank after the conditions had been produced and existed in the barrel as the natural result of the rolling? And next, Were the consequences that followed due to the condition of this oil in the barrel, and did the fire follow as a proximate result of such condition upon the opening of the barrel?

The record discloses that at no time on this day did the temperature exceed 76 degrees Fahrenheit. The plaintiff's testimony tends to show that gasoline vaporizes readily; that it combines with the air at practically any temperature readily; that, if the temperature is raised, it

2. NEGLIGENCE:
non-causative
connection.

vaporizes more readily; that liquid gasoline will not explode. It must first be broken up into vapor, and that vapor, escaping and combining with the oxygen in the air, causes an explosion. It is due to chemical action—the union of the oxygen from the air with the carbon in the gasoline. A glowing or red hot coal will not ignite the gas. An open flame will. A spark is a flame. It is possible for vapor to explode without coming in contact with either a flame or a spark. The conditions are similar to spontaneous combustion. The generating of an excessive quantity of gas from the gasoline, if given a chance for it to unite with the air, would mean a chemical compound or combining chemically of the gas and the oxygen in the air, and that would result in an explosion. Generally, however, sparks and flames are the two essential causes of ignition of the gas that forms from gasoline. It is exceptional for gasoline to ignite from any other causes than sparks or flame. This witness, however, testified that a temperature of 76 degrees Fahrenheit would not be sufficient temperature to suggest any unusual precaution in handling gasoline. A witness for defendant testified that it would be impossible, with a temperature of 76 degrees Fahrenheit, for gasoline or gas vapor passing through the venthole or bung hole of a barrel to be raised to a temperature of 900 degrees; that it takes a temperature of 900 degrees Fahrenheit to ignite gas; that gasoline vapor will not explode without a spark or flame.

Another witness testified that there could never be a flame from gas escaping from a crack or vent in one of these drums when the pressure would not be sufficient to burst the drum; that there could not be a flame without external fire or flame.

In fact, all the testimony offered both by the plaintiff and the defendant shows that spontaneous combustion could not follow and produce flame and fire under the con-

ditions and at the temperature of the air at the time this barrel was opened.

The evidence is undisputed that, at the time Barth undertook to empty this gasoline, there was no fire anywhere about the place. The question then arises: Was the fire that destroyed these buildings traceable to the manner in which the oil was handled, or to the manner in which Barth attempted to empty it into the tank, as its proximate cause?

There is evidence that one Murray, an employee of the plaintiff's, was present at the time the gasoline was being turned into the tank; that he had a cigarette in his hand; that he was under the influence of liquor; and that, about the time the gasoline started fairly running into the tank, someone struck a match. Negating this, however, there is testimony that no match was struck, or, at least, that no one saw a match struck. So, upon this point, there might well have been a question for the jury. But we have to say that the evidence is uncontroverted that spontaneous combustion could not take place under the conditions that attended the emptying of this barrel. Plaintiff's whole contention rests on the theory that the handling of the barrel produced a condition in the barrel which, in attempting to empty the barrel, produced spontaneous combustion, from which the fire followed that produced the injury. It positively appearing that spontaneous combustion could not follow, the question arises: What caused the fire? As there was no fire or light or flame in the building when defendant Barth took the barrel in, something must have happened which brought about the condition which produced the fire and destroyed the building. What it was, if no match was struck, does not appear. It must, then, have been caused by the intervention of some independent agency not known to or controlled by these defendants; an agency intervening which they could not and had no reason

to anticipate. If it could not occur without a spark or a flame, as all of the witnesses agree, under the conditions there existing, the spark or flame must have been produced by someone. We are inclined to think that it is traceable to the action of Murray, who is not a witness in this suit. It is certainly not traceable to any conduct of these defendants for which they are culpable. Negligence must be proven. Some act must be shown to have been committed by these defendants, or either of them, which produced the condition which caused the injury. The condition which they did produce was not the proximate cause of the injury. It could not come without the intervention of an independent agency. They are in no way shown to be responsible for the intervention of the independent agency. Therefore, the acts of this defendant are not shown to be the proximate cause of the injury, and they cannot be holden for the injury.

Some question is made about the introduction of evidence, but we have examined these points, and find no ground for reversal there.

Upon the whole case, we find that the court was right in directing the jury to return a verdict for the defendant because of a failure of proof of the issue that the fire was due and traceable directly to the acts of the defendant as its proximate cause. The case is, therefore,—*Affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

H. O. POTTER, Appellee, v. H. W. POTTER et al., Appellants.

DEEDS: Delivery Presumed from Possession. *Possession* by a grantee, prior to and subsequent to grantor's death, of an unqualified conveyance of property to grantee, creates a presumption of proper and legal *delivery*, with consequent burden of proof on him to allege the contrary.

Appeal from Chickasaw District Court.—W. J. SPRINGER,
Judge.

FEBRUARY 19, 1919.

ACTION in equity to cancel certain deeds and a bill of sale on the ground that there was no delivery made during the lifetime of the grantor. Decree was entered for the plaintiff. Defendants appeal.—*Reversed and remanded.*

Mears & Lovejoy and *Dawson & Wehrmacher*, for appellants.
W. H. Scott and *Smith & O'Connor*, for appellee.

GAYNOR, J.—On and prior to the 3d day of March, 1913, one Marvin Potter was the owner of a certain 80 acres of land in Swift County, Minnesota, and certain lots in the town of Nashua, Chickasaw County, Iowa. He was also the owner of certain personal property. He was a widower, and had two adult sons, H. O. Potter, plaintiff, and H. W. Potter, defendant.

On the 17th day of January, 1913, Marvin caused to be prepared a deed to the Minnesota land which recites:

"In consideration of the sum of one dollar and other valuable considerations, in hand paid by said H. W. Potter (defendant), of Chickasaw County, state of Iowa, do hereby sell and convey to the said H. W. Potter, and to his heirs and assigns the following described premises, to wit, forever all that tract or parcel of land lying and being in the county of Swift and state of Minnesota (describing it), and I do hereby covenant with the said H. W. Potter that I am lawfully seized in fee simple of said premises, that they are free from incumbrance; that I have good, right and lawful authority to sell the same; and I do covenant to warrant and defend the said premises and appurtenances thereunto belonging against the lawful claims of all persons whomsoever."

On the same day, he caused to be prepared a deed to the property in Nashua, the deed stating:

"I, Marvin Potter, in consideration of the sum of one dollar and other valuable considerations, in hand paid by H. W. Potter * * * do hereby sell and convey unto the said H. W. Potter and to his heirs and assigns, the following described premises,"—being the lots hereinbefore described, and with the same covenants of warranty contained in the deed to the Minnesota land. These deeds were duly signed and acknowledged by Marvin on that day, but retained in his possession until the 3d day of March, 1913.

On this day, he caused to be prepared a bill of sale, in substantially the following words:

"I, Marvin Potter, * * * for the sum of one dollar and other valuable considerations, have this day sold and to be delivered after my decease, unto my son, his heirs or assigns, H. W. Potter, * * * all my chattels, moneys, bonds and mortgages, and all household goods, also books and pictures, also all money and notes that may be due me at the time of my decease, the same being sold to the said H. W. Potter for value received, and to have and to hold the said goods, chattels, bonds, mortgages and property by the said H. W. Potter, against all other claims howsoever, and I, the said Marvin Potter, claim that I am the lawful owner of all goods and chattels and property herein mentioned."

This bill of sale was also duly signed, executed, and acknowledged by the said Marvin Potter. All these instruments were prepared by one F. R. Shope, an old friend of Marvin Potter's. The deeds were in the possession of Marvin Potter on the 3d day of March, 1913, at the time the bill of sale was executed, and were there present in the hands of Marvin Potter at that time.

At the time the bill of sale was executed, Marvin Potter

also caused a note to be prepared by his friend, Shope, for \$600, payable to his other son, the plaintiff in this suit, with the provision that it should not draw interest until the death of Marvin Potter, and should not become due until five years after the death of Marvin Potter. A mortgage was prepared, covering the land in Minnesota, and running to H. O. Potter. After all these instruments were completed, they were placed in an envelope, in the presence of Mr. Shope, or by Mr. Shope, at the direction of Marvin Potter. Mr. Shope wrote on the envelope the following words: "To H. W. Potter." After all this had been done, Marvin Potter handed the defendant the envelope containing the papers, and said—calling him by his first name:

"Here are your papers. Take them and put them in the bank. Keep them there with your other papers. Don't put them on record until after I am gone."

These papers were prepared in Marvin Potter's house. H. W. Potter, the defendant, and his wife were present at the time. Both had been staying with Marvin for some time before these instruments were executed. It appears that, after these papers were handed to the defendant H. W. Potter, he took them and deposited them in a bank, in which he had kept papers for some eight or nine years. It may be, and probably is, true that his father kept papers at the same place in which these papers were deposited; but it is also true that the defendant had used this same receptacle for the deposit of his own papers. How long they remained there in the bank does not definitely appear. They were taken from the bank, and were in the possession of the defendant at the time his father died. The defendant testifies:

"These papers were kept at the bank. They were not in the bank at the time of my father's death; neither were the deeds nor the bill of sale. They were in my box. I had them down at my house."

Marvin Potter died on Saturday, the 9th day of March, 1916. On the Monday following, the deeds and bill of sale were placed on record. After the father's death, the defendant mailed the note for \$600, with the mortgage that secured it, to his brother, the plaintiff. The plaintiff refused to accept them.

This action is brought by the plaintiff, the other brother, to cancel these deeds and bill of sale, on the ground that they were never delivered to the defendant during the life of Marvin Potter, and to have the property conveyed by the instruments declared intestate property. Issue being joined, a trial was had to the court, and a decree entered for the plaintiff, substantially as prayed. From this decree the defendants appeal.

The question for our determination is practically a fact question. The law questions relate only to the sufficiency of the facts proven to constitute a valid delivery, vesting title in the defendant.

There is a controversy touching what was said at the time these papers were delivered by Marvin to the defendant. There is no controversy as to the manual delivery of the papers in question to the defendant. Shope testified first that, when Marvin Potter handed the papers to his son, the defendant, he said, calling him by name:

"Here are your papers. Take them and put them in the bank. Keep them there with your papers. Don't put them on record until after I am gone."

On cross-examination, he testified that the father said, at the time he handed the papers to the defendant:

"Here are your papers. Take them and put them in the bank with your other papers. Don't put them on record until after I am gone."

Again, on cross-examination, he said that Marvin said to his son:

"Here are the papers. Put them in the bank and keep them there until after I am gone."

On being recalled for further examination, he testified that Marvin Potter took the papers and the envelope and handed them to his son, the defendant, and said, "Here," calling him by name, "are your papers. Put them in the bank until after I am gone."

Mr. Getsch, president of the Commercial Savings Bank of Nashua, testified that he had a conversation with the defendant, a few days after his father died, concerning a certificate of deposit; that defendant came to the bank, and wanted to know if he could get the money on the certificate. The witness asked the defendant what his authority was for drawing the money. It does not appear whether the defendant had the certificate with him at that time or not. A few days, or possibly a couple of weeks, after that, and after the certificate became due, he had another conversation with the defendant, concerning the payment of the certificate. Defendant came with his wife to the bank, and wanted to draw the money; showed a bill of sale as his authority for drawing it. (This is the bill of sale in question.) The witness told the defendant that he would have to consult authority, before he could get it on the bill of sale. He called in Mr. Scott, who, before that time, had been counselled by the plaintiff, touching defendant's right to the money. Mr. Scott was called in. A conversation took place. Scott interrogated the defendant. The witness relates the conversation touching this matter as follows: That, when Mr. Scott asked the defendant whether there was a proper delivery of the bill of sale, the defendant made no inquiry as to what would be considered a proper delivery. The only reply he made was that he got the papers out of the tin box at the bank. Witness thought he said he kept his own papers; that both he and his father had papers in that box. He said his father told him to put

that,—those papers,—some papers,—he mentioned some deeds, and, witness thought, a mortgage,—and he said those papers were to be placed in his box, and not used until after his death.

Scott testified that, in this conversation, defendant said, in substance, that his father had told him to put those papers in the bank and leave them there until after his death; that he didn't recall whether defendant said his father handed him the papers at the time he told him to put them in the bank. He said his father gave the papers to him for the purpose of putting them in the bank. He said, in substance, that his father had given or handed him these papers, and told him to put them in the bank. The defendant told him, at the time, that his father had given him, or handed him, these papers, and told him to put them in the bank.

Mrs. Potter, defendant's wife, testified that, when the papers were handed by Marvin to the defendant, Marvin said:

"Here are your papers. Now put them in the bank and take care of them.' My husband took the papers."

This fragmentary testimony, torn from the pages of memory, is all the verbal testimony tending to prove or disprove the delivery of these instruments by Marvin to the defendant before his death. Marvin is dead, and the defendant is prohibited, under Section 4604 of the Code, from testifying. We turn, therefore, to the circumstances for further light.

The intention of Marvin is made manifest in the wording of the instruments—the intention to give his entire estate to the defendant. Every expression used by him in the instruments themselves indicates and emphasizes this purpose. The only controversy that can arise is as to whether or not this purpose, so made manifest, was consummated in his lifetime. The deeds themselves were evidence of a

purpose on the part of Marvin to pass the title to his son at some time. There is nothing in the deed that suggests any intent on the part of Marvin that the deeds should not take effect immediately upon their delivery to the defendant. The instruments themselves express a clear and unequivocal intent to pass the title to the grantor therein named, without any reservation of rights in the thing conveyed. That the instruments passed into the actual physical possession of the grantee named in the instruments on the 3d day of March, 1913, is undisputed. That they were in the actual physical possession of the grantee therein named, the defendant in this suit, before the grantor's death, is undisputed. By whose authority they came again into the physical possession of the defendant, this record does not disclose. The only one who could speak upon this question stands within the inhibition of Section 4604. No witness testifies that this instrument was not always in the actual physical possession of the defendant, except such time as defendant had it on deposit in the bank. No one testifies directly that Marvin ever claimed or asserted or suggested any right in him to repossess these papers. At the time they were delivered, nothing was said that indicated a purpose on his part that they should be held subject to his control or direction. It goes without saying that, if the papers were delivered to the defendant, with instructions to deposit them in the vault or any receptacle for the use and benefit of Marvin Potter, the mere act of handing the papers, with such instructions, would not be a delivery sufficient to carry title. Here, however, we have an actual delivery of the instruments, duly executed, on their face passing absolute title, with no claim or right asserted then or afterwards, to the instruments, on the part of the grantor. The mere fact that the grantor might regain possession does not destroy the efficacy of the delivery as carrying title. *Albrecht v. Albrecht*, 121 Iowa 521; *White*

v. Watts, 118 Iowa 549; *Trask v. Trask*, 90 Iowa 318; *Newton & Seeley v. Bealer*, 41 Iowa 334.

The recording of a deed is not essential to passing title. The only restriction placed upon the rights of the grantee named in the deed, at the time of its manual delivery, was that it should not be recorded. The mere fact that the grantor retains possession of the thing conveyed, is only a circumstance to be considered in determining whether there was a completed conveyance. Where it is shown that the instrument conveys an absolute title, was actually delivered during the life of the grantor, the mere fact that the grantor remains in possession, but makes no claim to the property, does not destroy the legal efficacy of the instrument, or its legal effect. There is no substantive evidence that, after this physical delivery of these instruments, they were ever again in the possession of Marvin, or that he ever claimed a right to their possession. How long they were in the bank does not appear. By whose authority they were removed from the bank, does not appear. They were in the possession of the defendant at the grantor's death. This is not controverted. The presumption of a regular and proper and legal delivery must obtain, and the one alleging the contrary has the burden of proving, by clear and satisfactory evidence, that it was not delivered. *Corbin v. McAllister*, 144 Iowa 71; *Nowlen v. Nowlen*, 122 Iowa 541; *Hild v. Hild*, 129 Iowa 649.

While we might well hold that there was a valid delivery of the instruments in question on the testimony of Mr. Shope alone,—for there is no satisfactory evidence disputing what he says,—we can safely rest our holding on the proposition that the finding of the deed in the possession of the defendant after the death of his father, is a fact so strongly indicating a delivery before the death that, in the absence of any clear evidence overcoming the presumption that arises from possession, we must hold the delivery

to have been complete during the lifetime of the deceased.

For this reason, the case is reversed and remanded for a decree in accordance with this opinion.—*Reversed and remanded.*

LADD, C. J., SALINGER and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. RAY CARSON, Appellant.

SEDUCTION: Nonsufficient Seductive Arts. Seduction may not be
1 predicated on an indefinite and questionable promise of marriage and hasty protestations of love, evidently made for the purpose of obtaining sexual gratification from a woman who is by no means unfamiliar with the "way of a man."

CRIMINAL LAW: Verdicts Unsustained by Evidence. Verdicts in
2 criminal cases, even though having some support in the evidence, will be reversed if they are clearly against the clear weight of the evidence, the judgment of the trial court to the contrary notwithstanding.

Appeal from Lucas District Court.—D. M. ANDERSON,
Judge.

FEBRUARY 19, 1919.

CONVICTION for seduction. Defendant appeals.—*Reversed and remanded.*

J. A. Penick and W. Collinson, for appellant.

H. M. Havner, Attorney General, F. C. Davidson, Assistant Attorney General, C. F. Wennerstrum, and E. S. Wells, for appellee.

SALINGER, J.—I. For the sake of prosecutrix, as well as because it would serve no useful purpose to do otherwise, we refrain from detail. Prosecutrix was but 17 at the time

1. SEDUCTION:
nonsufficient
seductive arts.

of her alleged seduction, and defendant, about 20. But the record shows conclusively that, beginning at 15, she had such relations with men as that, while it may be true that such relations were not criminal, they were such as made her sufficiently familiar with the "way of a man" to understand the peril of permitting the defendant to take improper liberties with her at their first meeting,—one had after they had just been introduced,—to enable her to rate at its true value such promise of marriage as she testifies to. She testifies defendant solicited sexual intercourse almost at the beginning of this first meeting; that he took indecent liberties, and in connection "with carrying on that way," he began to "love" her; that she does not remember just what he said, except that, while taking these liberties, "he made the remark that he loved me and cared for me that way;" that, at one stage of soliciting intercourse, he said he thought a whole lot of her, and asked her if she could not learn to love him; that she told him she didn't know whether she could or not; that "the way he treated me and asked me to do business with him and talked that way to me, I did not believe that I could;" that, by what he said, and the taking of the liberties, he got her to lose control of herself; that she guesses he thought or knew she had lost control of herself, and thereupon "he went ahead and did his business;" that the only objection she made was she was afraid she would get herself into trouble, and did not want that to happen, and he said that, if she did, he would get her out of it. Up to this point, nothing was said about marriage. As to a promise of marriage, her testimony was this:

"He said if he got me into trouble, he would marry me—if he could not get rid of it, he would marry me. Q. Now, you would never have had intercourse with him unless he had either promised to marry you. A. No, sir. Q. And

now you state that is the reason that you had intercourse with him—because he made these promises. A. Yes, sir, because he let on like he cared for me. He told me he loved me.”

The quality of the “caring” and of the protestations of love has been sufficiently set forth. It suffices to say that they were not naturally calculated to induce a fall from chastity; that the “caring” was rather brutal, and the protestations quite casual and incidental. The important factor was the belated promise of marriage. That promise was this:

“Q. He told you, if he got you into trouble he would get you out of it? A. Yes, sir. Q. Or he would marry you,—one or the other? A. Yes, sir. Q. That is the promise of marriage you speak of when you say he promised to marry you? A. Yes, sir. Q. That is the first time you were ever with him? A. Yes, sir.”

In acting upon this record, we must bear in mind, too, that this testimony should not be strained against defendant, for, in the words of *State v. Haven*, 43 Iowa 181:

“It is perfectly natural, and to be expected, that the prosecutrix should, as far as possible, shield herself, and cast the blame, if any there was, upon the defendant.”

2. CRIMINAL LAW:
verdicts unsustained by evidence.

It is conceded that we should interfere with a conviction though the verdict is not wholly without support, if it be clearly against the weight of the evidence. See *State v. Pray*, 126 Iowa 249; *State v. Hessenius*, 165 Iowa 415; and *State v. Young*, 158 Iowa 647, at 652.

In *State v. Saling*, 177 Iowa 552, 555, 556, the cases governing the review of a conviction are collated, and held that, while we will not set aside a verdict of guilty readily, for being contrary to the weight of the evidence, we will do so more readily than if the verdict were on the civil side;

that, while we will not interfere where there is clear conflict in the evidence, we will not support the verdict if, proceeding carefully and cautiously, we must find that the verdict is against the clear weight of the evidence. We point out, in the *Saling* case, that, in *State v. O'Donnell*, 176 Iowa 337, we reversed a conviction of murder in the first degree because we find the evidence insufficient to sustain a conviction in that degree; and that *State v. Nolan*, 92 Iowa 491, is to the same effect. We conclude, in the *Saling* case, that:

"It will no more do to make the verdict of a jury conclusive in a criminal conviction of a grave felony than it would do to try criminal cases *de novo*. That neither is permissible does not in the least affect either our duty or our power to interfere with the verdict of a jury in a case where such interference is proper."

And we cannot agree that, in determining whether the evidence clearly preponderates against the verdict, the fact that the motion for new trial is overruled by the judge who heard and saw the parties and the witnesses ends the inquiry we now have. That is not true even on the civil side. See *Miller v. Paulson*, 185 Iowa —. We adhere to our statement in the *Miller* case that this advantage possessed by the trial judge is entitled to much weight on review on the law side, but also adhere to the pronouncement therein made that it is not and cannot be conclusive.

Using all due care and caution in dealing with this conviction, we are driven to hold that this verdict is against the clear weight of the evidence. Is a conviction for seduction sustained by evidence of such "seductive arts" as were here employed? If so, a seduction would occur if a stranger met a woman in the road, introduced himself by stating that he loved her, and, proceeding to take indecent liberties, then and thereby induced the woman "to lose control," and overcame the objection that intercourse solicited un-

der these conditions might get her into trouble by stating that, if that happened, he would either get rid of the child or marry. If that constitutes seductive arts and seduction, then, if the inmate of a brothel demands of a patron that, as a condition precedent to obtaining intercourse, he shall write a declaration that he loves her, and, if she conceives by him, he will either procure an abortion or marry, stages seductive arts and a seduction. We are of opinion the verdict is not warranted by the evidence. In reaching this conclusion, we are quite controlled by the elective and alternative nature of the promise testified to by prosecutrix, and the circumstances under which it was made.

We do not quarrel with the fact that, in many cases, weight is given to a promise of marriage. But, upon analysis, it will be found that no well-considered, if any, case has ever held that seduction may be found because "a" promise of marriage was made, and the prosecutrix testifies that she yielded to her own desires, although she finally says, on pressure by leading questions, that she would not have yielded without such promise.

Case law helps little. At some points in the presentation, the State concedes this. At others, the concession is forgotten, and decisions are urged as concluding some point or points in the appeal. *Stare decisis* cannot rule. The facts differ too much in the different cases. The case of *State v. Higdon*, 32 Iowa 262, cited by the State, is illustrative. But there is this much to be had from case law. If it be held that, upon stated facts, there is no seduction, that is authority whenever the facts, though they differ from those in the case relied on as an authority, have less probative weight than those present in the cited case. For instance, in *State v. Valvoda*, 170 Iowa 102, it is ruled that the correspondence shows the woman is not of chaste mind. The case might be authority on whether something other than correspondence showed a lack of chastity, if what was

shown indicated such lack as, or more, clearly than does correspondence in the *Valvoda* case. On this reasoning, *Baird v. Boehner*, 72 Iowa 318, supports the defendant. The only differentiation which the State attempts is to point out that the *Baird* case is a suit for damages for alleged seduction. That distinction is against the State. The plaintiff in the damage suit needed only a preponderance. A case that holds a preponderance was lacking of course holds that there was not proof beyond reasonable doubt.

Because the conviction is against the clear weight of the evidence, there must be a reversal, and the cause remanded.—*Reversed and remanded.*

LADD, C. J., EVANS, GAYNOR, and STEVENS, JJ., concur.

CENTRAL LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Appellant, v. CITY OF DES MOINES et al., Appellees.

WORDS AND PHRASES: *Sidewalks.* A sidewalk is a part of the
1 street expressly reserved for pedestrians, and constructed differently from other portions of the street.

STATUTES: *Construction—Delegation of Authority to Cities and*
2 *Towns.* The legislature has plenary power over the streets and highways, and may delegate such authority to the cities and towns within which the streets are located; and the power to control, improve, and repair the streets is conferred on cities and towns, under Section 753, Code, 1897, and Sections 751 and 792, Code Supp., 1913, without any prescription as to the manner of so doing.

MUNICIPAL CORPORATIONS: *Powers—Jurisdiction of Courts—*
3 *Arbitrary and Oppressive Acts of City Council.* Where certain powers are conferred on the city council, and the manner or mode of performance has not been directed by the legislature, such manner or mode ought not to be arbitrary or oppressive; and when this is attempted, the courts may interfere, and prevent an unreasonable course on the part of the city in carrying out what the city council has enacted.

MUNICIPAL CORPORATIONS: Powers—Improper Mode or Manner
4 of Performance of Powers. Courts cannot interfere with the acts of a city under a power clearly conferred by the legislature, but may interfere to prevent the arbitrary and unreasonable or oppressive mode or manner of performing what the city council, in its legislative discretion, may order or require.

MUNICIPAL CORPORATIONS: Powers—Arbitrary and Unreasonable Acts—Reducing Width of Sidewalks. Allegations of a petition that the city council acted arbitrarily and unreasonably in passing a resolution reducing the sidewalks to five feet in front of plaintiff's office building held insufficient to justify the interference of the courts, the petition failing to show that the street was not similarly narrowed on other portions of the street other than opposite plaintiff's building, and that the width of the street may not have been apportioned between pedestrians and the general traffic in strict conformity to the necessities of each; and *held* that the facts alleged in the petition were not sufficient to show that the acts complained of were arbitrary, unreasonable, and oppressive, or to overcome the presumption that the city council had not acted otherwise than legally and in good faith.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

MARCH 11, 1919.

SUIT in equity to enjoin the defendant city from reducing the width of the sidewalk abutting upon plaintiff's property. There was a demurrer to the petition, which was sustained. Plaintiff standing on its petition, judgment was entered dismissing the same. Plaintiff appeals.—*Affirmed.*

Carr, Carr & Evans, for appellant.

H. W. Byers, Reson S. Jones, Cole McMartin, and *C. A. Weaver*, for appellees.

LADD, C. J.—Plaintiff owns Lot 8, Block A, Commissioners' Addition to Fort Des Moines, Iowa, being located at the corner of Seventh Street and Grand Avenue in Des

Moines, with frontage of 132 feet on Grand Avenue and 67 feet on Seventh Street. Seventh Street runs north and south, and Grand Avenue, east and west. The latter street is 66 feet in width. Upon this lot there is an eight-story brick building, with basement, covering the entire lot, used as the home office of the plaintiff corporation, and with offices for rent. The building is alleged to be fitted and furnished as a modern office building, with elevators, appropriate heating apparatus, tiled floors, etc., and the principal entrance thereto is on Grand Avenue, at the center of its frontage thereon. This entrance affords access to the elevator, with two cars, each of which carries to the various floors more than 2,000 persons, during the day. Rooms in the building are being rented, in which from 350 to 400 persons are housed. The portion of Grand Avenue lying between the curbs and used as a roadway for vehicles is 42 feet in width, and on each side of the street, next to the lot line, is a sidewalk 12 feet in width. The city council of Des Moines, on June 5, 1916, passed a resolution changing the width of that portion of the street used as a roadway to 56 feet between the curbs, leaving the portion of the street to be used as a sidewalk on the south side thereof, next the building, but 5 feet in width; and it is proposing to tear up and remove all the sidewalk north of plaintiff's building, where the same fronts Grand Avenue, except 5 feet, adjacent to the lot line, and will do so, if not restrained: and it is alleged that such a walk along the north side of plaintiff's building is wholly inadequate to accommodate persons passing along the street and the large number of inmates of said building and those transacting business within the building during business hours of the day; that such persons would be crowded and jostled, and could not pass others on the walk without stepping therefrom into the street devoted to automobiles and other vehicles; that cutting the sidewalk to 5 feet there will interfere with the means of

egress from and ingress to said building; that it is proposed to permit the parking of automobiles and other vehicles along said sidewalk, rendering it unsafe for pedestrians to make their way along the same; that to reduce the width of the sidewalk, as proposed, will greatly depreciate the value of the building, to plaintiff's irreparable injury; and it is further alleged that, by the resolution widening the carriageway, as proposed, from its present width to that of 56 feet, and reducing the width of the sidewalk, as proposed, the city council is abusing the power vested in it, and acting arbitrarily and unreasonably, and for this reason, said resolution is void; that, unless enjoined, said city will proceed with the work of tearing out and removing said sidewalk, as alleged, and plaintiff will suffer great and irreparable injury, if defendant is permitted to carry out the resolution and make the changes as stated: and plaintiff prayed that defendant be restrained from making the changes proposed. Defendant interposed a general demurrer, which was sustained; and, as plaintiff elected to stand on the ruling, the petition was dismissed.

Section 751 of the Code confers on the city the "power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets * * * within their limits." Code Section 753 provides that:

"They shall have the care, supervision and control of all public highways, streets, avenues, * * * within the city, and shall cause the same to be kept open and in repair and free from nuisances."

Section 792 of the Code declares that:

"Cities shall have power to improve any street, highway, avenue or alley by grading, parking, curbing, paving, graveling, macadamizing and guttering the same or any part thereof, and to provide for the making and reconstruction of such street improvements."

A sidewalk is a part of the street exclusively reserved

for pedestrians, and constructed somewhat differently from other portions of the street, made use of by animals and vehicles generally. It is paved differ-

1. WORDS AND
PHRASES :
sidewalks.

ently so that the public may be better served, by maintaining the two portions of the way separately. Whatever may be the difference, the sidewalk constitutes a part of the street. *Warren v. Henly*, 31 Iowa 31.

As tersely stated in *Wabash R. Co. v. DeHart*, 32 Ind. App. 62 (65 N. E. 192) :

"The word 'sidewalk' has a well-understood meaning. We understand *ex vi termini* that a part of the street is meant. It is the public way, generally somewhat raised, especially intended for pedestrians, and adapted to their use, usually constructed in this country as a part of the street, at or along the side of the part thereof especially designed and constructed for the passage of vehicles and animals, there being often, if not generally, a gutter, also constituting a part of the street, between such parts; and, when the sidewalk is spoken of as being on a specific side of a designated street, it is to be understood to be a part so reserved of that street at or along the specific side of the roadway."

See 1 Elliott on Roads and Streets (3d Ed.) Section 23; *Perry v. Castner*, 124 Iowa 386; *Kohlhof v. City of Chicago*, 192 Ill. 249 (85 Am. St. 335); *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459 (11 N. E. 43).

The particular thing complained of is the narrowing of the sidewalk, set apart for exclusive travel by pedestrians (and consequent widening of that for the passage of vehicles and animals and other traffic) : and appellant contends that, in view of the uses made by its office building, those occupying the same, and others having necessary business therein, will be greatly inconvenienced, and it will result in the depreciation of the property in value; that, in

ordering the change in the sidewalk as described, the city council acted arbitrarily and oppressively; and that, for that reason, the city council should be restrained from carrying out its resolution and making the changes proposed. On the other hand, the appellee contends that the city is given by the statutes, excerpts from which are above quoted, full control over the streets, and that the courts may not interfere with the exercise of the discretion of the city council. It is not questioned that the legislature has plenary

authority over the streets and highways of the state, and may delegate such authority to the cities and towns within which the streets are located. See 1 Elliott on Roads and Streets (3d Ed.), Section 511 *et seq.*;

28 Cyc. 288.

The power to control, improve, and repair the streets is conferred by the statutes above quoted. The manner of so doing, however, is not prescribed. Where the legislature has

authorized the city by resolution or ordinance to order a specified change or improvement, or to enact a specified requirement, there can be no doubt that the courts may not interfere; but where certain powers are conferred on the city council, and the manner of performing these has not

been directed by the legislature, it would seem, according to the consensus of opinion, that the manner or mode of performance ought not to be arbitrary or oppressive; and that, when this is attempted, the courts may interfere, and prevent an unreasonable course on the part of the city in the execution of what it has, through the city council, enacted. *Kemp v. City of Des Moines*, 125 Iowa 640; *Swan v. City of Indianola*, 142 Iowa 731; *Lacy v. City of Oskaloosa*, 143 Iowa 704; *Hedge v. City of Des Moines*, 141 Iowa 4; *Dewey v. City of Des Moines*, 101 Iowa 416; *Des Moines Gas Co.*

2. STATUTES: construction: delegation of authority to cities and towns.

3. MUNICIPAL CORPORATIONS: powers: jurisdiction of courts: arbitrary and oppressive acts of city council.

v. City of Des Moines, 44 Iowa 503; *Town of Cherokee v. S. C. & I. F. T. L. & L. Co.*, 52 Iowa 279; *Miller v. City of Webster City*, 94 Iowa 162; *Town of State Center v. Barenstein*, 66 Iowa 249.

That the wisdom of a legislative act is not a matter of judicial consideration or review is too manifest for argument; but short of this, the courts may inquire into the acts of a city council. In other words,

4. MUNICIPAL CORPORATIONS:
powers: improper mode or manner of performance of powers.

where anything is done by the city in the exercise of the legislative function, in pursuance of the power clearly conferred by the general assembly, the courts will not interfere. They may interfere, however, to prevent the arbitrary and unreasonable or oppressive mode or manner of performing what the city council may, in its legislative discretion, order or require. The distinction pointed out clearly appears from an examination of the authorities cited, and in decisions elsewhere. Had the petition contained allegations of all the facts essential to determine the question, we should

5. MUNICIPAL CORPORATIONS:
powers: arbitrary and unreasonable acts: reducing width of sidewalks.

have been compelled to ascertain whether the actions of the city council were as alleged by appellant. In the control of the streets of a city, the use thereof, and their

width, the extent and kind of travel necessarily are controlling in the determination of the width of the sidewalk and the width of the street between the curbings for general traffic. Thus, in the residence portion of the city there may be room in a street of ordinary width for a parking, a narrow sidewalk may serve the purposes of pedestrians, and a narrow strip in the center be required for general traffic; while in the business portion, a greater width will be required to afford sufficient sidewalk room for pedestrians, and enough space between the curbing for street car lines and general traffic. It is often difficult and almost impos-

sible, with any degree of certainty, to determine how the street shall be apportioned in width to the sidewalk and the space between the curbings, in the congested portion of a city, so as to best serve the public; and no nice distinction should be drawn as a test to embarrass the city council in the discharge of their duties. Manifestly, then, without more information than the petition affords, we are unable to determine what the relative width of the sidewalk and the space between the curbs should be, in front of appellant's building, or whether, in narrowing the sidewalk, the city acted arbitrarily or unreasonably. The mere fact that the narrowing of the sidewalk might interfere with the convenience of those occupying appellant's building or visiting same, or that this might depreciate its value, would not alone warrant the conclusion that the city council, in so ordering, acted arbitrarily or unreasonably. This may have been essential to the best care of the travel on that street. For all that appears in the petition, more room for street car service, the transportation of freight, the passage of automobiles and other vehicles, was required; and widening the way between the curbings to 56 feet did not furnish space for such traffic out of proportion to that left for sidewalk for pedestrians. In other words, the width of the street may have been apportioned between pedestrians and the general traffic in strict conformity to the necessities of each; and for this reason it cannot be said that the city council, whose acts are presumed to have been in good faith, acted unfairly or unreasonably in ordering the narrowing of the sidewalk and the corresponding widening of the space for general traffic. Besides omitting allegations with reference to the kind and extent of traffic on the street, other than along the sidewalk in front of appellant's building, the petition does not indicate whether the sidewalk was narrowed to 5 feet, or about that, on any other portion of the street on either side, or whether the resolution of the city

council related to any portion of the street other than that opposite plaintiff's building. If the sidewalks were narrowed elsewhere along this street, it could hardly be said that the city was acting arbitrarily in such reduction in front of this building, unless other facts rendered it so. The facts alleged in the petition alone were not sufficient to warrant the condemnation of what was done as arbitrary and unreasonable or oppressive, nor even to overcome the presumption that the city council had acted legally and for the best interest of the public, and therefore the demurrer was rightly sustained.—*Affirmed*.

PRESTON, SALINGER, and STEVENS, JJ., concur.

SARAH GRUWELL et al., Appellees, v. ED. GRUWELL et al.,
Appellants.

DEEDS: Construction—Estates and Interests Conveyed—Qualifica-
1 **tion by Habendum Clause.** The granting clause in a deed, "do hereby sell and convey unto Sarah Gruwell and Ben Gruwell," was sufficient in form to have conferred on the grantees full fee title; but, as it contained no words of inheritance, it was subject to the qualification in the habendum clause, providing that the premises were to be held by either grantee surviving, until death of survivor, when title should vest in grantees' legal heirs.

DEEDS: Construction—Estates and Interests Conveyed—Joint Ten-
2 **ancy.** Under Section 2923, Code, 1897, a deed providing, "do hereby sell and convey" to two grantees, the premises to be held by the survivor *undivided* until the death of survivor, when title was to vest in grantees' legal heirs, held not to create a *joint* tenancy in the grantees.

DEEDS: Construction—Rule in Shelley's Case. Rule in Shelley's
3 **Case** discussed; and *held* that, even if a wife, under the provisions of a deed, would, as a survivor of a joint tenancy, have taken the fee, under the Rule in Shelley's Case, she would have taken the fee, not from her husband, her predeceased cotenant, but from the original grantor.

DEEDS: Construction—Estates and Interests Conveyed—Determination of Interests. Where a deed recited that premises were sold and conveyed to grantees, who were husband and wife, to be held by either husband or wife, whichever survived, and to be held by the survivor *undivided* until death of said survivor, and then title to vest in the legal heirs of the grantee, and the husband died before the wife, *held* that title to said premises passed as follows:

1. That, upon his death, the husband died seized of an undivided one-half interest in the property, subject to the life estate of his wife therein, and she was also entitled to take her distributive share, as his widow, of one third in said one-half interest.

2. That, upon the death of the widow, the heirs of the husband were entitled to a one-third interest, and the heirs of the widow were entitled to a two-thirds interest, in the fee title to the entire premises.

Appeal from Wapello District Court.—D. M. ANDERSON,
Judge.

MARCH 11, 1919.

ORIGINALLY, this was a suit in equity to reform a deed. By subsequent amendment, it became a suit to construe a deed and to quiet title. There was a decree for the plaintiffs, and the defendants appeal.—*Reversed.*

W. W. Rankin and *Work & Work*, for appellants.

Gillies & Daugherty, for appellees.

EVANS, J.—The controversy involves the title to 80 acres of land. This land was bought in August, 1903, by Ben and Sarah Gruwell, husband and wife. The original plaintiffs were Ben and Sarah Gruwell and their four children. The original defendants were the eight children of Ben Gruwell by a former marriage. With these defendants were joined the original grantors in the deed of 1903, who claimed no interest in the subject-matter of the controversy. The granting and habendum clauses of the deed in question were as follows:

"Know all men by these presents that we, Sylvester Streeby and wife, Rebecca Streeby, of Wapello County, and state of Iowa, in consideration of the sum of \$2,000.00 in hand paid by Sarah Gruwell and Ben Gruwell, of Wapello County, and state of Iowa, do hereby sell and convey to the said Sarah Gruwell and Ben Gruwell the following described premises situated in Wapello County, and state of Iowa, to wit: [description * * *]. Above premises are to go and be held by either Sarah Gruwell or Ben Gruwell, whichever survives the other, and be held by said survivor undivided until the death of said survivor, when title to said land is to be vested in the legal heirs of above grantees as the law directs."

It was charged in the petition that there was a mistake in the deed, in that it was intended to provide therein an estate for life to Ben and Sarah and to the survivor of them, and that the fee in remainder should go to the common heirs of Ben and Sarah, being their four coplaintiffs, to the exclusion of the other heirs of Ben Gruwell. The defendant heirs answered, denying the alleged mistake and resisting reformation, and alleged their interest in the property in accord with the terms of the deed as written. This was the state of the pleadings for the first two years of the pendency of the suit in the district court. Pending the suit, in May, 1917, Ben Gruwell died, leaving Sarah surviving him. Thereupon, Sarah filed a substituted petition, wherein she abandoned the claim of mistake in the deed and the prayer for reformation, and wherein she alleged herself, as the survivor of her husband, to be the owner in fee simple of the land in question, under and by virtue of the deed as previously set forth. In making this latter contention, she invoked the operation of the Rule in Shelley's Case. Her substituted petition was directed, not only against the defendants, but was presented, also, as a cross-petition against her four coplaintiffs, being her children. The four coplain-

tiffs did not join with her in the substituted petition. On the contrary, they adhered to the original petition, and added a second division or count, as an amendment thereto. By such amendment they claimed under the deed without reformation, and averred that such deed, properly construed, conveyed to them, subject to the life estate of their parents, the remainder in fee simple, they being the only heirs common to both life tenants. As between the plaintiff Sarah and the defendant heirs, an issue of law was made on the question whether the legal effect of the deed under consideration carried the fee simple title to the plaintiff Sarah. On this question, the position of Sarah was hostile not only to the defendant heirs but to the coplaintiff heirs as well. That issue was decided on the demurrer of the plaintiff Sarah to the answer of the defendant heirs. The trial court sustained the demurrer. The defendants standing on their pleading, decree was entered for the plaintiff Sarah, adjudging her to be the owner of the property in fee simple.

No account appears to have been taken, at the trial, of the pleading of the coplaintiff heirs. They were represented by the same counsel as the plaintiff Sarah, and their claims in hostility to the plaintiff Sarah which were put forward in their pleading do not seem to have been pressed upon the attention of the trial court. The inference naturally arises that they were content with the awarding of title to their mother, and that they were willing to await the course of nature, and take title by inheritance under her. After decree, and before this appeal was taken, the plaintiff Sarah died, and her administrator has been substituted in her stead. Her coplaintiffs, being her only heirs, are the only parties interested in sustaining the decree. They cannot sustain it without waiving their previous claims, adverse to their mother. They have not, in fact, pressed their adverse claims in argument here. We shall assume, there-

fore, that the plaintiff heirs elected to stand upon the ground taken by the mother in the district court, and we shall consider the case on that assumption, ignoring the manifest confusion of practice and pleading.

We have already set forth the parts of the deed material for our consideration. It contains a granting and a habendum clause. The granting clause, standing alone,

1. DEEDS: construction: estates and interests conveyed: qualification by habendum clause.

was sufficient in form to have conferred upon the grantees the full fee title. But its effect in this respect was presumptive only, and not conclusive. It contained no words of inheritance, and was, therefore, subject

to qualification by other language contained in the deed. *Husted v. Rollins*, 156 Iowa 546. Qualification is found accordingly in the habendum clause. This habendum clause in terms limited the title of the grantees named in the granting clause.

The argument for the plaintiffs rests upon two propositions: (1) That the life tenants took their life estate, not as tenants in common, but as *joint* tenants, and that Sarah Gruwell, as the survivor of them, took the title of both. (2) That, because the habendum clause purported to pass the remainder in fee to the heirs of the life tenants, therefore the legal effect of the deed, under the Rule in Shelley's Case, was to confer the full legal title upon such life tenants, and upon Sarah as the survivor.

If either of the foregoing propositions prove untenable, the whole structure of the case for plaintiffs falls with it.

First: Can it be said that the habendum clause discloses an intent to create a *joint* tenancy, and not a tenancy in common? Under Section 2923 of the Code, conveyances

2. DEEDS: construction: estates and interests conveyed: joint tenancy.

made to two or more in their own right create a tenancy in common, unless a contrary intent is expressed. Under the granting clause alone, a tenancy in common would be clearly implied. Is there any-

thing in the habendum clause to qualify such implication? It provides:

"Above premises are to go and be held by either Sarah or Ben Gruwell, whichever survives the other, and be held by said survivor undivided until the death of said survivor, when title to said land is to be vested in the legal heirs of above grantees as the law directs."

Not only does the clause in question fail to disclose affirmatively an intent to create a *joint* tenancy, but, by its fair implications, it tends to negative such intent. The provision that the premises "be held by said survivor *undivided* until the death of said survivor" is a finger of warning and restraint against any premature attempt by the heirs of either tenant to enter into the enjoyment of their succession before the death of both. Furthermore, the prominent characteristic of a joint tenancy, as distinguished from a tenancy in common, is that the survivor takes the whole right of property of both. In this case, if Ben Gruwell had only a life estate in the premises, his death terminated his estate, and no right of property survived him to anyone. There was nothing for a surviving joint tenant to take.

Indeed, if we were to find that the deed does disclose an intent to create a joint tenancy, even then the Shelley Rule would not be available to carry the fee title to the plaintiff Sarah. True, the deed, by its terms, provides that the remainder shall go to the heirs of the life tenants after the death of the survivor, "as the law directs."

3. **DEEDS:** construction;
Rule in Shelley's Case.

The most that can be said for this provision is that the property in fee should be divided between the heirs of the cotenants, and in the same proportions which they would receive if they were to take by inheritance from each cotenant. Concede, only for the sake of the argument, that, if all the heirs of each cotenant were common to both coten-

ants, then the Rule in Shelley's Case would apply, and cast the fee title upon the purported life tenants as joint tenants. Yet such is not the fact here. The eight defendants were children of Ben by a former marriage. They were not heirs of Sarah. If Sarah, as the survivor of a joint tenancy, took the fee, she took it, nevertheless, not from her predeceased cotenant, but from the original grantor. *Wood v. Logue*, 167 Iowa 436. By the terms of the deed, as so construed, therefore, in the light of the survivorship of Sarah, it purported to grant to her a life estate, with a remainder not only to her heirs, but also to the heirs of Ben. This last provision would defeat the operation of the Shelley Rule. The compensation or equity which underlies the Shelley Rule, as an offset to the apparent injustice of casting upon the present ancestor the purported remainder granted to future heirs, is that the property or its equivalent will, in ordinary course, reach such future heirs by inheritance. Wherever the purported grant lodges the remainder in a remainderman, in hostility to the line of inheritance, the Rule in Shelley's Case does not operate.

Of course, the real objective of such rule is not to work advantage or disadvantage upon the first or a future taker, but to lodge in the present tenure the power of alienation. For, though a taker take a title in "fee simple forever," inexorable Nature limits his enjoyment to an estate for life; and, in the absence of alienation, the "fee simple forever" finds its successive beneficiaries down the endless line of inheritance.

It will serve no useful purpose to enter into a discussion of the Shelley Rule. It has been fully discussed in our previous cases: *Doyle v. Andis*, 127 Iowa 36, 66; *Kepler v. Larson*, 131 Iowa 438; *Westcott v. Meeker*, 144 Iowa 311; *Westcott v. Binford*, 104 Iowa 645; *Harlan v. Manington*, 152 Iowa 707, 715; *Daniels v. Dingman*, 140 Iowa 386, 387;

Wood v. Logue, 167 Iowa 436; *Sanderson v. Everson*, 93 Neb. 606 (141 N. W. 1025).

Construing the deed under consideration according to its terms, it purports either: (1) To confer a life estate upon both grantees, as tenants in common, for the term of the life of the survivor, with a remainder over to the heirs of Ben, as to the undivided one half, and to the heirs of Sarah, as to the other one half; or (2) to confer upon both grantees, as tenants in common, a life estate during the life of both, and upon the survivor, as exclusive tenant, a life estate for the remaining term of her life, with the remainder over to the heirs of Ben, as to one undivided one half, and to the heirs of Sarah, as to the other undivided one half; or (3) to confer upon both grantees, as tenants in common, a fee title, subject only to a life estate to the survivor in the undivided one half of her predeceased cotenant.

Upon either construction, the result in this case would be the same, and we need not choose between them. If either construction 1 or 2 should be adopted, then the Rule in Shelley's Case would operate to cast the fee title upon the grantees, as tenants in common. If construction 3 be adopted, then the same title is conferred by the express terms of the deed. It is immaterial to the present parties before the court whether their ancestors took title under the operation of the Shelley Rule or under the strict terms of the deed.

It follows that Ben Gruwell died seized of an undivided one half of the property, subject to the life estate of his surviving widow. The surviving widow was also entitled to take her distributive share in such undivided one half. At the time of her death, therefore, Sarah Gruwell was entitled to take an undivided two thirds of the property. The final result is that the twelve heirs of Ben take one third of

4. DEEDS: construction: estates and interests conveyed: determination of interests

the fee title, and the four heirs of Sarah take two thirds thereof. The four plaintiffs take under both grantees, whereas the eight defendants take only under one. The mathematical outcome is that the eight defendants take eight twelfths of one third, or two ninths of the property, and the four plaintiffs take seven ninths thereof.

In holding that the plaintiff Sarah took the full title to the property, the trial court erred. The decree is accordingly—*Reversed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

HAYES PUMP & PLANTER COMPANY, Appellant, v. F. E.
SEARS et al., Appellees.

DEEDS: Passing of Title—Acceptance. An acceptance of a deed
1 by the grantee is as essential to the passing of title as the transfer of the deed.

DEEDS: Construction—When Title Passes—Delivery Before Alter-
2 **ation of Name of Grantee.** The title of the original grantee in a deed, delivered before the alteration of the name of the grantee, is not affected by such alteration.

DEEDS: Construction—Passing of Title—Evidence—Delivery.
3 Where a son had made a contract under which, for the transfer to him of certain real estate, he was to make a payment in cash, and deliver certain personal property, and it was thereafter agreed between him and his mother that she was to take the title to said land, in consideration of her making the necessary cash payment, and extinguishing a debt due to her from him, and, before the deed was delivered in which he was named as the grantee, an objection was made that it should be in her name as grantee, and thereupon, the name of the grantee therein was changed to her name, and thereafter, the deed was delivered and accepted, *held* that the mother took the title to the land, and that judgment creditors of the son acquired no liens on the land.

Appeal from Van Buren District Court.—SENECA CORNELL,
Judge.

MARCH 11, 1919.

SUIT to subject certain land to the payment of three judgments resulted in the dismissal of the petition. The plaintiff appeals.—*Affirmed*.

J. C. Calhoun, for appellant.

Ellsworth Rominger, for appellees.

LADD, C. J.—A written contract was entered into by Lem. Toops and F. E. Sears, by the terms of which the former undertook to convey to the latter 209 acres of land, estimated to be worth \$20,900, subject to a mortgage of \$7,000. In consideration therefor, Sears undertook to transfer a garage building, a hardware building, five automobiles, fixtures, machinery, and tank, all of the estimated value of \$12,890, and to pay \$1,010 when deeds were to be exchanged. It was stipulated that "each party is to make their deeds and Sears his bill of sale, and deposit same in ten days from this date in the Citizens Bank, Milton, Iowa, for delivery by them on March 1, 1915." Toops signed and acknowledged a deed and deposited it in the Citizens Bank of Milton. Sears did likewise, and also deposited a bill of sale, which, with the deed, on the day named, was turned over to Toops. The bank then handed Sears the deed from Toops, when Sears stated that "this deed will have to be made out to my mother, because I am indebted to her, and she is furnishing the money here." Edmundson, the cashier, remarked that "Toops will have to signify whether he wants it to be or not." Toops indicated that he did not care what was done with the deed, and thereupon, Edmundson erased the "F" in the name of F. E. Sears as grantee, and inserted instead the name of "Jennie," the name of the mother. It appears without dispute that Sears was, at that time, indebted to his mother in the sum of \$4,235, and that they

had agreed that she should assume the mortgage on the premises, pay Toops the \$1,010 difference, and take over the property in satisfaction of this indebtedness. Thereafter, on November 18, 1916, this action was begun, to subject the property or some interest therein to the payment of the three judgments against F. E. Sears, one for \$263.80, another for \$42.16, and a third for \$33.35. The indebtedness on which each judgment was rendered accrued long prior to the execution of the contract or deed.

The controversy turns on whether the deed from Toops to F. E. Sears was delivered to the latter before the erasure, or the delivery of the deed was made after the erasure of his first initial and the insertion of the name of his mother, "Jennie." The contract did not exact that the delivery of the deeds was to be made to the bank for the grantees named therein, but merely required that they be deposited with it "for delivery by them on March 1, 1915." It is quite immaterial whether the words "by them on March 1, 1915," be construed to refer to the parties to the contract or to the bank. In either event, the delivery was not to be to the bank, but the instruments were to be left there for delivery by the bank or the parties; and the numerous citations with reference to delivery to a third person, authorized to receive

the instruments, are not in point. The delivery was undertaken by the bank, and the evidence plainly shows, without contradiction, that it was not accepted in the form ten-

1. DEEDS: passing of title: acceptance.

dered. That an acceptance is quite as essential to the passing of title as the transfer of a deed, appears from numerous decisions. See *Sheehy v. Scott*, 128 Iowa 531; *Saunders v. King*, 119 Iowa 291; *Richardson v. Grays*, 85 Iowa 149. The evidence that, when the cashier of the bank un-

2. DEEDS: construction: when title passes: delivery before alteration of name of grantee.

dertook to deliver the deed to F. E. Sears, he refused to accept it, was undisputed; and only after the insertion of the name "Jennie" as grantee was there an acceptance of the deed, and the delivery completed.

The record is without evidence of collusion, especially on the part of grantee. She was affirmatively shown not to have participated in the transfer in any manner other than by entering into an agreement with F. E. Sears to furnish the necessary money to consummate the deal, and to take the land, subject to the \$7,000 mortgage, in satisfaction of an indebtedness of \$4,235, in addition to the money furnished to make the cash payment to Toops. We are of opinion that she thereby acquired complete title to the land, and F. E. Sears retained no interest therein. The trouble with appellant's argument is that it assumes that the deed was to be delivered to the bank, when the language of the contract does not warrant such an inference. Of

3. DEEDS: construction: passing of title: evidence: delivery.

course, if the deed had been delivered prior to its alteration, the title, as it would have been in F. E. Sears, might not have been affected thereby. See *Abbott v. Abbott*, 189

Ill. 488; *Gulf R. Co. v. O'Neal*, 131 Ala. 117 (90 Am. St. 22); *Burgess & Co. v. Blake*, 128 Ala. 105 (86 Am. St. 78); *Gibbs v. Potter*, 166 Ind. 471 (77 N. E. 942). But, as clearly appears, delivery was never effected to F. E. Sears, and therefore the rule of these cases cited has no application. We are of opinion that the court rightly decided that title to the land passed to Jennie E. Sears, and its decree dismissing plaintiff's petition is—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

J. CHRIS JENSEN et al., Appellants, v. L. ZURMUEHLEN,
Mayor, et al., Appellees.

MUNICIPAL CORPORATIONS: Municipal Water Plant—Taxation.

- 1 Under Sections 724, 747-a, 748, and 894, Subdiv. 5, Code Supplement, 1913, and Sections 749, 750, Code, 1897, the duty and power of the waterworks trustees is not alone confined to the fixing of rental rates, but also extends to the estimating the deficit, if any, to be provided for by the tax; and upon the performance of this duty by the trustees, the city council is obliged to levy the tax therefor, provided the trustees have not transcended the provisions of the statutes; and this obligation of the city and its agencies is not optional nor discretionary, but is mandatory, that a sufficient sum total be provided for the maintenance of the plant.

MUNICIPAL CORPORATIONS: Municipal Water Plant—Taxation

- 2 —**Levy to Produce Surplus.** The allegations of answer that the levy sought to be made in a suit of waterworks trustees against a city council would only increase a surplus held good on demurrer, as trustees have no statutory duty to accumulate a surplus.

Appeal from Pottawattamie District Court.—SHELBY CULLISON, Judge.

MARCH 11, 1919.

ACTION of mandamus brought against the defendants as city council of Council Bluffs, by the plaintiffs as the waterworks trustees of said city. The petition was dismissed by the district court, and plaintiffs have appealed.—*Affirmed.*

W. H. Killpack, for appellants.

Tinley, Mitchell, Pryor & Ross, for appellees.

EVANS, J.—Plaintiffs' action is predicated upon Chapter 5 of Title V of the Code and Supplement. This chapter comprises Sections 742 to 750, inclusive. It authorizes cities

of the first class, upon a majority vote of the electors, to erect or purchase waterworks, and to issue bonds therefor. Among the general powers conferred by Chapter 4 of said Title V upon cities and towns, Section 724, Code Supplement, 1913, specifies the power to assess water rates and rentals, and to levy a tax for the maintenance and operation of waterworks.

Section 894 (Sub. 5), Code Supplement, 1913, provides for a special tax, as follows:

"A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing waterworks owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of construction, renewal, repair or extension of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy."

Section 747-a, Code Supplement, 1913, provided that the waterworks so purchased or erected, pursuant to Chapter 5, "shall be managed and operated by a board of waterworks trustees." These are to be three in number, and are to be appointed by the mayor, for fixed terms of six years.

Section 748, Code Supplement, 1913, is as follows:

"The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employees as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employees as they may deem proper, good and suf-

ficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

Code Section 749 is as follows:

"The said board of waterworks trustees shall from time to time fix the water rentals or rates to be charged for the furnishing of water, and such rates shall be sufficient, together with the proceeds of the five-mill water levy and the sinking fund levy of two mills, for the maintenance and operation of such works, the proper and necessary extension thereof, for all repairs, and for the payment of the purchase money or cost, principal and interest, incurred in the purchase or erection of such works, as the same falls due, according to the tenor of the mortgage and bonds given to secure the payment of such purchase price or cost. The said board of waterworks trustees shall make out and file in the office of the city clerk quarterly statements, giving full and complete reports of the receipts and disbursements handled and disbursed by them in the administration of

their trust; such reports to be filed on the second Monday of January, April, July and October for the quarters preceding the first days of said months. Such reports shall be audited by the board of public works of such city. In the event, however, that said city may not have a board of public works, such reports shall be audited by the city council."

The plaintiffs, as trustees, certified to the defendants, as a city council, the necessity for the five-mill levy, in addition to the proceeds of rates and rentals, for the purpose of meeting the operating expenses and the maturing interest. The council refused to make such levy, either at the rate of five mills or at any lower rate, on the ground that the proceeds of the rates and rentals long since adopted, and in force and then continuing, were "sufficient" to meet all the current expense of operation and all the maturing obligations. In their answer herein, the defendants pleaded affirmatively the facts in support of such contention. These were, in substance, that the sum total of rates collected and the five-mill tax greatly exceeded any contemplated expenditure, and that excessive collection had already resulted in a large surplus; that the proceeds of the rates in force and in course of collection would meet all the obligations of the current year, and leave a surplus of \$60,000. Detailed figures of receipts and expenses were pleaded. Plaintiffs demurred to this answer. The demurrer being overruled, they elected to stand.

This reference to the pleadings foreshadows the point which we deem decisive, although it has not been argued by plaintiffs. The arguments disclose, also, that the differences of view between the contending parties are more numerous than the decisive point herein. Broadly stated, the contention for the plaintiffs is that the duty (and therefore the power) of estimating the current cost, and of meeting such cost by fixing the rental rates and by estimating the de-

iciency to be raised by taxation within the five-mill limit, is cast upon the trustees; that their determination, so made and certified, is conclusive on the council. For defendants, it is contended that the power of discretion conferred upon the board of trustees is confined to the fixing of rental rates; that the power conferred by Section 894 to make a five-mill levy is permissive only; that discretion is thereby conferred on someone; that such discretion is necessarily so conferred upon the city council as the only body representative of the city to which the power of taxation can be delegated by the legislature. We are quite clear, however, that the controversy at this point does not fairly involve the question whether the trustees may exercise the taxing power.

In *Martin-Strelau Co. v. City of Dubuque*, 149 Iowa 1, we construed these statutes, and held, in effect, that they cast upon the trustees the duty and the power, not only to fix the rental rates, but also to ascertain or estimate the deficiency to be provided for by the tax. Such was the implication, also, in *J. W. Edgerly & Co. v. City of Ottumwa*, 174 Iowa 205. The statute provides two sources of income: (1) Rental rates; (2) tax.

It is mandatory that the sum total to be drawn from both sources shall be "sufficient" for the maintenance of the plant. If the power of judgment and discretion be conferred

upon the trustee as to one source and upon the councilman as to the other source, to which of the two shall the mandate speak?

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plant: taxation.

If the sum total from both sources be not "sufficient," who is in default? Each may charge the deficiency to the paring of the other; and who shall declare judgment between them? Clearly, the statute lays its mandate upon the trustees to so provide that the sum total of proceeds from the two sources shall be "sufficient." It logically follows that their power of judgment and discretion over these two sources must be as broad as the mandate.

This duty of judgment and ascertainment having been performed by the trustees, it becomes a guide to the city council in the performance of its duty as to the levy, and is obligatory upon it as such, provided always that the trustees themselves have not transcended the statute. The underlying idea of the statute is that, when the city has once committed itself to the purchase of waterworks, its performance of its undertaking becomes obligatory. Performance is not optional or discretionary on the part of the city or its agencies. The plan of performance is set forth in the statute. Though the levy of the tax is permissive, under Section 894, it is also mandatory, under Section 749. The statutory plan of performance must be followed. This plan creates a trusteeship, to manage the plant and its finances. This trusteeship bears some analogy to a receivership of a private corporation. The possession and management of the plant bear some analogy, also, to the sequestration and *custodia legis* of private property. A real trust is created which holds the physical property and the funds, above the mere discretion of the city or its council. The execution of this trust is entirely consistent with the recognition of the ultimate right and present interest of the city in the trust property.

With this analysis of the statute, we turn to the affirmative allegations of the answer already referred to above. From these it appears that the rental rates now and for a long time past put in effect by the trustees will produce a revenue for the current year above \$143,000; that a large surplus has already been accumulated by excessive collections; that the sum total of rentals, plus the surplus on hand, will fully meet all maturing obligations and still leave an unexpended balance of \$60,000 on hand. This unexpended balance or surplus has no reference to the sinking fund provided for by the two-mill levy under Section 742. This two-mill levy for a sinking fund has been regularly made, and no controversy over it is presented herein.

It appears from the answer that a five-mill levy would produce \$26,000; that, if it were made, its effect would be only to increase the needless surplus to a total of \$86,000.

2 MUNICIPAL COR-
PORATIONS: mu-
nicipal water
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levy to pro-
duce surplus.

Instead of making an issue of fact upon these allegations of the answer, the trustees admitted the same by demurring thereto; and it is upon their demurrer that they now

stand, presenting to us a pure question of law. As a matter of law, we think the facts thus pleaded and admitted presented a good defense. The power conferred by the statute upon the trustees is commensurate with the duty laid upon them. They have statutory power to do their statutory duty. When they reach the full limit of duty performed, they will likewise reach the full limit of power conferred. As a matter of law, they were under no statutory duty to accumulate a surplus, as such.

If an issue of fact had been made upon the allegations of the answer, other considerations would enter the discussion. It is to be granted that the duties of the trustees must have some flexibility and elasticity. We do not hold that the trustees are required to estimate accurately, in advance, the exact amount of the total proceeds to be raised, and that they shall be deemed to transcend their authority when such exact amount is exceeded to any extent. We recognize as a practical fact that only approximate estimates are possible. We recognize, also, that practical wisdom in the performance of such duty would require a margin of safety in the estimate. Reasonable approximation is all that can be required, even though it result in an unexpended balance of some amount. But this consideration applies only to a question of fact, and not to a mere question of law. What would be a reasonable margin of safety in a given case would ordinarily be a question of fact, which should be resolved with liberality in favor of the estimate of the trustees. A working balance of some reasonable amount might, as a matter

of fact, be deemed a necessity to the practical performance of their duty by the trustees. These are questions which we do not pass upon by our holding on this demurrer. But they are foreclosed herein by the admissions inherent in such demurrer. For the reason indicated, the judgment entered below is—*Affirmed*.

All the justices concur.

CHARLES H. JONES, Administrator, Appellant, v. CITY OF FORT DODGE et al., Appellees.

MUNICIPAL CORPORATIONS: Streets—Obstructions—Abutting

- 1 **Property Owners.** Abutting property owners have the right, for appropriate purposes, to make reasonable temporary obstructions of the streets.

MUNICIPAL CORPORATIONS: Streets—Obstruction by Housing

- 2 **Over Sidewalk.** The placing of housing over the sidewalk in front of a building by the abutting owner while he is reconstructing the building, where no other part of the street other than in front of the building is used, and where it is, in effect, a proper barricade, is not unlawful, and does not constitute a nuisance or negligence, either on his part or on the part of the city.

NEGLIGENCE: Proximate Cause—Automobiles. Where a boy who

- 3 was on the street was, on account of the construction of housing constructed over the sidewalk, struck and injured by an automobile which was being negligently operated, held that the negligence of the driver of the automobile, and not the housing, was the proximate cause of the boy's injury.

Appeal from Webster District Court.—G. D. THOMPSON, Judge.

MARCH 11, 1919.

ACTION for damages for the wrongful death of plaintiff's decedent. At the close of the evidence, the trial court

directed a verdict for the defendant. The plaintiff appeals.
—*Affirmed.*

Healy & Thomas, for appellant.

Mitchell & Files, Healy & Faville, and *Kenyon, Kelleher, Price & Hanson*, for appellees.

EVANS, J.—On July 23, 1916, the decedent, Charles Jones, a boy seven years of age, was killed by collision with an automobile on Central Avenue in the city of Fort Dodge. While the boy was passing eastward along such avenue, he was run down unjustifiably by the driver of the automobile in question, and sustained injuries from which he immediately died. The driver of the automobile is not made a defendant herein. So far as appears from the record, he was never apprehended. The defendants named are the city of Fort Dodge, J. B. Butler, the owner of property abutting upon said street, and Zitterell, who was bound to Butler by contract, either as an employee or as a contractor. The alleged liability of these defendants is predicated by the plaintiff upon the fact that Butler was engaged, through Zitterell, in the repair of a building abutting upon the street, and for such purpose had cut off the sidewalk from travel, and had thereby driven the pedestrian travel into the street between the curb lines, and that this was an unlawful obstruction of the street, and created a nuisance, and that the defendant city was negligent in permitting it. The boy was walking in the street opposite the Butler front, at the time the automobile ran over him. The defendants filed separate answers, each denying liability. The defendant city denied the alleged negligence, and further denied that the acts charged against it, even if wrongful, were a proximate cause of the accident.

To go into further detail, it appears that, in February, 1916, the Butler building had been partially destroyed by fire. Only its walls were left standing, and these were a

menace to passing travel. The city authorities immediately stopped travel in that vicinity, by barricading the sidewalk and thereby withdrawing it from the use of the public. Central Avenue is an east and west paved street, and one of the main streets in the city. It is 75 feet wide, with 12-foot sidewalks on either side, leaving 51 feet as a traveling space for vehicles, from curb to curb. The street railway runs along its center line. In April, 1916, the property owner began to rebuild. For that purpose, he substituted for the barricade upon the sidewalk a complete housing, enclosed, and 8 or 10 feet high. The width of this housing was the full width of the sidewalk, and no more. It extended for 40 feet, being the frontal dimension of the Butler property. The street was otherwise free from obstruction, there being no material piled thereon, to obstruct the travel of vehicles. This left an unobstructed street 63 feet in width, including the sidewalk on the south side. Immediately preceding the accident, the boy, with his companion, was coming from the west, and was deflected into the street by the housing in question. At that time, there were no vehicles upon the street, except the automobile in question, and no pedestrians except the boy and his companion. There was a street car within a short distance. The automobile was coming from the east. The boy and the automobile were close to the curb at the time of the accident. It occurred at a point midway between the east and the west end of the housing in question. There is no suggestion in the record of any justification or excuse for the accident, so far as the automobile driver was concerned.

Considering first the alleged liability of the city, it is claimed by plaintiff that the housing which cut off the sidewalk travel was an unlawful obstruction of the street and

1. MUNICIPAL CORPORATIONS: streets: obstructions: abutting property owners. a nuisance, and that the city negligently tolerated the same. The obstruction was not necessarily a nuisance nor illegal. It is well settled that abutting property owners have

a right to a reasonable temporary obstruction of the street for appropriate purposes. In this case, the menace of falling walls imposed upon the city the imperative duty to cut off

2. MUNICIPAL COR-
PORATIONS:
streets: ob-
struction by
housing over
sidewalk.

pedestrian travel from the near vicinity. It performed that duty by a temporary barricade. It performed it later by permitting the property owner to erect the substantial housing already referred to. The city had an ordinance whereby it was provided that, for the purpose of improvement of his property, a property owner might have the right to obstruct the abutting street to the extent of one half its width, and for a period of time not exceeding four months, with a right in the city council to grant an extension of such time. The procedure provided whereby a property owner might avail himself of this permission in the ordinance was that he should file an application therefor with the city council, which should be passed upon by resolution, and that an appropriate bond should be required of the property owner. This procedure was not followed by Butler. It is contended, therefore, by the plaintiff that Butler's occupation of the street was unlawful, and that the acquiescence of the city in its unlawful occupation was negligence for which the city is liable. We see no merit to the point. In the first place, Butler was not occupying the street. He had piled no material upon the street. So far as his housing over the sidewalk was concerned, it was a mere substitute, and a safer one, for the barricade which was maintained by the city for the protection of pedestrians. The city had already withdrawn that part of the sidewalk from public use, and had not restored it. It was bound to maintain its barricade as long as the danger continued, and we can see no breach of duty on its part in adopting the housing of Butler as an appropriate performance of its own duty. Even if it be said that the failure to observe formalities in the matter of an application and a resolution granting the same rendered

the conduct of Butler in any respect illegal, yet it was an illegality that sustained no relation whatever to the causes which operated to the injury of the decedent. We think it clear that no negligence is shown on the part of the city which is in any manner relevant to plaintiff's cause of action.

It naturally follows, also, that the acts of the defendant city, such as they were, were remote, and not proximate, in their causal relation to the collision which caused the death of the decedent. At the time the boy

3. NEGLIGENCE:
proximate cause: automobiles. passed from the sidewalk to the pavement for the purpose of passing along the housing in question, there was no danger apparent, and none actually existed, so far as the condition of the street was concerned. It is alleged in the petition that it was a crowded thoroughfare. But there was neither man nor vehicle upon it at this time. It would be difficult to conceive of a safer situation presented upon a public street. The sudden appearance of the automobile and the disregard of its driver of the safety of the decedent were clearly an active and efficient cause of the injury. It was the intervention of an independent event, involving human responsibility. Except for this intervening event, the accident could not have happened. It will serve no useful purpose to enter upon a discussion of the question of proximate cause. The question is often a difficult one, and the books are full of discussion thereon. We think, however, that the question, as presented herein, is not a doubtful one, and that the act of the automobile driver must be deemed the independent and efficient and proximate cause of the accident, and that the defendant city is in no manner responsible therefor.

If the city is not liable, it necessarily follows that Butler is not; because there is no claim of any special and independent negligence on his part. The only claim is that he participated with the city in its negligence in unlawfully

obstructing the street, or that the city participated with him in the unlawful obstruction of the same. For the same reason, therefore, we find that he is not liable. This conclusion carries down with it, also, the claim of liability as against the contractor or employee of Butler. We think the trial court ruled properly. The order directing the verdict is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

EL E. LUNDE, Appellee, v. TOWN OF SLATER, Appellant.

TAXATION: Option Contract—Money and Credits—Assessment. An instrument where one party agrees to sell to another an *option* to purchase real estate, and a cash payment is made, and possession of premises, with use and benefit thereof, is given to the party having right to purchase during entire period of contract, with right to elect not to purchase during the time, and to forfeit all payments, and with right to warranty deed when entire price has been paid, construed to be an *option*, and not a contract of sale, and as such, held not assessable for taxes.

TAXATION: Assessment—Board of Review—Sufficiency of Objection. The objection that contract was not assessable as *money and credits*, made before the board of review, raises sufficiently, under Section 1373, Code Supplement, 1913, the question that the contract was an *option* contract, and not taxable.

Appeal from Story District Court.—E. M. McCALL, Judge.

MARCH 11, 1919.

THIS case involves an appeal from the action of the town council of defendant town, sitting as a board of review, in raising the assessment for moneys and credits against appellee \$25,000, on account of a contract which appellee says was an option contract, and not properly assessable as moneys and credits; but appellant contends that it is a contract of sale for the sale of real estate, and

has been so treated by the parties, and is properly assessable, and that the contract was drawn for the purpose of evading taxation. The district court held that the instrument was an option contract, and not, therefore, assessable, and accordingly reduced plaintiff's assessment in the amount that he had been assessed thereon. The defendant appeals. —*Affirmed.*

Bert B. Welty, for appellant.

Lee, Garfield & Coyle, for appellee.

PRESTON, J.—1. Appellant says that the only question is as to whether, under the law, the instrument in question was such an instrument as to be subject to taxation. Appellee cites a number of authorities to the proposition that an option contract is not assessable, and appellant concedes in argument that, if the contract in question is an option contract, then it is not assessable. The contract, executed March 1, 1915, between H. E. Lundé and wife, first parties, to J. E. Sheldahl, second party, is quite lengthy, and we do not deem it necessary to set out all of it. So much thereof as appears to be material is that:

1. TAXATION: option contract: money and credits: assessment.

"First parties agree to sell to the party of the second part * * * an option to purchase certain described real estate, consisting of about 158 acres; in case such option is exercised on the part of second party, he will pay \$31,500; second party will pay first parties \$4,500 on the execution of this agreement, the receipt hereof is acknowledged; second party is hereby placed in possession of said premises and shall have the use and benefit thereof, and shall pay to the first parties the further sum of \$27,000 on or before March, 1920; the second party shall have the entire period of the term of this contract in which to make his election to exercise the right to purchase the said land, and in case he should, at any time, elect not to conclude

the purchase of same, he may remove from the said premises, and give up possession thereof to first parties, and shall be held to forfeit all payments made by him on this contract, as rent for said premises; if any default is made in any part of the payments or agreements mentioned, second party shall have no claim in law or equity against the other, nor to the above-mentioned real estate; if the consideration is paid promptly, at the time or times agreed upon, first parties will, on receiving the said sums of money, as provided in the contract, execute and deliver a good and sufficient warranty deed of said premises to second party."

The evidence bearing upon the questions involved, including the intention of the parties, is, briefly, that plaintiff is the father-in-law of Sheldahl; Sheldahl has tilled the farm, and kept up the fences, since the contract was made, and has paid \$500 additional, and interest, and has occupied and managed the farm, and paid the taxes. The reason given by plaintiff for making the contract was that he was tired of farming. It further appears that plaintiff told the person who drew the contract what the arrangement was, and that the contract was drawn pursuant thereto; that plaintiff was going to give Sheldahl an opportunity to go on the farm, with the privilege of buying it in the future; that, after the details had been stated to witness, he says that the only thing he could figure out of it was an option, and that he drew the option contract accordingly. Plaintiff testifies that Sheldahl has never, at any time, exercised the right to buy this land, or agreed to buy it and pay for it; that there is no other contract or arrangement but the one set out; that he intended that his son-in-law should have the right to take the farm or not take it, at any time within five years; he intended to give him a chance to do that; he never understood he could hold him to pay the purchase price, unless he elected to buy the farm; that he couldn't get the money unless Sheldahl took the land. Shel-

dahl testifies that there was no other agreement or arrangement than the written contract, and that he has never elected to buy the farm; that he has until 1920 to do so; that he paid the \$500 in addition to the amount due, as rent, and that he could apply this on rent if he wished to, and that such was the understanding when he paid it; that he has to pay the \$27,000 if he exercises a right to get a deed. As said, appellant concedes that, if the contract in question is an option contract, it is not assessable. This being so, it leaves the sole question as to whether or not it is an option contract. Appellant's first objection is that the word "option" is used, and that it is thrown in for the purpose, as it contends, of having the contract found to be nonassessable. Their next objection is to the clause giving Sheldahl the entire term of the contract to make his election.

We think a proper construction of the contract is that it is an option. Sheldahl is not compelled to take the property, and he has not elected to do so, and plaintiff has not the right, under the contract, to compel Sheldahl to take the land, if Sheldahl should elect not to do so. Clearly, the parties had a right to contract that Sheldahl should have the full term of the contract, in which to make the election. It may be, and is probably, true that plaintiff expected Sheldahl to take the land at some time during or at the end of the five years, and that Sheldahl expected to take it, but that, because of the war, the scarcity of labor, scarcity of money, inability of Sheldahl to raise the amount of money required to be paid, or any other reason, Sheldahl could not be compelled to take the land unless he so elected, and plaintiff could not compel him to do so. True, Sheldahl might lose some of the money paid, either as rent or interest, but conditions might arise by which he might be compelled to, or he might prefer to, lose something in that way, rather than to elect to carry out his con-

tract. The payment by Sheldahl of \$500 additional does not constitute an election by him to take the land. He would simply stand to lose that much more, if he failed to make the election to take the land, and this amount is not a large sum, as compared with the total purchase price. Appellant's citations on the law of the case are, for the most part, as to rules for construction of contracts, and that the intention of the parties must govern. Numerous authorities are cited by appellee to sustain his proposition that the contract in question is a mere option; that the contract cannot be enforced until Sheldahl has made his election; that the contract is not a contract to sell the property, but gives the privilege to buy at the option of the other party; that it provides only for the right of election of Sheldahl to exercise a privilege, and then only when that privilege has been exercised by acceptance does it become a contract to sell. Among the authorities cited are *Bissell v. Board of Review*, 158 Iowa 38; *Hopwood v. McCausland*, 120 Iowa 218; *In re Assessment of Shields Bros.*, 134 Iowa 559; *Schoonover v. Petcina*, 126 Iowa 261, 262; *Low v. Young*, 158 Iowa 15; *Sheehy v. Scott*, 128 Iowa 551; *Hamburger v. Thomas*, (Tex.) 118 S. W. 770; *Barnes v. Rea*, 219 Pa. 279 (68 Atl. 836); *McGregor v. Ireland*, 86 Kan. 426 (121 Pac. 358); and other cases. We shall not take the time to review these cases, or restate the argument and reasoning therein. For the most part, they sustain the proposition. The case does not fall within the rule announced in *Rampton v. Dobson*, 156 Iowa 315, where it was held that the contract was a binding contract of sale, which plaintiff might have enforced at any time by suit. Neither does the instant case fall within the rule of *Montgomery v. Marshall County*, 152 Iowa 161, where a contract of sale of real property was attempted to be modified for the mere purpose of fraudulently evading taxation.

2. It is next contended by appellant that appellee is

confined to the objection urged before the board of review, and cannot urge new objections on the trial of the case

2. **TAXATION: as-** (citing *Barhydt v. Cross*, 156 Iowa 272).
essment: board
of review: In that case, plaintiff, in making his pro-
sufficiency of
objection. test before the board of review, made no

such claim as he insisted upon on appeal. The record of the board of review here shows that the appellee appeared before the board of review, and gave his reasons why the assessment, as established by the board, should not stand. In addition to this record, three members of the board testified on the trial that plaintiff claimed that the contract was not assessable as moneys and credits. This was not very specific, it is true, but the board understood the nature of plaintiff's complaint. The statute, Code Supplement, 1913, Section 1373, provides that one objecting, may make oral or written complaint to the board, which shall consist of a statement of the errors complained of, with such facts as may lead to their correction. We think the objection was sufficient. *In re Assessment of F. L. & T. Co.*, 155 Iowa 536, 542; *Burns v. McNally*, 90 Iowa 432; *Wahkonsa Inv. Co. v. City of Ft. Dodge*, 125 Iowa 148; *Gibson v. Cooley*, 129 Iowa 529.

The decision of the trial court was right, and it is—
Affirmed.

LADD, C. J., EVANS and SALINGER, JJ., concur.

JOHN J. NEY, Appellant, v. EASTERN IOWA TELEPHONE COMPANY, Appellee.

APPEAL AND ERROR: Law of the Case—Subsequent Trial. The
 1 rule that whatever was decided on the prior appeal is the law
 of the case on the subsequent trial, in no way affects matters
 first put in issue subsequent to the remand.

CORPORATIONS: Employment of Attorney—Ratification of Whole
2 of Stipulation by Ratifying Part. Where a number of the stockholders of the corporation entered into a stipulation under which a certain person was to be elected a director of the company, and a suit then pending was to be prosecuted to a termination, and the employment of an attorney therein was to continue, the action of the stockholders of the company, at a meeting held thereafter, in accepting part of the stipulation by electing said director, held to have ratified the entire stipulation, and constituted a ratification of the employment of said attorney, and supplied any want of original authority in his employment.

CORPORATIONS: Employment of Attorney—Ratification by Making
3 Expenditures in Suit. After the board of directors knew that an attorney was rendering services in a suit purported to be brought for the company, said board authorized a director to investigate and pay for services of a stenographer furnished in said suit, and payment was made by the directors to said stenographer. *Held* to make a question for the jury, in suit by attorney to recover against company for services, as to whether his employment had been ratified.

CORPORATIONS: Employment of Attorney—Notice to Discontinue
4 Appeal as Admission of Authority to Act. The serving of notice on an attorney to discontinue an appeal perfected by him in action purporting to be brought for the company held to make a question for the jury, in suit by attorney to recover against the company for services, as to whether it was an admission that he had authority to act.

APPEAL AND ERROR: Reversal—Proceedings after Reversal. A
5 reversal for directing a verdict decides only that appellant has at least a case for the jury, and does not decide that either party has or has not a case, as a matter of law.

CORPORATIONS: Employment of Attorney—Knowledge of Direct-
6 ors of Rendition of Services as a Ratification. While a corporation cannot be bound by the individual knowledge or action of its board of directors, yet the failure of such board to take any action disavowing the services of an attorney, in a suit purporting to be brought for the company or attempting to stop such litigation, when the board knew for a long time that he was serving as counsel in said suit, presents a jury question, in suit brought against the company for his services, as to whether his services were accepted and his employment ratified.

CORPORATIONS: Employment of Attorney—Records—Evidence.

7 Employment of attorney can be shown to have been authorized by the board of directors, by evidence other than a recorded resolution of said board.

CORPORATIONS: Proceedings of Directors—Special Meetings—No-

8 tice. Proceedings of the board of directors at a special meeting, of which notice has been given, are valid if all the members are present; and, when he has once appeared, the departure of one of the members, who was one of the defendants in the suit in which it was proposed to employ counsel, would not affect the validity of the action of the other members in employing such counsel.

*Appeal from Johnson District Court.—R. P. HOWELL,
Judge.*

MARCH 11, 1919.

THIS is the second appearance of this cause in this court. See 162 Iowa 525. In both trials the defendant claimed that it never employed the plaintiff, and that no employment by the president of its board of directors was authorized. On the first trial, these and other contentions were eliminated; and the court held, as matter of law, that there had been a binding employment, and that the only question for the jury was the amount due for the services. On the second trial, the court directed a verdict against the plaintiff, and thereby held that, as matter of law, defendant had never employed the plaintiff, and had not ratified his employment in any way. Plaintiff appeals from this direction of a verdict against him.—*Reversed and remanded.*

C. S. Ranck and Stephen Bradley, for appellant.

Milton Remley, for appellee.

SALINGER, J.—I. Whatever was decided on the first appeal is the law of this case. And the appellant urges that the pending appeal presents nothing that was not settled by

1. APPEAL AND
ERROR: law of
the case: sub-
sequent trial.

the first appeal. Now this cannot be true as to any matter which was first put in issue subsequent to remand. Some estoppels now relied on by plaintiff were not pleaded until then. Their history is this: A quo warranto suit was brought, to which the defendant was not a party. It involved a controversy

2. CORPORATIONS:
employment of
attorney: rati-
fication of whole
of stipulation
by ratifying
part.

between those who were parties as to which of two sets of men had been elected director. In settlement of this suit, a stipulation was entered into. We will assume, for the sake of argument, the first decision set-

tles that the mere *creation* of this stipulation did not operate as ratification or work an estoppel as to the defendant, because it was found to be fairly questionable whether a sufficient number of stockholders had joined in the stipulation. Whether they did or not is immaterial on this appeal, because the estoppel now relied upon does not stop with the mere making of the stipulation, but rests upon alleged action at the next ensuing stockholders' meeting, upon and in pursuance of said stipulation. It has a provision by which it was, under certain conditions, obligatory to elect one Rapp to be a director. The conditions arose. But in the absence of this stipulation, there was no obligation to elect Rapp. The stockholders did elect him, and thereby accepted the stipulation. By this acceptance, the corporation obtained whatever benefit it was to have Rapp serve as director, and, by accepting the election, Rapp was put to whatever burden it was for him to serve. The governing body of the corporation, the duly convened assembly of its stockholders, cannot so accept part of the stipulation and still leave it open for the corporation to say that the stipulation was not binding upon it. The stockholders' meeting knew, or should have known, what the stipulation upon which it acted contained. Therefore, by accepting part of it, it ratified all. Among other things,

the stipulation contained an express provision that the suit for an accounting brought in the name of the defendant, and upon services in which the claim of the plaintiff rests, should be continued to a termination, and that plaintiff should continue to be the attorney for the plaintiff therein, this defendant. This action of the stockholders' meeting in itself constituted a ratification of the employment of plaintiff in said suit, and supplied any want of original authority.

1-a

Let the employment have been originally never so unauthorized. Let nothing else serve to establish a ratification, and yet another matter, at least, made a fair question for the jury. There is evidence that, after Rapp was elected, and after the board knew that plaintiff was rendering services, Rapp was authorized to pay for services of stenographers furnished in the very suit in which plaintiff was acting, in a suit purporting to be brought by this defendant. The jury could find there was no objection to paying the stenographers, beyond desiring it investigated whether \$40 had not already been paid upon the services. It could find Rapp was authorized to investigate what, if anything, had already been paid, and, after such investigation, to pay what he found had not yet been paid. It is without dispute that he did pay the money of the defendant for those services. We are not saying the jury could not have found that all this was an attempt to buy peace, rather than an acknowledgment that the employment of plaintiff was authorized. We have no occasion to pass on this point at this time, but are abidingly satisfied the jury could find that the direction for Rapp to investigate and pay, and the payment by him, sustained the new plea of estoppel made. See *Woods v. Honey Creek D. & L. Dist.*,

3. CORPORATIONS:
employment of
attorney; ratification by making expenditures in suit.

180 Iowa 159, and cases therein cited; and *Athearn v. Independent Dist.*, 33 Iowa 105.

1-b

In the same case is a notice served on plaintiff to discontinue an appeal perfected by him. To be sure, this too might have been prompted by a desire to minimize trouble.

4. CORPORATIONS:
employment of
attorney: notice
to discontinue
appeal as
admission of
authority to
act.

It may be that, after long silence, it was thought to be more advisable to stop expenditures on the appeal which, by possibility, the district might have to pay for, rather than to remain silent, and rely on the claim that, no matter what expenditures were made, the corporation owed nothing for them, because plaintiff had no right to act for it. But all that was done and was not done raises a question for a jury. And it was a fair jury argument that, if defendant believed it was under no liability for any expenditures because plaintiff had no authority to act, it was unnatural for it to give him formal notice not to act further. This is not saying that one who notifies an attorney to stop proceedings thereby ratifies his employment, on the theory that, where one claims the lawyer has no authority to act, it cannot matter to him how much he does or what expenditures he makes. But reasonable men might act differently in this. While some would rely upon their right to disavow all expenditures because of the want of authority, others might be impelled to at once notify a trespasser to desist. It suffices to say that all these lines of argument fairly make a jury question upon whether what was done and not done is an admission that plaintiff had authority to act.

Without further limitation, some things we have just said would be holding that certain matters constitute a ratification or work an estoppel, as matter of law. There

5. APPEAL AND
ERROR: reversal:
proceedings af-
ter reversal.

was no way of disposing of some of the points without using language susceptible to that construction. But in view of what this appeal presents for our decision, all that we do or can *decide* is that the district court erred in holding that, as matter of law, said matters did not constitute a ratification or an estoppel. We say this because it is necessary to keep it and the underlying reasons for saying it in mind, when passing upon what the first appeal has *decided*. If, on appeal from the *overruling* of a motion to direct verdict as to a given issue, there is a reversal, it is a holding that, as matter of law, such issue was proved or disproved. But where the appeal is from *directing* a verdict,—and, in effect, that is the situation presented in both the first and in this appeal,—then reversal *decides* nothing except that it was error to hold below that there was no question for a jury. Reversal for directing a verdict does not decide whether either party has or has not a case, as matter of law, and decides nothing save that the appellant has at least a case for a jury. *Winnike v. Heyman*, 185 Iowa 114. So we are now deciding, not alone that the decision on the first appeal cannot affect issues raised subsequent to remand, but that, though a matter was passed upon on the first appeal, if that was an appeal from the directing of a verdict against defendant, the decision was nothing more than that the plaintiff had not made a case as matter of law. Keeping this in mind, we are constrained to say plaintiff has the right to go to a jury on matters additional to those we have referred to. A careful analysis of the decision on the first appeal will make clear what these matters are. We shall stop in this opinion with pointing out such as we think are of outstanding importance.

II. While the corporation cannot be bound by the individual knowledge, action, or nonaction of members of its

board of directors, evidence that the board knew, for a long time, plaintiff was serving and continuing to serve, and yet failed to take any action disavowing the services or attempting to stop the litigation, will make it at least a question for a jury whether the services were accepted, and so the employment ratified. In reaching this and other conclusions, we consider testimony which was rejected, but should have been received. See *Campbell v. Park*, 128 Iowa 181.

2-a

While it was found on the first appeal that plaintiff had no competent evidence that his employment was authorized by a formal and duly recorded resolution of the board, made in advance of his employment, and while we think he has still failed to adduce such evidence, we are of opinion that the testimony offered by him tending to show that the board did, in fact, give advance authority for his employment, should have been received. It is one thing to shut out a resolution because it is not competently proved; it is another to hold that one who renders services for a corporation must be held, as matter of law, to have acted without authority, because he cannot produce a proper record book showing a resolution employing him. If that were the rule, corporations could escape all liability for services requested by the board by merely failing to make a record of a resolution. That is not the law. *Selley v. American L. Co.*, 119 Iowa 591; *Zalesky v. Home Ins. Co.*, 102 Iowa 613; *Athearn v. Independent Dist.*, 33 Iowa 105; *Bellmeyer v. Independent Dist.*, 44 Iowa 564.

We hold that, with testimony erroneously excluded received, it was, at the least, a jury question whether or not plaintiff had been duly employed by the board to do what he

8. CORPORATIONS:
proceedings of
directors: spe-
cial meetings:
notice.

did. We do not overlook the claim that the meetings upon the action of which the plaintiff relies were special ones, and that the members were not notified of the meeting.

It appears that four of the five members were present. The jury could find that the fifth one was present, and took his departure when the matter of employing counsel was taken up. Of course, failure to give notice was not material, if all the members appeared without it. And, once appearing, the departure of one who was to be the defendant in the very suit for which it was proposed to employ counsel could not nullify the action of the four who remained. And it is, to say the least, a serious question whether, if a majority be present, its action is ever invalidated because there was failure to give notice of the meeting to one who, if notified and present, would be sure to be opposed to any action of the majority because such action might be injurious to him personally. See *Rafferty v. Town Council of Clermont*, 180 Iowa 1391.

III. We think that, at the least, it was a fair question for the jury whether the manager, Luse, employed plaintiff, or with knowledge acquiesced in his services, and whether said manager was acting within his authority as manager, in such employment or acquiescence. This might make it immaterial that employment or ratification by the president did not bind the corporation.

IV. The defense that plaintiff should not recover because he acted in bad faith, was for the jury.

V. We think any claim for the services in the quo warranto suit is out of this case: not because of anything decided on the first appeal, but because there is a concession in the record that plaintiff is making no claim for those services.

For the reasons stated, there must be a reversal.—
Reversed and remanded.

LADD, C. J., EVANS and PRESTON, JJ., concur.

IDA M. STEVENS, Administratrix, Appellee, v. PEOPLES SAV-
INGS BANK, Appellee, et al., Appellant.

IDA M. STEVENS, Administratrix, Appellee, v. FARMERS AND
MINERS SAVINGS BANK, Appellee, et al., Appellant.

APPEAL AND ERROR: Perfecting Appeal—Service of Notice on
1 Attorney. Notice of appeal addressed to appellee's attorneys is
sufficient, under Section 4114, Code Supp., 1913, where service
of the same is made upon the attorneys as such, the relation of
client and attorney being such that a notice to the attorney
should be deemed the practical equivalent of actual notice to
the client.

VENUE: Change of Venue—Nonresidence of Codefendant. Defend-
2 ant, who is a proper party to a suit, cannot have the venue
changed to the county of her residence if her codefendant is a
resident of the county where the action is brought. Section
3501, Code, 1897.

PARTIES: Defendants—Bank Deposits—Action Against Bank and
3 Claimant of Deposit. One having the bank passbook and claim-
ing to be the owner of a deposit is a proper party defendant,
under Sections 3462, 3466, Code, 1897, in an action brought
against the bank for said deposit.

EXECUTORS AND ADMINISTRATORS: Appointment—Jurisdic-
4 tion of Court—Residence. Evidence reviewed, and held to sus-
tain finding of trial court that decedent, at the time of his
death, was a resident of the county in which administrator of
his estate was appointed.

EVIDENCE: Res Gestae—Declaration of Ownership of Bank Pass-
5 books. Where, in an action brought by decedent's administra-
tor, for bank deposits made by decedent, against one claiming
ownership thereof under alleged gift from decedent, plaintiff in-
troduced evidence of declarations of the alleged donee inconsis-
tent with her claim of ownership, held that evidence offered by

said claimant of declarations made by her before decedent's death, and while in possession of his bank passbooks, were admissible, (a) as being in the nature of *res gestae*, and (b) as showing the *animus* and intent attending possession, and (c) as rebutting plaintiff's evidence tending to show that claimant had not made such claim during decedent's lifetime.

APPEAL AND ERROR: Review—Exclusion of Evidence—Prejudicial Error. Where evidence was excluded which was admissible, and the court, which tried the case without a jury, based its finding in part upon the absence of such evidence, its exclusion held prejudicial error.

Appeal from Monroe District Court.—SENECA CORNELL, Judge.

MARCH 11, 1919.

CONTROVERSY over the ownership of certain bank deposits, which were represented by passbooks. The deposits in question were made in his lifetime by Grant Buckner, now deceased. The plaintiff is his administratrix, and as such, claims the amount of the deposits. The controversy involves separate deposits in two banks. The plaintiff brought a separate action against each bank, and in each case joined Marie Buckner as a defendant, she being in actual possession of the bank passbooks, and claiming to be the owner thereof and of the deposits represented thereby. By agreement of the parties, the two cases were consolidated and tried together as an action at law, without a jury. Judgment went for the plaintiff, and the defendant appeals.—*Reversed and remanded.*

Malcolm & True and *N. E. Kendall*, for appellant.

McCoy & McCoy and *J. C. Mabry*, for appellee.

EVANS, J.—Prior to September, 1916, Grant Buckner had been a resident of Monroe County for 18 years. During that period of time, he had been in the continuous employment of the Monroe Hotel as its cook. He made his

home at the hotel. During that period of time, he was not the head of a family. He had been married, but his wife had been divorced from him, and had obtained the custody of their only child, a daughter. He was a colored man. He had formerly lived at Oskaloosa. He had a sister resident there. Shortly prior to September, 1916, he became afflicted with an ailment which proved to be quick consumption. He was advised by his physician to take a rest, and to seek recuperation. He once contemplated going to a sanitarium. He finally decided to go to the home of his sister at Oskaloosa. He went there about September 1, 1916, and died there on October 19th. His belongings were few, and in the main were portable in a trunk or suit case which he carried with him to Oskaloosa. He left a few items of property, including a bedstead, at Albia. He had an understanding with his employer that his place would be kept open for his return, in case of improved health. He had two bank passbooks, one of which showed a deposit of \$713 in the Peoples Savings Bank, and the other showed a deposit of \$629 in the Farmers and Miners Savings Bank. The banks respectively made no defense against these deposit claims. They admit their liability respectively to the proper holder of the passbooks. It is the claim of Marie Buckner, defendant, that the decedent gave to her these passbooks and the funds represented thereby, a few days before his death. The real controversy is over the ownership of these passbooks. Each bank asks, in effect, that the plaintiff, as administratrix, and the defendant Marie Buckner, as alleged donee, shall interplead, and that the question of such ownership may be adjudicated, so that the banks may be protected by such adjudications.

I. The appellees filed a motion to dismiss the appeal for want of jurisdiction. The ground of attack is that the notice of appeal was not addressed to the plaintiff appellee.

1. APPEAL AND
ERROR:
perfecting
appeal:
service of
notice on
attorney.

The notice of appeal was in the following form:

"In the District Court of Monroe County, Iowa.

"Ida M. Stevens, Administratrix, Plaintiff, v. Peoples Savings Bank and Marie Buckner, Defendants.

"Ida M. Stevens, Administratrix, Plaintiff, v. Farmers and Miners Savings Bank and Marie Buckner, Defendants.

"Notice of Appeal

"To J. C. Mabry and McCoy & McCoy, Attorneys for the Plaintiff, and R. U. Woodcock, Clerk of the District Court of Monroe County, Iowa.

"You are hereby notified that the defendant, Marie Buckner, has appealed from the order and judgment of the district court entered in the above-entitled causes on October 11, 1917, in favor of the plaintiff, to the Supreme Court, and that said appeal will be heard and determined at the January term of said court for the year 1918.

"Malcolm & True, N. E. Kendall,

"Attorneys for said defendant.

"We hereby accept due and legal service of the foregoing notice of appeal this October 12th, 1917.

"McCoy & McCoy and J. C. Mabry,

"Attorneys for plaintiff.

"R. U. Woodcock, Clerk of the District Court."

It will be noted that this notice was not addressed to the plaintiff, but was addressed to her attorneys, as such. We have frequently held that a notice should be addressed to the person for whom it is intended. See *In re Estate of Anderson*, 125 Iowa 670; *Steele v. Murry*, 80 Iowa 336.

Section 4114 of the Code provides:

"An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any

attorney who appeared for him in the case in the court below."

This section deals with the matter of *service* of the notice, rather than with its requisite form or contents. If this notice had been addressed to the plaintiff, it could undoubtedly have been properly served upon plaintiff's attorneys. Is it a fatal defect in the notice that it was addressed to the plaintiff's attorneys as such? There is a certain trend indicated in our past holdings which invites the argument made by the appellees against the validity of this notice. No case, however, has actually gone thus far. To hold the notice fatally defective in this case would be to take a step farther than we have gone heretofore. To so hold would be exceedingly technical. The notice as drawn unequivocally discloses an intent to notify the plaintiff, through her attorneys as such, that she has appealed. In *Bloom v. Sioux City Traction Co.*, 148 Iowa 452, we held that it was not a fatal defect in a notice of appeal that it was not addressed to the clerk of the district court. It was actually served upon him, and we held this to be sufficient. This was put upon the ground of the want of interest on the part of the clerk; but it was, nevertheless, a qualification of the broad proposition that the failure to address the notice to the party served is necessarily fatal to the validity of the notice. In *Pilkington v. Potwin*, 163 Iowa 86, 93, there was a failure to address the notice to the defendant, I. A. Potwin, and a failure also to address the same to his attorneys as such. Neither was there any acceptance of service by the attorneys as such. On the contrary, the attorneys accepted service as such for another defendant only. Our holding in that case, therefore, does not reach the case at bar. In *Sleeper v. Killion*, 166 Iowa 205, the validity of an original notice was involved. It was actually served upon two minors. It was not addressed to them. It did not indicate in any manner that they were parties to the suit entitled at the head of the notice. Neither did

it indicate in any manner that they had any interest in such suit, nor that any interest of theirs was under attack. It was held that the notice was fatally defective, and conferred no jurisdiction over the minors. It will be seen that the holding in that case dealt with substance, and not mere form. In the case of *Pilkington v. Potwin*, the opinion lays some stress upon the fact that the notice had been addressed neither to I. A. Potwin nor to his attorneys as such, and that there had been no purported service upon his attorneys as such.

We reach the conclusion that, in the notice before us, there was no room for mistake or doubt as to the real purport of the alleged notice of appeal, and that it should be held sufficient to address a notice of the appeal to the attorneys of the appellees as such, at least in any case where the service of notice of appeal is made upon the attorneys as such.

It should be noted, also, that a service of such notice upon the attorneys of the appellee is not a substituted service, in the ordinary sense, such as a leaving of copy at the place of residence with a member of the family; nor is it a constructive service, in the sense that a publication of a notice is. The relations of a litigant to his attorneys in the litigation are so close and active, and the responsibility of an attorney to his client in such a case is so definite and quasi official in its nature, that a notice to the attorney should be deemed the practical equivalent of actual notice to the client. We reach the conclusion that the motion to dismiss for want of jurisdiction should be denied.

II. The defendant Marie Buckner filed a motion for a change of place of trial from Monroe County to Mahaska County, on the ground that this was a personal action against her, that she was a resident of Mahaska County, and that there was no warrant for bringing a personal action

2. VENUE: change
of venue: non-
residence of
codefendant.

against her in Monroe County. This motion was overruled. Code Section 3501 provides that personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside. In each of the

cases before us, the defendant bank did reside in Monroe County. If, therefore, Marie Buckner was a proper party defendant in an action brought against a resident of Monroe County, she was not entitled to a change of venue, under Code Section 3502. Was she a proper party defendant?

3. PARTIES: defendants: bank deposits: action against bank and claimant of deposit.

Code Section 3462 provides:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided."

Code Section 3466 provides:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, it must order them to be brought in."

On the face of the foregoing sections of the statute, they seem to answer our question in the affirmative. It is urged by the appellant that these sections are applicable only to equity cases. They doubtless have their most frequent application in equity cases, but their provisions are not confined to equity cases. In *Fowler v. Doyle*, 16 Iowa 534, a case at law, it was held that these sections had special application where a debtor is under an apparent liability to different parties for the same debt. See, also, *Kennedy v. Moore*, 91 Iowa 39; *Barto v. Harrison*, 138 Iowa 413; *Lamkin v. Lamkin*, 177 Iowa 583. We hold

that the motion for a change of venue was properly overruled.

III. The defendant Marie Buckner denied the representative capacity of the plaintiff as the legally appointed administratrix of the estate of Grant Buckner. Her ground

4. EXECUTORS AND ADMINISTRATORS: appointment: jurisdiction of court: residence. of attack upon this appointment is that Grant Buckner, at the time of his death, was a resident of Mahaska County, and there was no jurisdiction in the district court of

Monroe County to appoint an administrator for his estate. Whether the legality of such appointment can be thus attacked collaterally in this suit, we will not now stop to inquire. The question was litigated below as a question of fact, and disposed of accordingly by a finding of the court that Grant Buckner, at the time of his death, had not lost his domicile in Monroe County. We have read the evidence on this question. It consists, in the main, of alleged declarations made by the deceased himself, during the period of his stay at the home of his sister and shortly prior to his going there. Naturally, this was the only form of evidence available to either party, inasmuch as the deceased had not acquired any property or home of his own in Oska-loosa; nor had he been there long enough to give evidence by conduct (such as voting) of his probable intention. Whether he changed his domicile was a question of intent on his part. Under the evidence, this intent can be found only from his own statements. The evidence is conflicting only in the sense that many witnesses testified on behalf of the defendant to statements made by Buckner indicating that he had made a permanent change; and as many, perhaps, testified on behalf of the plaintiff to statements by him indicating otherwise. All the witnesses may have testified truthfully. Indeed, whether Buckner intended to return to Albia quite clearly depended upon whether he believed he would regain his health, so as to be able to resume

his work. In such case, he doubtless intended to return to his old job, which was kept open for him. On the other hand, if he had resigned himself to hopelessness as to his chances of life, he doubtless intended to remain with his sister, and to die in her home.

That he should be hopeful one day and hopeless the next is not an unusual experience for the sick. A consumptive is said to be usually more courageous than despondent. In any event, it may be true that Buckner may have made all these conflicting declarations of intention, precisely as testified to by opposing witnesses. The mere fact that he had come to the home of his sister either to recuperate or to die is not very persuasive of a change of domicile. We are impressed, also, that the question of his intent to change his domicile was governed more by his plans in the event of his recovery than by the fact, if such, that he had yielded hope, and had chosen to die in his sister's home. The facts that he had left his employment at Albia, not strictly of choice, but under the pressure of necessity, and that he had stipulated for his old job upon his return, and that he had left with his employer some of his personal effects, are circumstances which tend to negative an intent to change his domicile. Taking the evidence in all its circumstances, we think the finding of the trial court upon that issue has the support of a fair preponderance of the evidence.

IV. On the issue of the ownership of the passbooks, and on the question whether Buckner had made a gift of the same to his sister, the evidence on behalf of the alleged donee

5. EVIDENCE: re:
posed: decla-
ration of own-
ership of bank
passbooks.

consisted largely of declarations made by the decedent to various witnesses that he had made such gift. There was also direct evidence of the making of the gift and the delivery thereof. This evidence was given

by the daughter of the donee. The evidence on behalf of the plaintiff consisted, also, in part of declarations by the donor,

and also of declarations and conduct of the alleged donee after the date of the alleged gift, and before and after the death of the donor, which declarations and conduct were inconsistent with her present claims. Briefly, the testimony on behalf of the plaintiff in resistance to the claim of gift tended to show that such claim was an afterthought, and made for the first time after the death of the decedent. At the close of plaintiff's evidence to such effect, the defendant attempted and offered to prove by various witnesses the declarations of herself while in possession of the passbooks, and before the death of the decedent, to the effect that they belonged to her, and that the decedent had given them to her. Objection was made to this line of testimony as being self-serving, incompetent, and immaterial, and these objections were sustained. It is now urged that the rulings of the trial court at this point were erroneous.

It is undoubtedly true that it was open to the defendant to prove her own declarations made while in possession of the property, explanatory of such possession and of the nature of her right thereto. This line of evidence is in the nature of *res gestae*, and is admissible as showing the animus and intent which attend the possession. Such evidence does not necessarily constitute proof of the fact thus claimed; neither is it permissible to the claimant to prove the origin of her alleged title by such declarations. We think that some of the evidence offered was admissible under this rule. It was admissible, also, for another reason. The evidence on behalf of the plaintiff tended to show that the claim now made by the defendant had never been made by her during the lifetime of the decedent, nor for some time thereafter. Such fact, if true, was a very material and proper fact for the plaintiff to prove and to put forward as a circumstance negating strongly the good faith of the present claim. The defendant was entitled to rebut such alleged fact and the inferences arising therefrom. The

evidence offered was admissible for that purpose; not for the purpose of establishing affirmatively any element of her own case, but for the purpose only of negating the damaging circumstance of her silence during the life of the alleged donor. The importance of this circumstance found emphasis in the finding of the trial court, wherein it was said:

"And when the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."

The foregoing pronouncement is in accord with the authorities. It clearly indicates, however, that it was highly material to the alleged donee to show that she claimed to be such while the donor was yet alive. On the question of the admissibility of this evidence, see the following authorities: *Thomas' Admr. v. Lewis*, 89 Va. 1; *Martin v. Martin*, 174 Ill. 371; *Harris v. Cable*, 113 Mich. 192; 12 R. C. L. 971; 20 Cyc. 1223.

It is urged by the appellee, however, that the objection to this evidence was properly sustained, because it was not offered as rebuttal evidence. This claim is based upon a statement of counsel for the defendant, at the time of the offer, as follows:

"We want to recall Mrs. Wooten. It is a matter of original evidence."

The evidence was, in fact, offered after the close of plaintiff's evidence. The materiality of it was emphasized by the testimony on behalf of plaintiff already given. The evidence offered partook of the character both of original evidence and of rebuttal evidence. In so far as it was *res gestae*, it was original evidence. In so far as it rebutted the inference that the defendant's claim was an afterthought, of recent origin, it was rebutting evidence. There was no objection made to the offer on the ground that it was out of

time or place, or that it was not original, or not rebuttal. We have considered much whether, in view of the trial to the court without a jury, the rulings could be deemed prejudicial. It must, in the first instance, be presumed such; and, as already indicated, this presumption is strongly confirmed by the fact that the findings of the court were in part based upon the absence of such evidence. We are constrained to say, therefore, that the exclusion of the evidence was error and prejudicial. For that reason, the judgment below is reversed, and a new trial ordered.—*Reversed and remanded.*

LADD, C. J., SALINGER and STEVENS, JJ., concur.

SENA G. DOLPH, Appellee, v. AMANDA WORTMAN et al., Appellants; MARTICIA V. DOLPH, Intervener.

GIFTS: Failure to Consummate—Mistake—Effect. A failure to ¹ *fully* consummate an intended gift *inter vivos*, during the lifetime of the donor, even though such failure is the result of a manifest mistake on the part of the donor, absolutely nullifies the intended gift.

PRINCIPLE APPLIED: A grantor, purely out of love and affection, intended to make a gift to his brother of Sec. 8, Twp. 71, Range 40, Mills County, Iowa. The deed described the land correctly, except that it gave the range as "42." The grantor never owned any land in Range 42. *Arguendo*, it was conceded that said deed was duly delivered. The grantee was never in possession of the land. After the death of both brothers, the mistake was discovered. *Held*, the gift must fail.

REFORMATION OF INSTRUMENTS: Voluntary Deed. A voluntary deed,—one supported by no consideration other than the affection which the grantor held for his brother, grantee,—may not be reformed or enforced.

PRINCIPLE APPLIED: See No. 1.

ESTOPPEL: Equitable Estoppel—Non-Change of Pleading, Etc. One

3 is not estopped to assert the existence of a fact, when his antagonist (a) has not pleaded an estoppel, (b) has in no wise changed his position, and when the pleadings of the one sought to be estopped have always been consistent with the existence of the fact in question.

DEEDS: Delivery—Conditional Delivery. No legal and effective

4 delivery of a deed exists until the grantor makes such a delivery that it may be said therefrom that he fully and unreservedly intended to irrevocably dispossess himself of all title. So held as to a transaction where grantor, on two occasions, manually handed a deed of gift to the grantee, his brother, with directions to record the deed if he (grantor) did not survive, in one case, a trip to a distant place, and in another case, a severe sickness, the grantor in each case having subsequently, and without controversy with the grantee, repossessed himself of the deed, and having died in possession of the land and of the deed.

Appeal from Mills District Court.—O. D. WHEELER, Judge.

JUNE 27, 1918.

REHEARING DENIED MARCH 12, 1919.

SUIT in partition of lands in the name of A. H. Dolph at the time of his death. By way of cross-petition and petition of intervention, the widow and children of J. H. Dolph alleged that 954 acres of the land had been conveyed to J. H. Dolph, and prayed that title thereto be quieted in them. The plaintiff, as widow of A. H. Dolph, alleged that, if J. H. Dolph acquired said land, this was in fraud of her marital rights. These allegations were put in issue; and, on hearing, the court found that the 954 acres of land were conveyed to J. H. Dolph before the intermarriage of A. H. Dolph and plaintiff, and that this was in fraud of plaintiff's marital rights; and decreed that the plaintiff was entitled to an undivided one half of said land, and the widow and children of J. H. Dolph to the other half. All parties other than plaintiff appeal.—*Reversed.*

Genung & Genung, Tinley, Mitchell, Pryor & Ross, and John Y. Stone, for appellants.

C. E. Dean, Genung & Genung, and Tinley, Mitchell, Pryor & Ross, for appellee.

LADD, J.—I. A. H. Dolph, known herein as Henry, died January 18, 1916, intestate, seized of about 2,000 acres of land, leaving a widow, plaintiff herein, and no descendants. His first wife, to whom he was married in 1857, died in June, 1894, and he was married to plaintiff, a widow, with three children, June 17, 1896. Her right to one half of all the above land except 954 acres is not questioned, nor is the right of defendants and cross-petitioners to share therein, or their respective portions. But it is alleged by cross-petitioners that, on August 28, 1895, Henry made and delivered to his brother, J. H. Dolph, known herein as Hiram, a warranty deed of:

1. Gifts: failure
to consummate:
mistake: effect.

rried in 1857, died in June, 1894, and he was married to plaintiff, a widow, with three children, June 17, 1896. Her right to one

half of all the above land except 954 acres is not questioned, nor is the right of defendants and cross-petitioners to share therein, or their respective portions. But it is alleged by cross-petitioners that, on August 28, 1895, Henry made and delivered to his brother, J. H. Dolph, known herein as Hiram, a warranty deed of:

"All of Section 8 and the Northeast Quarter and the North Half of Southeast Quarter of Section 7, and the East Half of the Northwest Quarter of said Section 7 except a small lot of about 6 acres in the northwest corner of said East Half of the Northwest Quarter of Section 7, all in Township 71, Range 40, in Mills County, Iowa, being all the land described in the petition as being in said Sections 7 and 8 except the Southwest Quarter of said Section 7."

Hiram departed this life, July 8, 1914, leaving a widow, Marticia V. Dolph, sister of Henry's first wife. She, by petition of intervention, joined the cross-petitioners, who are her children by Hiram, in praying that the petition be dismissed as to above-described land, and the title to an undivided one third of said land be quieted in intervener, and to an undivided two thirds thereof in cross-petitioners. For convenience, these parties may be referred to as cross-petitioners.

A sister of Henry's, and nephews and nieces and children of deceased nephews and nieces, are defendants; and they, with plaintiff, put in issue the allegations of the cross-petition; and, in addition thereto, plaintiff alleged that the deed from Henry to Hiram, if executed, was in fraud of her marital rights, subsequently acquired, and ought not to bar her claim to share, to the extent of an undivided half of the land alleged to have been conveyed, as widow of Henry. The alleged deed was not produced at the trial, but was found by the court to have been executed, and to have been in fraud of plaintiff's marital rights; and on July 3, 1914, she was decreed to be entitled to an undivided one half thereof, and cross-petitioners, being the wife and children of J. H. Dolph, to the remaining one half. The defendants and the cross-petitioners appealed.

After defendants had filed their abstract, on December 22, 1917, the several parties stipulated that the deed bearing date August 28, 1895, attached to the stipulation, was the original deed referred to in the evidence on the trial; that plaintiff, in the fore part of August, 1916, gave some of the old wearing apparel which had been worn by Henry to her sister, Mrs. Byers, for the use of her husband; that Mrs. Byers took such apparel to her home in Kansas, and, at some time in the fall, found the deed in an envelope in one of the vest pockets of said apparel, and thereupon notified plaintiff's son, and later delivered the deed to him, and he to plaintiff; and that the deed, with the envelope, might be mailed to the Supreme Court of Iowa, and should be treated by the court as in evidence, and the deed as the original deed, and might be used and inspected by the Supreme Court in the determination of the appeal, with the understanding that this stipulation as to the discovery of this deed would be made a part of the record.

II. The deed described "all of Section eight (8) in Township No. seventy-one (71), Range No. forty-two (42),

west 5th P. M." Henry Dolph owned no land in that range, but he did own Section 8 in the township of the same number in Range 40, or 12 miles east of that described. The deed is alleged by cross-petitioners to have been voluntary, and a gift, and the evidence leaves no doubt that the only consideration was love and affection.

The deed, then, even though delivered, did not convey the section of land which Henry Dolph owned in Range 40, and the gift of that section was not completed in his lifetime.

"To constitute a valid gift *inter vivos*, the intention to make it must be satisfactorily established, and this intention must have been executed by actual, constructive, or symbolical delivery of the thing proposed to be given, without power of revocation. In other words, there is no gift until the intention of giving is fully consummated by the donor, transferring all right to and dominion over the thing given to the donee." *Tucker v. Tucker*, 138 Iowa 344.

See *In re Estate of Elliott*, 159 Iowa 107.

"Where something remains to be done in carrying out the donor's intent, no matter how unequivocal the intent itself may be, the gift is not complete; for, so long as the contemplated action is not taken, it is to be presumed that the donor intends to retain the title." *Abegg v. Hirst*, 144 Iowa 196.

Though what was said in these cases related to personal property, the principle that the gift must have been completed is quite as applicable in the case of realty. If the delivery of the deed were conceded, it did not convey Section 8; for, even though the grantor intended so to do, he did not carry out that intention.

Cross-petitioners argue that plaintiff and defendants are estopped from arguing that the description in the deed is not in accord with the oral evidence. A sufficient re-

2. REFORMATION OF
INSTRUMENTS:
voluntary deed.

sponse is that a plea of estoppel is not to be found in the issues raised by the pleadings. Moreover, no prejudice upon which to rest such a plea appears to have been suffered.

3. ESTOPPEL: equitable estoppel: non-change of pleading, etc.

One cannot well be said to have been prejudiced in the discovery of the truth with respect to an alleged gift, by ascertaining that the donee did not obtain as much as was first thought!

Again, it is argued that whether the deed, if delivered, conveyed less than the 954 acres claimed by the cross-petitioners, was not put in issue. The replies of defendants and plaintiff deny the allegations of the cross-petition, and also specifically deny that any such deed as alleged was ever made or delivered. Plainly enough, then, the issue as to the execution of a deed such as pleaded was definitely raised. The introduction of the deed itself in evidence definitely settled this issue, and proved beyond question that a deed was made, but with description different from that testified to by the several witnesses speaking on that subject.

"It is well settled that courts of equity will not assist the grantee in an imperfect conveyance which is not supported by either a valuable or meritorious consideration against either the grantor or his representatives." *Else v. Kennedy*, 67 Iowa 376.

The principle is concisely stated in *Enos v. Stewart*, 138 Cal. 112 (70 Pac. 1005):

"A court of equity interferes to correct a mistake in a written instrument only in furtherance of justice, and to prevent fraud or some injustice. In this case, by refusing to correct the deed, no fraud or injustice is done to appellant. She has lost nothing, because she paid no consideration for the deed. She has been deprived of nothing the law would otherwise give her. It is true, the intention of the grantor is not carried out; but it would have been equally true if an attempt had been made to make a will, and it had

been defective in a vital part. The court could not reform a will, nor make it so that it would comply with the law. In this case, the deceased intended to convey the property, but she did not do so. That intention will not now be carried out in favor of one who paid nothing for the conveyance, and against a lawful heir."

See *Lister v. Hodgson*, L. R. 4 Eq. Cases 30; *Shears v. Westover*, 110 Mich. 505 (68 N. W. 266); *Willey v. Hodge*, 104 Wis. 81 (80 N. W. 75); *Henry v. Henry*, 215 Ill. 205 (74 N. E. 126); *Mulock v. Mulock*, 31 N. J. Eq. 594; Thornton on Gifts, Section 363. This does not infringe on the rule permitting identification of what is really devised, in case of a will.

Counsel argues that there was a sufficient consideration in the affection of these brothers. For 30 years, they had lived about 80 rods apart. A pathway connected their homes. Henry accorded Hiram honor because of his patriotic service in the War of the Rebellion, during which Henry was accumulating property at home, and desired to recognize his supreme devotion to their common country by a substantial token of his affection and appreciation. But he was under no legal obligation so to do. The only consideration was that of love for his brother and appreciation of his worthiness as a citizen of the republic. The obligation was moral only, and this is held not to constitute a valuable consideration for a conveyance or contract. *Meginnes v. McChesney*, 179 Iowa 563.

There are cases holding that a writing purporting to be for a gift will be enforced by the courts as between blood relatives, but the proximity even must then be close, and has not been extended to collateral heirs. *Marling v. Marling*, 9 W. Va. 79 (27 Am. Rep. 535); *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579; *Burford v. McKee*, 1 Dana (Ky.) 107; Thornton on Gifts, Section 364.

Here, the grantor was a brother, and therefore not gov-

erned by the above cases, even if the suit were for the enforcement of a contract. But see *Meginnes v. McChesney*, supra. There is no escape from the conclusion that the deed as to Section 8 may not be given effect.

III. The discovery of the deed eliminates all inquiry as to its existence and contents. Was it ever delivered? Whether or not an instrument has been delivered is largely a question of intention, to be gathered from

the facts and circumstances surrounding the transaction, in connection with the direct proof. *Brown v. North*, 141 Iowa 215;

Creveling v. Banta, 138 Iowa 47; *Foreman v. Archer*, 130 Iowa 49; *Albrecht v. Albrecht*, 121 Iowa 521. The deed purports to have been signed and acknowledged August 28, 1895, and the stipulation of facts leaves no doubt that it was in the possession of Henry at the time of his death, and that Henry continued in the possession of the land, other than Section 8, described therein, until that event. In the fall of 1895, Henry was getting ready for a trip to the Pacific coast with Hiram, and, according to the latter's widow, came to their house in the latter part of August, saying that he had fixed up his business as he wanted it, and that he had brought the deed.

"Q. What did he say it was? A. He said it was all of his home place, Section 8 and part of Section 7. He said W. M. Evans, a banker, had made the deed. Q. What, if anything, did Henry say to Hiram about who he wanted to have the 960 acres of land? A. Yes, sir, he said he wanted him to have it. Q. What did he say about the deed being good? A. He said it was a warranty deed to this land. He said, 'Here is a deed to this land that I want you to have.' He said it was to be recorded at his death. Q. Who did he say was to have the use of the land as long as he lived? A. Henry, himself, was to have the use of the land. Q. What, if anything, did he say about having lots of money and prop-

4. DEEDS: delivery: conditional delivery.

erty outside of the land? A. He said,—yes, sir,—he had land and lots of money outside of this. He says, ‘I don’t know as I will ever marry again and I have no children.’ * * * Q. What, if anything, did he say in that conversation with Hiram about the effect of the deed? A. He said the deed was good. He said nothing could come against a deed. Q. What did Henry do with said deed that he took in his hand when he was there at that time? A. He gave it to his brother, Hiram, my husband. Q. What did Hiram do? A. He read it over. Q. What did he first do when he read it over,—tell the court whether he took it in his hands. A. I said he took it in his hands. Q. What did Hiram say to him about reading it over, if anything? A. He told him to take the deed,—read it over. Q. Did Hiram say anything to Henry to the effect that he would accept the deed? A. Yes, sir. Q. What, if anything, did he say? A. ‘Why, Henry, of course, if you wish it,’—or something to that effect. Q. That is, Hiram said something of that kind. A. Yes, sir. [The witness added that she had no part in the conversation.] I remember when Henry started back that day. Q. What, if anything, did he say to Hiram about what they would do with that deed? A. Hiram took the deed he wanted up town; and put it in the bank. Q. What bank? A. Evans’ bank. Q. What did you hear Henry say to Hiram about what they had better do with the deed, if anything; what did Henry say to Hiram,—not what they did,—but what did Henry say to Hiram about it? A. They would put it in his papers. Yes, sir, they would go up and put it in the bank in his papers. * * * Q. Well, now, who had the deed in his possession when Henry said that to Hiram? A. Hiram had the deed. Hiram put the deed in his pocket when they went to town.”

The witness testified that her second daughter, Mrs. Davis, was present; and the latter’s account of the transaction was substantially the same as that of her mother.

Harvey (Hiram's son) recalled having heard a conversation between Henry and Hiram, shortly before their trip to the West, wherein the former said:

"Hiram, I have been telling Harvey about my going away for awhile out West, and I have told him about the making of this deed to you for the 960 acres of land. I have told him, in case anything would happen to me, or both of us, that he was to get this deed and have it recorded; that he was to leave it in the Evans bank, at Malvern."

Evans testified to having been cashier of the First National Bank at Malvern at that time; that Henry employed him to prepare a deed of the land from Henry to Hiram, and a like deed from Hiram to Henry; and that they were signed and acknowledged at the bank at the same time; that the deed from Henry to Hiram was left at the bank until it closed, some time in 1896. The circumstance warranted the conclusion that the witness was confused, and the reference to the deed executed by Hiram, and that feature of the case, requires no further attention.

Strohl recited a conversation which he claimed to have had early in April, 1895:

"He told me about making a deed to that land there, that he had to Hiram Dolph; that he had made a deed prior to his marrying with Mrs. Dolph, and told me what land he had deeded to his brother. Q. What did he say it was? A. He told me that it was Section 8 and three 80's in 7. * * * The way he came to tell me was in regard, as I started to tell before, about the brick he had hauled up to another place, where the new home is now. There was a rumor in the neighborhood that he was going to build a new house. I made the remark about him building a new house."

The witness, after relating some conversation, proceeded:

"Then is when he told me that this land belonged to

Hiram. Henry Dolph said the arrangement was that Hiram was to have the land after his death. Q. He did say he was to have the use of the land? A. He said he was to have the use of the land as long as he lived, himself. He said the deed was not to be recorded until after his death. * * * He didn't want to build it [new house] there, because that land belonged to his brother Hiram, he said. * * * He said the reason he gave it to Hiram was because Hiram served in the army,—that is, in the Rebellion,—and fought for his country, and he felt as though he was under obligation to give Hiram something, because he stayed at home and made lots of money, while Hiram was in the war."

It will be observed that the witness claimed to have had this conversation some months before the deed was drawn. One White testified that the witness had said to him, shortly before testifying, that he knew nothing of the transaction; though the witness denied this. This witness also appears to have been somewhat confused, and he says that Henry told him that Hiram was to have the land after his death, and that it belonged to Hiram. It also appears that, in the spring of 1896, Henry gave a dinner at his home, at which several guests were present, and among them, Mrs. Gridley, plaintiff in this case. The widow of Hiram, her two daughters, and her son Harvey substantially agreed in their testimony that the conversation arose concerning the place, in which Mrs. Gridley remarked that it was pretty, and the home nice; that Henry agreed with this, but, pointing to the land surrounding, remarked, in substance, that he only had the use of it during life; that it belonged to Hiram. On the other hand, Mrs. Keckley was present, and recalled having heard no such conversation as mentioned; but swore that someone asked Henry about his father's homestead, and he replied, "No, Hiram has father's homestead," and that it belonged to Hiram.

Mrs. Kearny, a sister of plaintiff's, who was present, denied having heard the talk testified to by the witnesses other than Mrs. Keckley, and the plaintiff was sure that no such conversation occurred.

The story is unreasonable. According to Mrs. Gridley, she was then engaged to marry Henry. He had invited her to his home that she might meet his relatives. This was the home to which he was about to take her. Their courtship was not over. If, at that time, he made the statement claimed, probably it is the first time in the world's history that a man courting a woman under similar circumstances has been equally frank. What probably did occur was the conversation related by Mrs. Keckley, an entirely disinterested witness; and reference to "old homestead" or "old place" of Hiram's father could easily have been confused with, or, at least, recalled, after the lapse of 20 years, as the "old place" of Henry.

According to Mrs. Keckley, who is a daughter of Dr. Brothers', the family physician of Henry, the latter left the deed with the doctor in 1901, and the witness cared for it until the doctor's death, in 1906, when she placed it in the vault of the First National Bank of Malvern, and informed Henry of this the following year, when he said he would call for it. Hiram's son Howard claimed to have heard Henry remark, in 1909, that the deed was at this bank.

Hiram's widow recalled the circumstance of Henry's coming to the house in February, 1911, and telling her husband that he was going west, and would leave the deed at the bank; that he said he was not well, and said the envelope containing the deed was marked "J. Hiram;" and that, if he should die, Hiram was to take the deed and have it recorded; that it was at the Malvern bank. In July or August, Henry was sick, and called Hiram over to his house. Hiram's wife accompanied him, and, upon their arrival, according to her story, Henry said:

"Possibly I won't get well. Take your deed. I am very ill,—I don't know as I will get well. Q. Where did Henry get it from? A. He took it from his trousers pocket. His trousers were lying at the head of his bed or desk or stand. Henry was in bed. * * * Q. Did he take anything out of his trousers pocket? A. Yes, sir, he took his deed. Q. He took what? A. His deed. Q. What did he do with it, other than to hand it to Hiram, his brother? A. He handed it to Hiram, his brother. Q. What did he say about it? A. If I do not get well, you put it on record. He said he had the deed in his possession just a short time. Q. Did he say where he got it, a few days before that time? A. He says, 'Here is your deed,—take it and keep it. If I don't get well, you, of course, put it on record.'"

He had gotten the deed out of the Malvern bank a few days before. On the back of the envelope was "J. Hiram Dolph." The envelope was not sealed. Several witnesses testified to having seen and read the deed at Hiram's house. Henry called for it in the latter part of October, said he was feeling better, and, according to the witness, told Hiram to "get your coat and your deed," and they would take it to a bank at Hastings,—and started on their way, so to deposit it.

The evidence also tends to show that, shortly before Hiram's death, Henry assured him that the deed would be recorded at his (Henry's) death; that it was with Henry's papers at the bank; and that, shortly after Hiram's death, Henry, in response to the inquiry of his widow, "What about this deed of Hiram's?" said:

"It is just like it has always been; it was with my papers; it is all right. Nothing can change it. It was to be recorded at my death, as we always understood, and as Hiram knew. * * * It is with my papers, and I want it recorded at my death."

Not all the evidence bearing on this issue has been

recited, but enough to present every phase of the case; and we are unable to escape the conviction that there was never an intention on the part of Henry to make an unconditional delivery of the deed. If he handed it to Hiram in 1895, as he doubtless did, it was to allow him to read it and arrange for its custody at the bank with Henry's papers, and with the understanding that, if anything happened to Henry on his trip west, so that he did not return, the land described should be Hiram's. But Henry returned, and the deed continued in his custody for more than 15 years, when it was again handed to Hiram, with instructions to record if he (Henry) did not get well. The design seems to have been that title to the 954 acres pass, if Henry should not return or should not recover. Even the direction to Harvey Dolph was that, if anything should happen to Henry, or both Henry and Hiram, he (Harvey) should get the deed and have it recorded. The record contains some statements from which, if standing alone, delivery might be inferred. But the witnesses testify from memory, of conversations occurring many years previous. They are interested, and parties to the suit, and competent to testify only because of not having participated in the conversation related. These circumstances are to be considered, as bearing on their credibility. *Hart v. Hart*, 181 Iowa 527. Moreover, others were not present during a large part of these conversations; and the adverse parties necessarily rely upon the circumstances shown, the probability or improbability of the stories told, and a comparison of these with ordinary rules of human conduct, under similar circumstances, to test the credibility of the several witnesses. Notwithstanding all this, we have been impressed with the candor and good faith of those who have testified concerning these conversations. The conversations between these brothers doubtless were substantially as related. In the nature of things, the exact words, doubtless, were not recalled; but the story, in a general way,

was as related. The evidence of these conversations is not alone to be considered. The conduct of these men is quite as, if not more, important in determining what Henry intended, in what was done with the deed. Doubtless, the deed passed between Henry and Hiram about as the witnesses described; but whether the mere handing of the deed by one to another passes title *in praesenti*, depends upon the intention with which this is done. Did Henry, in the conversation had in August, 1895, intend to part with title? If so, how came he to retain the deed in his control? His health was not good, and he was about to take a trip west. Without children or wife, he quite naturally wished Hiram, for whom he had even more than a brother's affection, to have the larger portion of his estate. The talk with his brother so indicated. If he handed the deed to Hiram, it was to enable him to read it; and, even though some of the evidence might be construed as indicating a purpose to then part with title,—and this is doubtful,—such an inference is obviated by the circumstance that, immediately following the talk, they agreed that the deed should be deposited with Henry's papers at the bank, and they started away so to do. Why deposit it with Henry's papers, if it had been delivered to Hiram? The only explanation possible is that these men, unfamiliar with the law, might have thought that retaining the deed would assure to Henry the use of the land described therein for life. But nothing appears to have been said, justifying this conclusion. On the contrary, what was said and done is more suggestive of the purpose to make a gift of this land *causa mortis*; that is, that Hiram should have the land in event Henry died, and not otherwise. Such a gift of realty may not be made. *Reeves v. Howard*, 118 Iowa 121. See *Vosburg v. Mallory*, 155 Iowa 165.

The talk concerning Henry's having the use during life, and not recording the deed until his death, is confirmatory

of this conclusion, though not necessarily inconsistent with the theory that the deed was delivered. Harvey Dolph's account of a conversation between the brothers, wherein Henry told Hiram that he had directed Harvey to get the deed and have it recorded, if anything happened to Henry, or to both, is susceptible of no other explanation, unless it be that the deed previously had been delivered. And the same is true of the talk had in 1911. As said, all these conversations are to be considered and construed in connection with what was done, in ascertaining the intention of Henry with reference to this deed. That he was in possession of the deed at the time of his death is a strong circumstance against the theory of there having been a previous delivery; and this is strengthened by the fact that, except momentarily, in 1895, and for a few months conditionally, in 1911, the deed continued in Henry's possession or control during more than 21 years, from its making until Henry's death, and that, during all this time, Henry continued in possession, and, in so far as known to his neighbors, other than Hiram and family, as absolute owner.

Even though there be some evidence—and we do not pretend to have quoted all of it—which, standing alone, might be construed as showing a delivery of the deed, the facts with respect to its custody and the circumstances proven are so inconsistent with any design on his part of presently passing title, that the inference is irresistible that, whatever may have been said or done, there was no intention on Henry's part of passing title *in praesenti*. The inference is equally strong that he did intend the deed to become efficient in conveying title to Hiram upon his death; but the gift, to be effective, must have been completed by delivery in his lifetime. This conclusion obviates the necessity of passing on the appeal of cross-petitioners; and intervener, as plaintiff, in any event, will be entitled

to her distributive share. The decree on the appeal of defendants is—*Reversed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

ORPHA J. PYLE, Administratrix, Appellee, v. CLYDE L. HERRING et al., Appellees; DES MOINES UNION RAILWAY COMPANY, Appellant.

NEW TRIAL: Procedure to Procure—Motion (?) or Petition (?)

- 1 An application for a new trial, in the form of a *motion* made after the expiration of three days after the return of verdict (Sec. 3756, Code, 1897), may be treated as a *petition* for a new trial, under Sec. 4091, Code, 1897, *when said so-called motion contains all the matters required in a petition*.

NEW TRIAL: Procedure to Procure—Hearing on Petition—Pro-

- 2 **duction of Evidence—Waiver.** Evidence in support of a *petition* for a new trial, filed subsequent to the expiration of three days after the return of the verdict, *must be produced precisely as required in any ordinary proceeding*, and the one opposing such petition does not waive such requirement by simply failing to demand that the petitioner make such production.

PRINCIPLE APPLIED: See No. 3.

EVIDENCE: Judicial Notice—Judicial Proceedings and Evidence

- 3 **Received.** The court, on the hearing on a *petition* for new trial, under Sec. 4091, Code, 1897, cannot take judicial notice of evidence introduced in the trial of the cause at a time *when the defendant in said petition was not a party to the action*, even though such evidence was duly preserved and made of record in the cause by the filing of the shorthand notes, with proper certificate thereto.

PRINCIPLE APPLIED: An action for damages for wrongful death was on trial against several defendants. At the close of plaintiff's evidence, one of the defendants moved for a directed verdict in his favor, on the ground that the evidence wholly failed to show that he was responsible for the death. The motion was sustained, and verdict was so returned, followed by immediate judgment thereon. The trial proceeded as to the remaining defendants. In the course of such further trial, the

remaining defendants introduced photographs and other evidence, theretofore unknown to plaintiff, which tended to show that the defendant who had been discharged was really responsible for the death. The jury disagreed. Plaintiff, on due notice, filed a petition for a new trial against the discharged defendant, on the ground of newly discovered evidence, and in the petition, "referred" to such newly discovered evidence, and made it a part of his petition by such reference only. On the hearing on said petition, plaintiff did not introduce such new testimony; but the shorthand notes, duly certified, had then been filed. The defendant did not demand that said testimony be introduced,—just remained silent.

Held: (1) the introduction, as in an ordinary action, of the testimony in support of a petition for a new trial, is absolutely necessary.

(2) The defendant did not waive the introduction of said testimony.

(3) The court could not take judicial notice of said testimony.

NEW TRIAL: Discretion of Court—When Court Has No Discretion.

- 4 Courts have no discretion to grant a new trial on the ground of newly discovered evidence when there is no evidence whatever to support the same.

PRINCIPLE APPLIED: See No. 3.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

SEPTEMBER 24, 1917.

REHEARING DENIED MARCH 12, 1919.

THIS action is prosecuted in the name of the administratrix of the estate of Franklin J. Milligan, against Clyde L. Herring, doing business as the Herring Motor Company, the Herring Motor Supply Company, the Herring Motor Company, the Ocean Accident and Guarantee Corporation, and the Des Moines Union Railway Company, for damages resulting from injuries which, it is alleged, were negligently inflicted upon Milligan, causing his death. Upon motion of the Des Moines Union Railway Company, appellant herein, at the close of plaintiff's testimony, the jury, by direction of the court, returned a verdict in its favor. Thereaf-

ter, the trial was proceeded with against the other defendants. The exact interest of the Ocean Accident and Guarantee Corporation in the subject-matter of the litigation does not appear from the record.

After the verdict had been returned in favor of appellant, evidence consisting of photographs and other testimony tending to show that the injuries causing the death of Milligan were due to the negligence of the Union Railway Company was offered on behalf of the defendant Herring. More than three days after the jury had returned the verdict aforesaid, plaintiff filed a motion to set aside the verdict returned in favor of the defendant Union Railway Company, upon the ground of newly discovered evidence. Due notice of the filing of said motion was served upon all adverse parties. Attached to the motion were the affidavits of plaintiff, her attorneys, and one of the attorneys for the Ocean Accident and Guarantee Corporation, tending to show diligence upon their part in procuring testimony, and that the failure to produce the evidence relied upon herein was not due to negligence. The photographs, the testimony of the photographer who took the same, and other testimony relative thereto, offered in evidence upon the trial by the defendant Herring on his behalf, were referred to in the motion for new trial, and, by reference only, made part thereof. The further material facts are hereafter referred to. The motion was sustained, and the defendant the Des Moines Union Railway Company appeals.—*Reversed.*

Parker, Parrish & Miller, for appellant.

Dale & Harvison, C. V. Cox, Clark, Byers & Hutchinson, and *Miller & Wallingford*, for appellees.

STEVENS, J.—I. On behalf of appellant, it is argued that an application for new trial after three days must be made by petition, and not by motion. Appellee practically

concedes this to be the rule, but contends that the motion met all the purposes of a petition, was not objected to by appellant, and was so treated by counsel and the court; and that appellant waived the right to object to the form of the application.

1. NEW TRIAL: procedure to procure: motion (?) or petition (?)

The form of the application was not questioned by counsel for appellant, and, as the allegations thereof substantially conformed to the requirements of a petition for new trial on the ground of newly discovered evidence, it was properly treated as such by the court. *Callanan v. Aetna National Bank*, 84 Iowa 8; *Heim v. Resell*, 153 Iowa 356; *Hunter v. Porter*, 124 Iowa 351; *Wilson v. McCutchen*, 138 Iowa 225.

II. The point is made by counsel for appellee that appellant's abstract does not correctly and fully present the record in the court below. The specific denial of appellant's abstract relates to the evidence offered upon the trial after the jury had returned a verdict in favor of appellant. None of this evidence is incorporated in appellant's abstract, but appellee has filed an additional abstract containing the same. The alleged newly discovered evidence consisted of the photographs and the testimony of several witnesses introduced upon the trial in behalf of Herring. The only record of the proceeding upon the hearing of the petition for a new trial is that of the ruling of the court sustaining the same, and the exception of counsel for appellant thereto. It is not claimed that the photographs, the reporter's shorthand notes, or other testimony, were offered upon the hearing of the petition, nor that counsel for appellant agreed that the same should be considered in evidence, or treated by the court as having been offered; nor is there anything in the record from which such agreement or consent thereto on the part of

2. NEW TRIAL: procedure to procure: hearing on petition: production of evidence. waiver.

counsel for appellant may be inferred. Indeed, both the abstract of appellant and the additional abstract of appellee are wholly silent as to the proceedings upon the hearing of the petition, except as above stated. The affidavits attached to the petition contained no statement of the alleged newly discovered evidence.

This court, in *Heim v. Resell*, supra, held that:

"When an unsuccessful party desires to secure a new trial on the ground of newly discovered evidence, by a proceeding instituted otherwise than within three days, as provided in Code Section 3756, he must support his allegations by evidence, and that affidavits which might have been received on a motion for a new trial, filed within three days, are not competent or sufficient in themselves to sustain his allegations."

See, also, *Carpenter v. Brown*, 50 Iowa 451; *Markley v. Owen*, 102 Iowa 492.

It was incumbent upon the plaintiff to offer the evidence relied upon as in an ordinary proceeding, so that the court could determine whether the same was cumulative, material, or competent to establish any issue in the case. *Town of Manson v. Ware*, 63 Iowa 345; *Heim v. Resell*, supra.

Had affidavits or secondary evidence been offered, and the defendant failed to object thereto, he would have waived the right to thereafter complain because the best evidence had not been produced. This is the effect of the holding in *National St. Bank v. Boesch & Son*, 90 Iowa 47, cited by counsel for appellee. But the alternative of objecting to inadmissible testimony or waiving such objection was not presented, as no evidence of any character was offered upon the hearing. Surely, counsel for appellant was under no obligation to demand the introduction of evidence to sustain the allegations of plaintiff's petition, but had the undoubted right to await the offer thereof, and then object thereto.

if they desired to do so. The point presented is not one where counsel has neglected to object when objection should have been made, and permitted their adversary to introduce improper testimony, but a situation in which no evidence was offered.

III. But it is also contended by counsel that the duly certified official shorthand report of the trial, when filed in the office of the clerk, became a part of the record in the case, and that the exhibits, which were a part of the record, and the official shorthand notes, were referred to in the petition for new trial, and by such reference specifically made a part thereof, and that the trial court would take judicial notice thereof.

3. EVIDENCE: judicial notice: judicial proceedings and evidence received.

While it is true, as claimed by counsel, that the trial court is presumed to know what occurred during the trial, yet it was held, in *Baker v. Mygatt*, 14 Iowa 131, that it could not take judicial notice of the record in another case, even though the judge in fact remembered the contents of such record; while the Supreme Court of Maryland, in *Matthews v. Matthews*, 112 Md. 582 (77 Atl. 249), held that, on the second hearing of a divorce case, the court could not take judicial notice of the record of the former proceeding. See, also, *Streeter v. Streeter*, 43 Ill. 155. The Supreme Court of West Virginia, in *State v. Davis*, 68 W. Va. 142 (69 S. E. 639) held that a criminal court could not take judicial notice of a former conviction, even though the same occurred on a previous day of the same term. This court, in *Constantine v. Rowland*, 147 Iowa 142, which was an action for damages on an indemnifying bond in an attachment proceeding, held that the court could not take judicial notice of the statement in the petition in the attachment suit that defendant was a nonresident of the county where the action was brought. In the following cases, it was held that, while a court will take judicial no-

tice of its own records, it will not, in one case, take judicial notice of the record in another case: *Fassler v. Streit*, 92 Neb. 786 (139 N. W. 628); *Anderson v. Cecil*, 86 Md. 490 (38 Atl. 1074); *Hall v. Cole*, 71 Ark. 601 (76 S. W. 1076); *Loomis v. Griffin*, 78 Iowa 482; *Haaren v. Mould*, 144 Iowa 296; *Matthews v. Matthews*, supra; *Grace v. Ballou*, 4 S. D. 333 (56 N. W. 1075); *McCormick v. Herndon*, 67 Wis. 648 (31 N. W. 303); *McNish v. State*, 47 Fla. 69 (36 So. 176); *Wellman v. Hoge*, 66 W. Va. 234 (66 S. E. 357); *O'Connor v. United States*, 11 Ga. App. 246 (75 S. E. 110); *People v. Carr*, 265 Ill. 220 (106 N. E. 801); *Keaton v. Jorndt*, 259 Mo. 179 (168 S. W. 734); *Streeter v. Streeter*, supra. The Supreme Court of Arkansas, in *Murphy v. Citizens' Bank*, 82 Ark. 131 (100 S. W. 894), held that the court could not take judicial notice of its own records in other cases pending therein, even between the same parties. It has been held, in a garnishment proceeding, that the court will take judicial notice of the judgment rendered in the principal case. *Texas & P. R. Co. v. W. C. Powell & Son*, (Tex.) 147 S. W. 363. In *Bunting v. Powers*, 144 Iowa 65, it was held that the court would take judicial notice of the decree claimed to have been violated in a contempt proceeding.

The directed verdict was returned by the jury on January 11, 1916, and on the same day, judgment was entered thereon in favor of appellant. Defendant, when the verdict was returned, filed, and judgment entered, ceased to be a party to the further proceedings, and was not required, for any purpose, to take notice of the further progress of the trial. The jurisdiction of the court had terminated, for all purposes except to pass upon a motion for new trial, filed within three days after the verdict. Jurisdiction to pass upon a petition for new trial upon the ground of newly discovered evidence, filed more than three days after the verdict, could only be had upon

notice to the adverse party. *Hawkeye Ins. Co. v. Duffie*, 67 Iowa 175; *Owen v. Smith*, 155 Iowa 463; *Hamill v. Joseph Schlitz Brewing Co.*, 165 Iowa 266; *Loos v. Callendar Sav. Bank*, 174 Iowa 577; *Scott v. Scott*, 174 Iowa 740; *Kwentsky v. Sirovy*, 142 Iowa 385; *Todhunter v. De Graff*, 164 Iowa 567; *Willson v. District Court*, 166 Iowa 352; *Des Moines Union R. Co. v. District Court*, 170 Iowa 568.

Numerous of the above-cited cases hold that the court cannot take judicial notice of the record or proceedings in the same case tried at a prior term, even though the trial judge personally remembers the record in detail. In *Heim v. Resell*, supra, the doctrine that it is incumbent upon the moving party to present the newly discovered evidence upon the hearing of a petition for new trial, is clearly and emphatically stated. The record does not disclose that any evidence, competent or otherwise, of the alleged newly discovered evidence was offered or before the court upon the trial of the petition. The reference to exhibits and shorthand notes in the petition, making the same a part thereof, was not different from a like reference thereto in pleading generally. The court could not take judicial notice of the evidence offered upon the trial of the remaining defendants, after verdict had, by direction of the court, been returned in favor of appellant.

IV. It is true, as claimed by counsel, that the trial court generally exercises large discretion in passing upon a motion or petition for new trial, and this court will rarely interfere therewith; but it cannot be said that this rule applies to cases where the petition, based solely upon the ground of newly discovered evidence, is supported by no evidence thereof. The court can then exercise no discretion whatever: the petition must be denied.

Other matters urged are without controlling merit; and it is our conclusion that the petition for new trial

4. NEW TRIAL: discretion of court: when court has no discretion.

should have been overruled, and the judgment of the court sustaining the same is reversed, and this cause is remanded for such further proceedings and hearing upon the petition for new trial as may be in harmony with the opinion.—*Reversed and remanded.*

GAYNOR, C. J., LADD, WEAVER, EVANS, and PRESTON, JJ.,
concur.

M. E. SHERMAN, Appellant, v. J. C. SMITH et al., Appellees.

CORPORATIONS: Stock Issued for Other than Money. Stock issued for property other than money, and without permission of the executive council, is not absolutely null and void, but voidable only. (See Sec. 1641-b, Code Supp., 1913.)

WORDS AND PHRASES: "Void" and "Voidable." The word "void," when used to secure a right to, or to confer a benefit on, the public, will, as a general rule, be construed as implying a declaration of absolute nullity; when used with respect to the rights of private individuals, it will be construed, as a general rule, as implying voidability only.

PRINCIPAL AND SURETY: Judgment Against Principal Binding on Surety. An unappealed judgment against a principal, on his defensive plea of want of consideration and unauthorized material alteration, is conclusive on the codefendant surety.

FRAUD: Fact and Opinion. Representations that a company had built up a good business and was making money are, if knowingly false, actionable; otherwise as to a representation that a purchaser would be able, in a short time, to pay for the business out of the profits.

PRINCIPAL AND SURETY: Concealment of Material Facts. Principle recognized that sureties are released by the fraudulent concealment, on the part of the one taking the guaranty, of facts which increase the risk of the surety, and induce him to enter into the contract under a false understanding of the facts.

PRINCIPAL AND SURETY: Non-Material Concealment. The fraudulent concealment of the fact that an incorporated drug company,—the sale of the corporate stock of which was the

subject-matter of the suretyship,—was, at the time of the sale, defendant in an undetermined action for injunction against the *unlawful* sale of intoxicating liquors, is not such *material* concealment as will release the surety.

Appeal from Calhoun District Court.—F. M. POWERS, Judge.

OCTOBER 25, 1918.

REHEARING DENIED MARCH 12, 1919.

JUDGMENT on promissory notes went against defendant J. C. Smith, despite defense by him and his codefendants, his sureties, that no valid consideration supports the notes, and that they had been materially altered. From this judgment, no appeal has been taken. A further defense was that the notes were obtained by fraudulent representations. The sureties were released. Hence, plaintiff appeals.—*Reversed.*

Hume & Bradshaw, for appellant.

O. C. Brown, for appellee.

SALINGER, J.—The statute requires a permission from the executive council if it be proposed to issue stock shares for something other than cash. It attaches certain consequences for so selling without such permis-

1. CORPORATIONS:
stock issued for
other than
money.

sion, and affixes a penalty where corporation officers make false certificates. Chapter 104, Section 4, Acts of the Thirty-third General Assembly (Section 1641-d, Code Supplement, 1913); Sections 1641-b, 1641-e, 1641-f, Code Supplement, 1913. Plaintiff filed a certificate which stated falsely that stock had been paid for in money. No permission was had to issue for anything but money. Shares of this stock are the sole consideration for plaintiff's notes. And appellees assert that, because of the statute violations aforesaid, said shares are also-

lutely null and void, and that, therefore, the notes are wholly unsupported by any consideration.

This argument necessitates a fuller analysis of the statute, or rather, of its penalties. The said act of the thirty-third general assembly provides that the capital stock of any corporation issued in violation of the terms and provisions of statutes on this matter shall be void, and that, in suit brought by the attorney general on behalf of the state, a decree of cancellation shall be entered; and, if the corporation has received any money or thing of value for the stock, same shall be returned to the one from whom it was received. Section 1641-e is that any corporation violating the provisions of the chapter shall, on application of the attorney general, on behalf of the state, be dissolved, its affairs wound up, and its assets distributed among the guiltless stockholders; Section 1641-f, that any representative of a corporation, or any officer or agent thereof, who violates any of the provisions of the chapter, shall, on conviction, suffer fine or imprisonment.

We are of opinion that, when the statutes are read together, as they should be, it was not the legislative intention to make stock issued under the conditions at bar *ipso facto* void, but to make violations of this chapter a cause for having the stock cancelled at the suit of the attorney general, and to inflict other punishments for the violation, which, however, do not include that the stock issue shall be void, instead of voidable. The failure to have the approval of the executive council has been dealt with in this court, and it was held, in *First Nat. Bank v. Fulton*, 156 Iowa 734, that the clear purpose of the particular statute provision dealing with this point was "to protect the corporation, as such, against the issue of its corporate stock in payment for property or services or other things at fictitious value." And it is expressly ruled that a note given

for corporate stock issued in violation of this provision may be collected. We have not had occasion to deal with the other violation—the false certificate. But in the law generally, the words “void” and “voidable” are frequently used by legislatures interchangeably; and where the word “void” is used to secure a right to or confer a benefit on the public, it will, as a rule, be held to mean null and incapable of confirmation; but, if used respecting the rights of individuals capable of protecting themselves, it will often be held to mean voidable. See *Van Shaack v. Robbins*, 36 Iowa 201, and cases cited; and numerous authorities to like effect may be found in our own reports,—more, that so hold as to clauses in insurance policies which provide for their becoming void upon certain contingencies. In *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, the court construed a statute that all stock, bonds, or securities of a railroad company purchased of the company by a director thereof for less than par value should be null and void, and held that, because the purpose of the statute was the protection of the corporation, the word “void” should be construed to mean “voidable.” In *Matter of New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540 (42 N. E. 1088), an act incorporating a bridge company provided that the construction of a certain bridge should be begun within two years and be continued without unreasonable delay until completed, and that otherwise, the act and all rights and privileges granted thereby “shall be null and void.” It was held that “null and void” here meant voidable. Against this, we are cited to 7 Cyc. 745, which is, “Commercial paper cannot be based on any consideration which is a violation of an express statutory provision.” This does not quite meet the situation. The consideration here was shares of stock. They had infirmities for which they might, on proper action by the attorney general, have been cancelled, and, after be-

2. WORDS AND
PHRASES :
“void” and
“voidable.”

ing cancelled, they would have furnished no consideration. But, while the shares were issued without complying with all statute directions on the subject, they were still shares of stock whose validity might never be attacked by the authorities of the state. The shares themselves were not a violation of law, say, like larceny. To illustrate, a note given for the transfer of a note whose consideration was furnishing game killed in violation of the game laws would not fail of consideration on the ground that the note transferred was itself a transgression of the statute. The maker might choose to pay it. On the other hand, a note given for services in killing game in defiance of the game law would be vulnerable to a plea of want of consideration; for the very plea would be a tenable resistance to paying. On the whole, we are inclined to hold that consideration for the notes in suit is not lacking because some statute provisions were disregarded or violated in the issuance of the stock.

1-a

Be that as it may, the trial court gave the plaintiff judgment on the note against the principal debtor, Smith. From this action no one has appealed, and all that this ac-

3. PRINCIPAL AND
SURETY: judg-
ment against
principal bind-
ing on surety.

tion necessarily involves is the law of the case, though the case is reviewable here *de novo*. *Babcock v. City of Des Moines*, 180 Iowa 1120. As to Smith, then, it is settled that the stock furnished a sufficient consideration. But it appears clearly, Smith was *particeps criminis*, and the judgment against him might rest on that fact, and, therefore, be not necessarily a finding that the stock was good consideration, despite the law violations involved in its issuance. But there are at least two reasons why this will not avail the appellees: While, because Smith was *particeps criminis*, he can have no *affirmative* relief by asserting his own wrong, if the stock was void for criminality Smith could successfully *defend* against a note based on such stock only, and

have purely defensive relief, even though he participated in the crime. Therefore, a judgment against Smith on the note is, of necessity, a finding binding on all parties before the court that the stock constitutes a valid consideration, even though they were not adversative, and were on the same side. *Smith v. Creditors*, 181 Iowa 189, and cases cited. Second, if, by reason of estoppel or any other reason, it was bindingly adjudicated that Smith must pay the notes, it follows that, though the judgment rest upon the inability of Smith to urge certain defenses, that, if he must pay, the sureties must pay.

It is true that, in the sense of receiving something for themselves, there was no consideration as to the sureties, no matter how much consideration there was as to the principal. But that is equally true whether the stock in question was void or not void. The sureties were not to receive and did not receive any of the stock, whether void or valid. But at this point the consideration to the sureties is what it always is: First, what the principal received; second, the detriment to the payee in having relied upon the undertaking of sureties, and then having the surety fail to respond to his undertaking.

1-b

The plea of material alteration is, of necessity, in the same case. If there was a material alteration of the instrument, there should have been no judgment against Smith. There was, and it is not appealed from. What has been said as to the validity of the stock as a consideration applies fully to this situation. Moreover, the alleged alteration was made at the request of Brown.

II. Now, it is defended that the notes were obtained by fraudulent representations. Of course, as to Smith, the judgment against him settles that this defense is not sustained. But it does not necessarily dispose of the defense by the sureties. Unlike said defense of want of considera-

tion and of material alteration, the sureties here may defend with the alleged fraud, even if their principal may not, because the claim is that the signing by the sureties was obtained by fraudulent representations made to them. If that be a tenable claim, it is a complete defense, even though no false representations were made to the principal.

The court discharged the surety Gertrude Smith. This action cannot be sustained, on the evidence. All that appellee says on the subject is, "It is unnecessary to devote space to discuss the case against Gertrude H. Smith. The statute referred to in our brief settles that." We take it this is a reference to the statutes dealing with the issuance of stock. Of this defense we have disposed. As to false representation, there is absolutely no testimony that any representation whatsoever was made to Gertrude H. Smith, or that she relied on any. The record contains scarcely more than an occasional casual mentioning of her name. It was error not to enter judgment against her, as well as against her principal, Smith.

III. It is claimed Smith made certain false representations to Brown at the request of Sherman. This is denied, and appellant contends further that they were but the expression of an opinion. We need not settle the dispute over this, because it is conclusively made to appear that Brown refused to act on these alleged representations of Smith's, and did not rely on them. All that was relied on, if anything was, are alleged false representations made by Sherman after Brown refused to act on what it is claimed Smith said. And we address ourselves to the conduct of Sherman.

3-a

The definite allegations in pleading are that Sherman fraudulently represented:

(a) That the drug company was doing a good business; (b) that it was making money; (c) that Smith had

built up a fine business, and was doing well therein; (d) that the business was such that Smith would be able to meet the payments on the notes in suit as such payments fell due. It is pleaded these representations were false and fraudulent, because Sherman knew and did not reveal, and Brown did not know: (a) That the drug company whose shares were sold to Smith for the notes in suit had been doing business at a loss for more than six months before Brown signed them; (b) that the company was largely in debt, and had been obliged to borrow, to pay its debts and running expenses; (c) that its taxes remained unpaid.

We have first to say that the alleged false representations are not nonactionable opinions. Assume one knows that a concern has, for six months, been doing business at a loss; that it is largely in debt, has been compelled to borrow to meet debts and running expenses, and has delinquent taxes: and he is guilty of a fraudulent and actionable misrepresentation in saying that the concern is doing a good business, and that a fine business has been built up and the builder was doing well therein and is making money.

As to the alleged representation that the business was such as that Smith would be able to meet the installments on the notes as same fell due, we think that is the statement of a nonactionable opinion, because it declares a deduction as to the future. Brown testifies, on cross-examination, that Sherman used the words "in my judgment," in saying that Smith would pay out. And it has bearing that Smith did pay fourteen \$100 installments out of the business. And it is doubtful whether there was any reliance; for Brown testifies he said he (Brown) could not see how a business incorporated for \$5,000 could maintain itself, pay clerk hire, rent, taxes, insurance, support Smith and his family, and pay \$100 a month.

IV. This brings us to the evidence on the question whether what is said to be, is false, and, if so, whether the false matter was fraudulently uttered.

Is it proved the business was operated at a loss for six months before Brown signed, or; if it was, that plaintiff knew it when he stated what is charged? Consideration of the true condition comes first. If it be not shown that a falsehood was told about it, there is no room for inquiring into *scienter*. What is the evidence for the claim that the business was operated at a loss for more than six months before Brown signed? The consideration of the question resolves itself into settling a conflict between Smith and Sherman, and between Smith and matters that are either undisputed or conclusively established. There is nothing in the record that impeaches Sherman. On the contrary, it is not easy to understand what motive he could have for making fraudulent representations to obtain the signature of sureties. Even if the drug stock was below par, and the business unprofitable, without sureties, Sherman had ample security given him by Smith, and surrendered Smith's securities to him after the signing of the notes by defendant sureties. In these circumstances, Smith's testimony might naturally be colored by a desire to let Sherman have nothing but the note of Smith, which does not appear to be valuable, and to obtain the release of Smith's wife and his father-in-law. And the credibility of Smith's testimony is otherwise affected. Time and again, he squarely contradicted himself, and had to retract on material matters, either through the stress of cross-examination, the production of his own letters, or of indubitable other evidence. These instances are too numerous to be detailed without unduly extending this opinion. A few, however, are illustrative. He testifies repeatedly that an injunction granted in December, 1908, prevented him from selling liquor, and that, after its issuance, he sold no liquor,—and this though

the injunction, of course, was directed to illegal sales only. On cross-examination, he admits his permit was not taken from him, and that he continued selling liquor until the summer of 1909. To support the theory that there were debts of which Sherman knew, he testifies he had advised Sherman of them by letter. He testifies later that he never reported these items to Sherman in any manner. He is constant in attempts to swell the indebtedness. He states the debts of the drug company were between \$2,000 and \$2,200, when the incorporation took place. On cross-examination, he says they were \$1,650. About that time, he reported to Sherman that the total indebtedness outstanding was \$161.92, including "outstanding cigar bills of \$130, the sale of which are guaranteed:" i. e., a conditional debt, with right to return. After the incorporation, he wrote Sherman that all the bills excepting \$1,000 to the Des Moines Drug Company were old bills, coming due in March, 1908, and he was glad to say "they are practically all paid up now." At the time when Sherman sold out to Smith, the actual indebtedness consisted of three items, aggregating \$93.45, which Smith attempted to raise to \$180.01, admitting, on cross-examination, that at least three of the items put in by him were not incurred until about seven months after Brown signed. He reported one of the items as being \$102. He testifies it was \$76. Defendants pleaded the indebtedness was \$2,300. Smith testifies that, at the time of the incorporation, the inventory came to \$3,000. He advised Sherman that he was carrying \$3,000 insurance and needed \$500 more, and after he bought Sherman's stock, he was still carrying \$3,500 insurance.

4-a

Is the statement that the business was a good one proved a false one?

Notwithstanding the testimony of Smith to the contrary, it appears, by the evidence of the record of sales,

that the month of May, 1908, is about an average one for the summer of that year, and is a good month. In that month, the sales came to \$588.05. The June sales fell some \$50 short of this; September and October sales were, respectively, \$739.75 and \$801.82,—higher than the sales in May. The record demonstrates that, in the main, the business of 1908 was as good as it had been in the three years in which its profits paid in full the original cost of the store, \$3,721.60, its maintenance and operation, and the maintenance of Smith. Smith testifies the business "began" to fall off after the notes were signed. On February 29, 1908, he wrote that payments to Sherman and extra efforts to clean up small bills had reduced their bank account to \$64, but that, as business was holding up in good shape, he soon hopes to increase the deposit sufficiently to clean up what was owing the Des Moines Drug Company, and at an early date; on March 16, 1908, that business was extremely quiet just then, but that he had hopes of its being better as soon as weather and roads became settled; on July 7, 1908, that "the sales show quite an increase, and hope to make a better showing this month." Two days later, he wrote that crop prospects were very promising, and that he looked forward to a good fall. On August 10th, he wrote that everything was moving along nicely, and that he expected "an excellent fall trade;" on September 2, 1908, "I am enjoying very good business this week." About six weeks before the notes were signed, on October 11, 1908, he wrote:

"You will note quite an increase in sales, which increase I hope to keep up; also the collection of accounts I have every reason to believe will become very satisfactory, so we may look for something in the shape of dividends before many weeks."

Smith was buying this drug store at the very time the notes were being signed; knew all about it; and thought

it worth buying at a large price. Three months after the notes were signed, the sales ran substantially to those of May, 1908, which, as said, is shown to be an average good month. After the notes were signed, the store enabled Smith to live and to make 14 monthly payments, of \$100 each. As late as May 3, 1910, when advised that Smith was delinquent, Brown wrote Sherman: "I have understood that he was doing a splendid business until the last few months."

It is true that, during several months of the year 1908, Sherman was not satisfied that the business was being kept up to the proper pitch, during some of the months. It should be remembered these letters were written in comment upon statements of Smith to which we have before adverted. Sherman states his views thus:

"So far as I am able to learn, the business had not, in the three years Smith was at Lohrville, suffered any loss of volume of business to any extent, though there might have been a month here and there which was less or more."

Whatever the effect of these facts may be upon *scienter*, they give no support to the substantive charge that the representations made by Sherman were, in fact, false. It has no tendency to prove that the business was in a ruinous condition because Sherman, on receiving optimistic opinions and reports from Smith, felt moved to say that he was, for the time being, not satisfied, and urged Smith to increase the volume of sales. Had the business, in fact, been losing ground, and unprofitable, these letters from Sherman would bear on his knowing this to be so. But, where the evidence shows the business was, in fact, not suffering, complaints by Sherman and his urging an increase of sales do not prove that the business was not prosperous.

4-b

It is elementary that fraudulent concealments on ma-

terial matters are equivalent to affirming a fact which does not exist. Story on Equity Jurisprudence, Section 215; 2 Kent's Commentaries *483; Stearns on Suretyship, Section 106. And the doctrine applies quite strictly in favor of sureties.

5. PRINCIPAL AND SURETY: CON-
cealment of
material facts.

"Thus, if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions *as to the real state of the facts*, such a concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it *under such circumstances* is equivalent to an affirmation that the facts do not exist." Story on Equity Jurisprudence (12th Ed.), Section 215. See *Burks v. Wonterlin*, 6 Bush (Ky.)20, 22.

There are a good many things that operate to release a surety; and the six Iowa cases cited for appellee release sureties. The difficulty is that the citations are irrelevant. They have no bearing on whether anything in this record works a release. Let us take up some of the alleged concealments,—all but one of them, which will be considered separately.

It is complained Sherman said the book accounts were worth \$1,000, and did not inform they were worth not over \$400; that he did not tell that the tangible assets consisted of much old, rundown stock, bought of a former owner, and that it would not invoice as much as \$2,500. We think the pleadings do not seek relief because of such concealment, and that there is no evidence the book accounts were not worth more than \$400, or that the stock of goods was in said condition.

The next complaint is, Sherman did not tell of letters which complained of the business falling off from July to October, 1908. This alleged concealment, too, is not relied on in pleading. At any rate, the sole materiality of such complaint by Sherman is that it bears on *scienter*.

and their effect on establishing *scienter* is considered elsewhere in this opinion.

4-c

To be sure, Sherman testified that no mention was made of any debt owing to the Des Moines Drug Company. Some nine months before the notes were signed, there was a debt due that concern; but, at that time, Smith wrote Sherman an argument in support of Smith's hope that he would soon clean up this debt. Moreover, Sherman had assumed this debt. It is presumed he is solvent, and the record indicates affirmatively that he is. For all practical purposes, this item had ceased to be anything that the Lohrville Drug Company would be called upon to pay.

4-d

Appellees say Sherman admits he did not inform Brown of a debt owing the Lohrville bank. This is not very material, unless it appears that there was a debt due that bank, and that Sherman had knowledge of it. It does appear that, in February, 1908, the drug company owed two notes aggregating \$450. It does not appear that they were owing to the Lohrville bank. On the contrary, Smith wrote what would tend to make Sherman believe there was no indebtedness to said bank; for, on February 29, 1908, he wrote that the balance at the bank was \$64, and that he hoped soon to increase it materially, and he made no mention of any indebtedness owing the bank. The natural construction of it was to take it as an assurance that, while the debt was small, it was the bank that was the debtor.

4-e

We cannot trace the statement of Smith that, in February, 1908, there were two notes aggregating \$450, beyond one note which he claimed was a note for \$200, and which, the evidence shows, was for \$174.58. But this note was made before the corporation was formed, and was not its debt at all, when the notes in suit were signed. Moreover,

it gives very little support to an allegation that material indebtedness was fraudulently concealed, to show that, some nine months before the notes were signed, the drug company owed \$450 in notes.

4-f

It is not so material that Sherman says he did not inform of "the other debts," as is the question what other debts there were to inform of. At the time of the sale, and before the notes were signed, Sherman had, in effect, relieved the corporation of the debt of something like \$1,000 due the Des Moines Drug Company. Eliminating this, and certain goods held virtually on commission, and with the right of return, the debts of the corporation, at the time the notes were signed, consisted of \$56.83, due the Western Bottle Manufacturing Company, \$4.80, due the Continental Compound Company, and \$31.82 due the W. L. Yetter Company,—a total of \$93.45. Some 18 days before the notes were signed, Sherman had written Smith to reduce indebtedness materially within 30 days. It is elementary that neither misrepresentation as to or concealment of an immaterial matter will release the surety. It is said, in *Comstock v. Gage*, 91 Ill. 328, at 336, that, in order that failure to communicate a fact to a surety should have the effect of a fraud, "it must be a fact which necessarily must have the effect of increasing the responsibility of the surety, or operating to the prejudice of his interest." It must be a material or inducing concealment. *Security Sav. Bank v. Smith*, 144 Iowa 203, at 210. Even if we assume, upon the testimony of Smith, that Sherman said to Brown there was no indebtedness, the fact remains that the indebtedness was, as to a business of the size of this drug store, trifling. In *Chace v. Brooks*, 5 Cush. (Mass.) 43, it was held that the accidental omission of a small amount of indebtedness, which did not materially increase the liability of the guarantor, would not release him. In *Powers v. Clarke*, 127 N.

Y. 417 (28 N. E. 402), the creditor said to the surety that the obligation of the principal debtor might be as high as \$1,000. In a letter guaranteeing the obligation, the surety said he understood the indebtedness would be about \$600. In truth, it turned out to be about \$900, and it was held the parties had made estimates only, and that there was no false representation which discharged the surety.

4-g

There is no *scienter*. Aside from the fact that the indebtedness was, in fact, inconsiderable, Sherman had every right to believe that it was inconsiderable. In February, 1908, Smith wrote Sherman that the bank balance was unusually low, because of extra efforts to pay bills, and that there was practically no need to buy anything. In January and in March, Smith wrote in a way that advised Sherman the indebtedness consisted of small items, aggregating a small amount; and, something like a month before the notes were signed, that Smith would proceed with collections as urgently as possible, and that he was "satisfied bills will all be paid, and something left by December." And Sherman testifies he considered the debts of the corporation were all taken care of.

So far, we have assumed Sherman represented there was no indebtedness. Smith says he did so represent. But Brown testifies the statement was that the concern had "practically no other debts, but might have said they had a few small bills, current expenses, or things of that kind." Certainly, the record justifies such a statement as that.

4-h

The only delinquent taxes were \$51 for 1906 taxes, and \$26.56 for the second half of 1907. Sherman did not inform Brown of this delinquency. If we assume that failure to inform of this is the equivalent of having represented fraudulently that it did not exist, and that the pleadings cover such a misrepresentation, it remains true that a tax

indebtedness of \$77.56 can hardly be treated as a material matter here. Be that as it may, the evidence fairly shows that Sherman had every reason to believe no taxes were delinquent. He could not have known or suspected that the taxes of 1906 were unpaid. They were due and payable in 1907, before the drug company was incorporated, and long before its transfer; and at the transfer, Smith had reported no unpaid taxes. Smith never included the 1906 taxes in any statement sent to Sherman. On March 16, 1908, he advised Sherman the taxes came to \$47, and at the end of that month, he sent a statement of bills paid, which included as one item, "Insurance, rent, and taxes, \$83.15."

4-i

There is no evidence that money was borrowed to pay debts and running expenses.

The proof fails to establish any right to release the sureties because of fraudulent representations to the effect that the trade was good and that the store was doing a nice business. The essential complaint is that it had run at a loss for six months, and was heavily indebted. The proof does not so show.

V. At the time when the sureties signed, injunction proceedings were pending, to restrain the drug company from selling or keeping liquor, in violation of law. Sherman knew of the pendency of this suit, and did not inform Brown of it. It is not charged that he made any misrepresentation, as for instance, that no such suit was pending; and at this point, appellees rely upon the proposition that failure to speak to this point was a fraudulent concealment, and the equivalent of an affirmative fraudulent misrepresentation on the point. For the sake of argument, we will assume this. The question remains whether the suppression was that of a material fact. The position of the appellees is that it is that, because this injunction proceeding was very

G. PRINCIPAL AND
SURETY: non-
material con-
cealment.

detrimental to the business of the drug company, and caused it great loss. The evidence does not disclose Sherman believed the proceeding was dangerous. The first knowledge he had of the proceedings was given by a letter from Smith, of date September 2, 1908, in which it was said:

"I do not believe they have very much against us, and hope we can beat them to it. However, should an injunction be granted, it will be November 1st before it is in effect, and as there is no local opposition at all here, we believe it can be dissolved at an early date. My attorney and I went through all the reports since January, 1908, and could find no error of any kind."

And in a letter of October 11, 1908, speaking of depositions to be taken, Smith wrote:

"I have looked each witness up carefully, and am satisfied that they will do me no harm at the hearing Friday, which makes our case look more hopeful. Personally, I believe we have an excellent chance to win out."

Sherman testifies that, while the proceedings were pending, there was a question whether injunction would be granted. It may be conceded the correspondence shows Sherman was of opinion that, if an injunction were granted, it would compel operating the business without profit, if not at a loss. Be that so, yet the ultimate claim of the appellees is that, whatever might be true of the mere pendency of the injunction proceedings, the entry of the injunction worked substantial injury, because the concern could thereafter sell *no* liquor; and that this inability to sell liquor "took away all of that business, and hurt the business in other ways, and hurt the town more or less, so that our business fell off in all lines by the fact of that injunction; and after the injunction was granted, our sales fell off at once,—I would say fully 50 per cent." Now, if the fact that business thus fell off after the injunction was granted settles that this was due to the granting of the in-

junction, it would follow that to conceal so injurious a thing as this would be the concealment of a material matter. But may we thus be concluded? The fact that business fell off to this extent is, as has been seen, contradicted by the testimony of both Smith and Brown. But suppose it did fall off to the extent stated, or some material extent. How does that prove that it was due to the entry of a decree forbidding nothing but the unlawful sale of intoxicating liquors? The right to sell liquor lawfully remained. If, then, the sureties have cause to complain that a material concealment was practiced, it is, in effect, grounded on the assertion that they consider the practice of violating the liquor law a substantial business asset, and would not have signed the notes, had they known the business was threatened with being stopped from selling liquor, in violation of law. It is said in *Franklin Bank v. Stevens*, 39 Me. 532, at 539, that, while many things indirectly affect the liability of the surety, the misrepresentation or concealment which will release him must be something that immediately affects his liability, and bears directly upon the particular transaction to which the suretyship attaches. The case of the appellees is not within this pronouncement. First, there is no competent proof that the pendency of the injunction suit affected the prosperity of the business, nor that the injunction subsequently entered did. Second, it has been demonstrated that neither could have caused anything which, in law or good morals, is an injury. It does not lie in the mouth of these sureties to say they would not have become sureties if they had been advised that the drug store was in danger of being prevented from selling liquor in violation of law. Now, it transpired that, upon the entry of the injunction, there was some \$400 to pay, in costs and attorney fees. As has been said, Sherman believed, during the pendency of the injunction proceedings, that they would never result in an injunction.

There is no evidence what expense, if any, attached to the mere pendency of the proceedings. We have held that lawful and substantial consideration passed for the notes. We are disinclined to cancel them because plaintiff, who believed they would prove abortive, did not inform Brown that injunction proceedings were pending, and, after the notes were signed, a cost and attorney fee bill of \$400 existed. If paid, it took a long time to have it affect the prosperity of the business; for, as has been seen, it did not disenable Smith from making 14 monthly payments of \$100 each, nor prevent Brown from writing, a long time afterwards, that he (Brown) had understood the business was splendid until the last few months before Brown so wrote.

VI. The purpose was to sell the shares for their true value. The parties estimated that value to be \$3,300, and Smith says they were worth not over 60 per cent of that. It is pleaded that, if the correct amounts of the debts had been deducted, the 33 shares would have had an estimated value of but \$1,800, and that, therefore, the estimated consideration put into the notes is too large by \$966.66; and it is additionally prayed that, because of mutual mistake, the notes should be reformed by giving credit in \$966.66 as of the date of the note. There is no proof that justifies reformation.

VII. Both sides urge that the other was guilty of laches. We have no occasion to consider the claim. No laches is pleaded, nor is there any substantial evidence of any. The issue may not be raised on this appeal for the first time.

The decree is reversed. The trial court will enter judgment for plaintiff, as prayed, against the defendants Gertrude Smith and O. C. Brown, or, at his election, appellant may, in rule manner, obtain such decree in this court.—*Reversed.*

LADD, EVANS, and STEVENS, JJ., concur.

ELSA F. WARD, Appellee, v. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appellant.

INSURANCE: Negative Conditions Precedent. A policy which
1 provides (1) for a general stated indemnity in case of death from accident, but (2) for a reduced indemnity in case the death results from a particular kind of accident *unless specified exculpatory circumstances attend such latter accident*, imposes the obligation on the insurer, in order to escape by payment of such reduced indemnity, to allege and prove that the specified exculpatory circumstances did not exist.

PRINCIPLE APPLIED: A policy provided for a general indemnity of \$5,000 in case of accidental death. It also provided for \$1,000 only, in case death resulted (1) from the overturning of an automobile, or (2) from the insured's being thrown from an automobile, *unless* the automobile (a) was struck by a train, or (b) by another automobile, without fault of the driver of the automobile in which the insured was riding. The proofs of loss simply showed that death resulted from the overturning of an automobile, and that there were no eyewitnesses. *Held:* (1) that the proofs were sufficient for a \$5,000 recovery; and (2) that the insurer must plead that the automobile was not struck by a train, and was *not* struck by another automobile.

WORDS AND PHRASES: "Unless." "Unless" is often employed
2 as equivalent to "except."

EVIDENCE: Negative Conditions. He who so draws his contract
3 as to assume both a general liability and a special but lesser liability dependent on a negative condition precedent, has the burden, in order to escape with the lesser liability, to prove that the exempting conditions did not exist.

PRINCIPLE APPLIED: See No. 1.

Appeal from Black Hawk District Court.—H. B. BOIES,
Judge.

NOVEMBER 23, 1918.

REHEARING DENIED MARCH 12, 1919.

Dunshee, Haines & Brody and Pickett, Swisher & Farwell, for appellant.

J. D. Liffing and Edwards, Longley, Ransier & Smith, for appellees.

ACTION on an accident insurance policy. A demurrer to the answer was sustained, and, defendant having elected to stand on the ruling, judgment was entered accordingly. Defendant appeals.—*Affirmed*.

LADD, J.—The defendant is a mutual assessment accident association, and, on January 31, 1916, issued a certificate of membership to G. L. Ward, whose death on April 10, 1917, resulted from bodily injury, effected, solely and independently of all other causes or conditions concurring, contributing, or intervening, through external, violent, and accidental means. Proofs of death were furnished, but the association refused to pay the \$5,000 indemnity claimed. Its liability for \$5,000 was denied in its answer, which alleged that, in the proofs of death furnished by plaintiff, she made oath that "her deceased husband came to his death by the overturning of the automobile;" that he "was instantly killed, by reason of being caught under and crushed by said automobile as it turned over;" and that there was no witness to the accident or injury; and it alleged the facts to be as shown. It set out that portion of "Part C" of the certificate stipulating that "the compensation payable for loss resulting from the overturning of any automobile or from the member being thrown from any automobile shall not exceed \$1,000, and that the payment of such sum shall discharge the association from all further liability, unless the accident shall be caused by the automobile being struck by a railway train or engine, or by an interurban or street car, or by another automobile, without any fault upon the part of the driver of the automobile in which the member was rid-

ing," and alleged that, by virtue thereof, and under the proofs of death filed, its liability to the plaintiff on account of the death of her said husband was limited to the payment of \$1,000, and that she "had wholly failed to furnish any proof or evidence showing or tending to show that the overturning of the automobile causing the injury from which her husband was killed was due to the said automobile being struck by a train or engine, or by an interurban or street car, or by another automobile, and that, by reason of said facts the plaintiff has only presented a claim against it under her proofs for the sum of \$1,000," and that said amount had been tendered and refused.

To this answer the plaintiff demurred, on the ground, in substance, that the facts pleaded therein did not constitute a defense, for that the burden was on defendant to plead any defense or partial defense it might have, and that the provisions of "Part C" quoted, constituting a limitation upon the amount of liability or a partial exemption therefrom, are defensive matters, and necessarily to be pleaded affirmatively. In other words, the limitation of the amount of indemnity to \$1,000 is not consequent on death "resulting from the overturning of any automobile" or "being thrown from any automobile," as pleaded in the answer; but, to invoke such limitation or exemption, it must appear, and hence be pleaded by way of defense (this being omitted from the answer) that death was not caused by the automobile's "being struck by a railway train or engine, or by an interurban or street car, or by another automobile, without any fault on the part of the driver of the automobile in which" the insured was riding. The demurrer was sustained, and the controversy is with reference to whether the portion omitted from the answer should have been pleaded, to constitute a good defense. Counsel for appellant concede that what was pleaded, i. e., that the insured was killed by the overturning of the automobile.

must have been set up in the answer, to be available as a defense, and such is the voice of authority with respect to exceptions or limitations on the indemnity stipulated. *McClure v. Great Western Acc. Assn.*, 141 Iowa 350.

In construing the clause quoted from "Part C" of the certificate, much depends on the meaning to be accorded the word "unless." The word, "unless," used in the act, is thus defined by Webster: "Upon any less condition than (the fact or thing stated in the sentence or clause which follows); if not; supposing that not; if it be not; were it not that." The Century Dictionary defines the word as meaning: "If it be not that; if it be not the case that," etc. These definitions clearly indicate, as was said by Douglas, J., in *City of Hickory v. Southern R. Co.*, 137 N. C. 189 (49 S. E. 202), "a negative condition precedent, as much so as the condition in a mortgage that, 'unless' the money is paid, or 'if it be not' paid by a certain day, the land may be sold." This was said in construing a charter to a railway company, awarding it the right of way on which constructed, "unless the owner or owners shall apply for an assessment of the value of said lands as hereinbefore directed, within two years next after that part of said road has been located."

In *Ramsdill v. Wentworth*, 106 Mass. 320, a statute providing that, when a testator omits to provide for any of his children, they shall take a share, unless otherwise provided for, or unless it appears that the omission was intentional, was held to imply that the burden of proof is upon those who would make such intention appear. In *Manning v. Keenan*, 73 N. Y. 45, a section of the code of that state provides for the service of an affidavit of title to property in the possession of the sheriff on that official, and that thereupon, the officer would not be bound to retain the property, unless he should, on demand, be indemnified.

2. WORDS AND
PHRASES:
"unless."

In commenting thereon, the court, speaking through Folger, J., observed that:

"The word *unless* has the force of *except*; its primary meaning is 'unloosened from,' so what follows in the sentence after the word *unless* is excepted or loosened from what went before it; and, though the officer is primarily bound by his process to keep the property, or to make delivery to the plaintiff, the service of affidavit of claim suspends that obligation and he is no longer bound so to do, unless indemnity is given, when he is again bound; and as no claim by a third person was, without the section, valid against an officer who had obeyed strictly his process, so none should after that section be valid, unless made as it provided, and if so made, then it should be valid. For such a form of expression in a statute sometimes amounts to an affirmative enactment, and in fact *in proprio vigore*, confers all that is excepted from a negative or restrictive provision." See *In re Estate of Pearsons*, 110 Cal. 524 (42 Pac. 960); *Alexander v. People*, 7 Colo. 155 (2 Pac. 894); *In re Estate of Smith*, 131 Cal. 433 (82 Am. St. 358).

As seen, the word is often employed as equivalent to "except." That meaning could well have been intended; for, manifestly, the clause following was intended as a limitation on or description of what preceded. The reduction on the amount of indemnity was to be upon the loss' being caused by the overturning of the automobile, or being thrown therefrom, if not caused by a collision, such as described. In other words, the language following the word "unless" is in the nature of a limitation, attached to what preceded. The definitions of the lexicographers lend support to this construction; for if "unless" be defined as meaning "if not," or "if it be not," the clause following is made as a limitation or description of conditions under which the general clause preceding shall apply. The language bears this construction; and, as it must be construed

most strongly against the association, we are inclined to concur with the ruling of the trial court in construing the portion of "Part C" of the certificate as, in its entirety, constituting an exception, rather than saying that what follows the word "unless" is an exception to the exception preceding. This conclusion finds support in *McClure v. Great Western Acc. Assn.*, 141 Iowa 350, where the policy provided that, if accidental injuries were "received while on the roadbed or bridge of any railroad company, except while crossing at a public highway," the indemnity should be for one fifth of the amount stipulated in the contract and for one twentieth of the time;" and the association insisted that, though "the burden of proof was on defendant to show that the accident occurred on the roadbed or the railway, when this appeared, such burden shifted to plaintiff, and rested on him to prove that it happened while crossing a public highway. In other words, defendant having proved the exception, plaintiff must establish the exception to the exception. The trouble with this contention is that the last supposed exception is but a limitation on the first, and the defendant is only relieved from the larger liability when the accident occurs on the roadbed elsewhere than in crossing over a highway. Indeed, several courts have held that this limitation is implied, even though no mention is made of the insured crossing the track where travelers have the right to be." The decision is not put on this last ground, as counsel for appellant seems to think; but the clause following the word "except" was held to be a limitation, and, as we think, that decision rules this case, if the word "unless" were to be treated as equivalent to "except."

The proofs of loss, then, were sufficient in stating the manner of death without negating the exception as construed; and, of course, sufficient facts must have been

pleaded in the answer to raise the defense

3. **EVIDENCE:** negative conditions. that the beneficiary was entitled to but \$1,000 as indemnity. That the exception might be difficult of proof furnishes no justification for changing this rule of pleading, nor can it be said that, under this construction of the clause, defendant was required to prove a negative. Inasmuch as the defendant failed to plead entire exception, the court rightly sustained the demurrer to the answer, and its ruling in so doing is approved. —*Affirmed.*

PRESTON, C. J., EVANS and STEVENS, JJ., concur.

MARY WENSEL, Administratrix, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

RAILROADS: Self-Preservation and Reliance on Signals. The presumption that a person will act in harmony with the recognized instinct of self-preservation, aided by the legal right of deceased to rely on the giving of warning signals by an engine crew in approaching a public crossing, at great speed, on a dark night, may create a jury question on the issue of deceased's negligence in entering upon such crossing, even though, under other conditions of light at the same place, the deceased might have had an unobstructed and safe view of an approaching train for a distance varying from 260 feet to one-half mile.

DEDICATION: Conclusive Intent. Intent on the part of an owner of land to dedicate the same for a public highway will not be conclusively presumed on a record showing:

1. That, for at least 20 years, the public had continuously and generally used, as a public highway, a well-defined railway grade, which had been abandoned for switching purposes.

2. That, during said time, the public authorities improved said way as a public highway.

3. That, until about the end of said time, the railway company maintained a crossing where said abandoned grade touched its main line, but then removed said crossing, owing to the fencing of said way by the presumed owner thereof.

HIGHWAYS: Dedication by Conduct. Conduct on the part of an owner of land, when relied on to show a *conclusive* intent to dedicate the land for highway purposes, must be unequivocal. So held where the record showed travel and public improvement for many years, but revealed uncertainty (a) as to the ownership of the land during part of the time, and (b) as to the extent and nature of the original right in the land.

RAILROADS: Estoppel to Dispute Public Nature of Crossing. A railway may not be estopped from insisting that, at the time of an accident, a crossing was not public, when it had removed said crossing and ceased the maintenance of the same long prior to the accident in question.

Appeal from Marshall District Court.—JAMES W. WILLETT,
Judge.

JANUARY 20, 1919.

REHEARING DENIED MARCH 12, 1919.

ACTION for damages resulted in the judgment against defendant from which it appeals.—*Reversed.*

Hughes, Sutherland & O'Brien and *E. N. Farber*, for appellant.

Carney & Carney, for appellee.

LADD, C. J.—The railway track of the Chicago, Milwaukee & St. Paul Railroad Company extends through the incorporated town of Melbourne in an easterly and westerly direction, and that of the Chicago Great

1. RAILROADS: self-preservation and reliance on signals. Western Railroad Company passes over it at right angles, on an overhead crossing.

Two hundred and fifty-one feet east of the intersection is an overhead crossing of the highway. Two hundred and sixty-three feet west of the railway intersection, an alleged highway crosses the Chicago, Milwaukee & St. Paul Railroad Company's right of way and tracks. At about fifteen minutes after six o'clock in the afternoon of

January 21, 1914, George O. Wensel, when about to walk from the north along this alleged highway over the tracks, was struck by a western bound passenger train, and killed. The petition charges defendant with negligence in several respects:

(a) In not having a headlight upon the front end of the engine, of sufficient power to be seen at a reasonable distance, considering the speed of the train; and, in fact, having no light at all, sufficient for headlight purposes.

(b) In approaching the crossing referred to, one which had been used for years by pedestrians and teams, with the full knowledge of the defendants, without sound of whistle at a sufficient distance east of the crossing to give notice to anyone attempting to cross, that a train was approaching.

(c) In not causing or having the bell upon said engine rung as an alarm, at a sufficient distance east of the said crossing so that persons attempting to cross should hear it and protect themselves from danger.

(d) In operating the said train and engine at a dangerous and excessive speed, exceeding 50 miles an hour at the time, on the evening in question, into and through the limits of the incorporated town of Melbourne, aforesaid, when pedestrians or teams, it might be anticipated, would be attempting to cross the railway at the crossing in question.

(e) That defendant, well knowing the fact that the crossing in question, being within the limits of the incorporated town of Melbourne, was used very frequently by teams and pedestrians, well knowing the danger of high speed with no headlight or sound of whistle or bell, and at excessive speed, on the occasion in question, negligently and recklessly operated its engine and train in such manner as to instantly kill George O. Wensel, and all by reason of the carelessness and negligence of the defendants, as aforesaid.

(f) That the defendant, contrary to the provisions of

the ordinance set forth, did operate the said locomotive engine and train, on the occasion in question, negligently, within said town, and prior to striking the said George O. Wensel, without ringing the bell of the locomotive continually, as provided in said ordinance.

These charges of negligence were put in issue, as was plaintiff's averment that decedent was without fault.

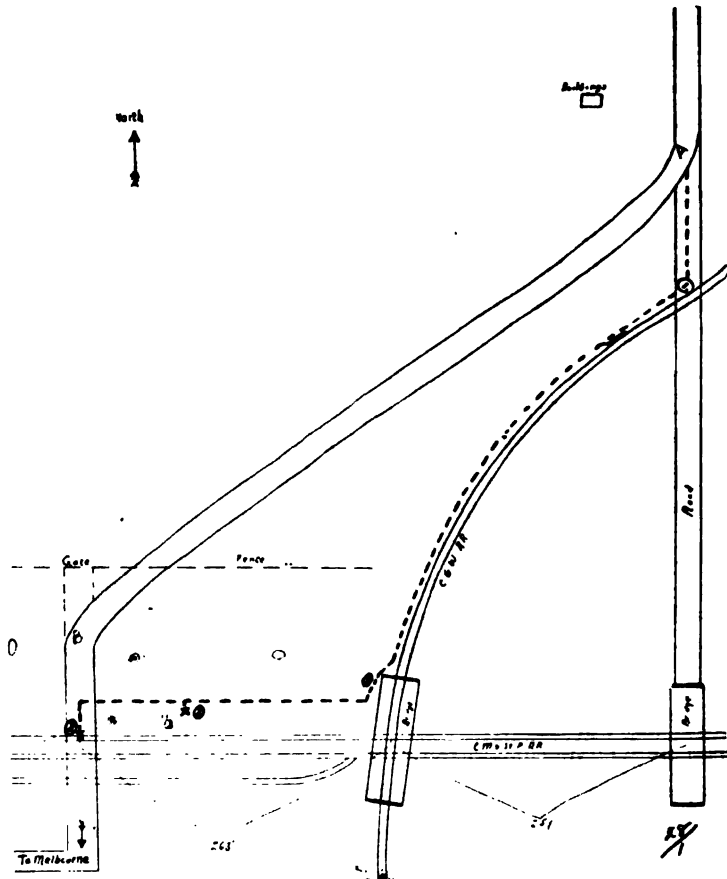
I. Appellant's first contention is that the evidence conclusively shows that Wensel was guilty of contributory negligence.

After completing the work of the day on the farm, decedent, accompanied by Nelson, walked along the Chicago Great Western Railway Company's track to the bridge or overhead crossing, passed down the grade, and took a well-beaten and traveled path about 30 feet north of the Chicago, Milwaukee & St. Paul Railway tracks, and proceeded along the same in westerly direction to the center of the alleged road, 36 feet north of the north rail of said track, and turned south. Wensel walked ahead; and, as he stepped close to the track, he was struck by the pilot beam of the engine, and his body thrown 50 feet. The dotted line on the annexed map shows the course they pursued.

The jury might have found from the evidence that, as the train approached from the east, the whistle was not blown, the bell was not rung, and that the train was moving at a speed of from 40 to 50 miles per hour.

Nelson testified that, when walking along the path, and at "2" in the dotted line, about 84 feet west of where they turned to go over the track, he stepped down about 6 feet to the south, and looked for trains, but saw none; that he could see the piling of the Chicago Great Western Railway Company's overhead crossing, but could not see the overhead wagon bridge beyond; that the place where he stopped was 8 or 10 feet above the double track, and from there he followed Wensel in a westerly direction, as

recited, until 5 or 6 feet behind him when reaching the track; that he did not notice Wensel looking; that he (witness) was watching the footpath or wagon road; that there was an embankment toward the east, and, owing to the darkness, he could not see the railroad bridge,—merely an outline of it,—could not see it plainly.



"Just a few seconds before he (Wensel) got killed,—it was not very many seconds,—I saw a little bit of a light coming. It looked like a switch light, off 300 yards. There was no other light on the train."

He testified further that he was then 5 or 6 feet back of Wensel, and:

"It was a very few seconds after I saw the engine before he was struck. The engine was about 30 feet away. * * * There wasn't a particle of light. There was no bell rung or whistle sounded. * * * There wasn't any sound indicating the approach of a train. * * * It didn't take very many seconds from the time I saw the train until it hit him,—took him out of my hands. I pretty near held him; I tried to clutch him, but couldn't,—it was so quick. It was going so fast that you wouldn't have time to think of what you would do."

With reference to observing Wensel, the witness testified he had not looked at Wensel, to determine whether he was looking or not.

"Q. And that is the reason that you didn't notice him look? A. No, sir. Q. So far as your personal observation of Mr. Wensel's head just prior to the injury or striking, you don't know whether he looked east or west? A. No, sir; I didn't notice his head. Q. On coming down that path from the corner, can you say whether or not you noticed Mr. Wensel's head,—in what direction it was turned? A. No, sir."

Re-cross-examination:

"Q. There was an incandescent light in front then? A. There was no light to speak of. There was a light,—yes; but it showed no reflection on the ground, anyway; it showed no reflection of the light whatever. Q. There was a light there? A. Yes, sir. Q. And you saw it? A. Just for a second. Q. By looking, you could see the light, couldn't you? A. Yes, sir; that is all you could see. I saw the light and knew it was a light and knew there was a train coming, and as near as I could guess, it was 30 feet away at that time. I believe it was that distance away. * * * Q. And you didn't see him look then? A. No, sir. Q. And

yet you were looking at him? A. Possibly,—yes; I was looking at him, of course, trying to get hold of him.”

Re-direct examination:

“Q. Did you look at him until you tried to get hold of him? A. No, I didn’t look at him before till I seen the light, and then I made a break for him. There was no gleam of light on the rails or track ahead of the engine.”

He had made a written statement, previous to the trial, that Wensel was in plain view; that he did not see him look to the east, and did not think he looked in the direction from which the train was coming.

One Bollenbacker, assisted by others, made experiments as to how far east they could see from certain points north of the track at the crossing in question. At a point about 20 feet north of the north track, they testified to having a clear view, looking east, for 500 feet, without obstruction; at a point 32 feet north of the north rail, to having a clear view for 262 feet up to the Chicago Great Western Company’s overhead bridge; that, from the center of this crossing to the west end of the embankment north of the Chicago, Milwaukee & St. Paul Railway Company’s track, the distance was 62 feet; that it was 26 feet from the top of the embankment at the west end to the most northerly rail, and at the bottom, a distance of 20 feet; that, from a point 14 feet north of the northerly rail in the crossing, they could see past the overhead wagon bridge; that, from a point 5½ feet north of the north rail at the crossing, they had an unobstructed view to the curve, approximately one-half mile away.

It is evident from this that looking from the point marked “2” 36 feet north and 84 feet east of the crossing, ought not, under the circumstances, to be regarded as the exercise of the degree of care exacted before undertaking to pass over the crossing. Nelson does not appear to have looked again before reaching a point 5 or 6 feet north

of the north rail, but this was in time to enable him to avoid danger. The jury might have found that he did not observe whether Wensel looked or turned his head in either direction; and if they so did, an inference arose that, owing to the natural instinct of self-preservation, he was in the exercise of ordinary care in approaching the crossing, and such inference was to be considered in connection with all the evidence adduced, in passing on the issue as to whether decedent was guilty of contributory negligence. *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488, 492; *Lunde v. Cudahy Packing Co.*, 139 Iowa 688; *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268. Had he looked at the point in the alleged road in turning south, he could not have seen beyond the overhead railroad crossing, and the train had not then reached that point. As appears from the experiments, the view became more extended as he approached the track. The east boundary of Melbourne was the highway passing over the highway overhead crossing. No stop was made in the town, and it might have been found that the speed of the train was at least 45 miles per hour, without any warning, such as sounding the whistle or ringing the bell, without headlight other than one likened unto a switch light 300 feet away, and scarcely visible, and that the "roar of the train" was unheard in front, as it approached the crossing; and if so, and something of care might be inferred, there was room for the jury to find that decedent was without fault in what he did. Of course, if he must have seen the approach of the train, had he done what his instincts for self-preservation exacted, nothing could be gained by indulging in the presumption that he so did. Nor can it be said, in view of his right to rely on the giving of statutory signals, that, if none were given, and the roar of the train could not be heard, failure to listen necessarily constituted negligence. It is well settled that decedent was not bound to look and listen from any particular point in

the way, if, in keeping a lookout, he exercised ordinary care. All required of decedent was that he exercise ordinary care for his own safety, in approaching the tracks; and the evidence, as we think, was such as to carry that issue to the jury.

II. The court instructed the jury that the point where Wensel was killed was on a highway crossing, and the alleged road along which he was approaching it was a public highway, and so shown to be by the undisputed evidence. The situation will be better understood from an examination of the annexed map.

2. DEDICATION:
conclusive in-
tent.

The evidence showed that there was a well-worn pathway from A on the map, the entire length of the dotted line; and that, for many years, children, in going to and returning from school, and people generally, made use of it. This had continued many years. The evidence was equally conclusive that, about 25 or 30 years prior to the accident, a railroad track connected the Chicago Great Western Railroad and the Chicago, Milwaukee & St. Paul Railroad, extending from A to B on the map, for switching purposes; and that, about 25 or 30 years ago, this track was removed, and the switching thereafter done south of the latter company's track; and that thereafter, and for 20 or 25 years, the wye from A to B, and from the latter point on south over the crossing to the business portion of Melbourne, was traveled by the public generally as a highway, being made use of by the inhabitants generally, living east and northeast of Melbourne; that the road was improved by the incorporated town of Melbourne by inserting a wooden culvert, a few years prior to the trial, and making some repairs thereon; that, throughout this period, the Chicago, Milwaukee & St. Paul Railroad Company maintained a crossing of plank and dirt over its tracks continuously up to December, 1912, or in July following, when the fence indicated on

the map was constructed by one Miller, and the company lowered a portion of its tracks and removed all or a portion of the planks from the crossing. Shortly afterwards, Miller constructed a gate, as appears on the map, and he and some neighbors persisted in the use of this crossing; and, shortly after this accident, the company restored the crossing of plank and dirt. After the construction of the fence, the traffic seems to have passed south over the wagon crossing.

The evidence leaves no doubt that this wye was clearly defined by its elevation from the surface, it having been previously graded for the railway, and it was continuously used as a highway by the public for at least 20 or 25 years, and kept in repair by those whose duty as officials exacted the care of streets and highways. Was this showing sufficient to warrant the conclusion that this road had been dedicated by the owner and accepted by the public? Dedication may be either express or implied. It is express when the purpose to devote a particular strip of land to highway purposes is by grant, as by deed. It is implied when an intention to devote the land to the public use is clearly manifested by the conduct of the owner. The *animus dedicandi* must exist in either case, but in neither is any particular formality of words required. An implied dedication of land for the public use as a highway may be established in any conceivable way by which the intent of the owner can be made apparent.

"The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the

public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." Elliott on Roads and Streets (1st Ed.) 92 *et seq.*

As said in Greenleaf on Evidence (16th Ed.), Section 662:

"The right of the public does not rest upon a grant by deed, nor under a twenty years' possession, but upon the use of the land, with the assent of the owner, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment."

The rule is laid down in *Wilson v. Hull*, 7 Utah 90 (24 Pac. 799), that:

"The intention of the owner of the land to dedicate may be inferred from his acquiescence in its continued use as a road by the public. In order to constitute acquiescence in a legal sense, the owner must know that the public is using his land as a road. There must be an act of the mind, a knowledge that the public is using the land as a highway, and a purpose on the part of the owner not to object. A knowledge of the use for such a purpose, without objection by word or act, may authorize the inference that the owner consents to the appropriation."

In *Schettler v. Lynch*, 23 Utah 305 (64 Pac. 955), the court declares that:

"The dedication may be inferred from long-continued

use by the public, with the knowledge of the owner, and without objection by him."

Substantially the same doctrine is laid down in *Lonaconing, M. & F. R. Co. v. Consolidation Coal Co.*, 95 Md. 630 (53 Atl. 420). See, also, *Tise v. Whitaker-Harvey Co.*, 146 N. C. 374 (59 S. E. 1012); *Hanger v. City of Des Moines*, 109 Iowa 480; *Dodge v. Hart*, 113 Iowa 685; *Pence v. Bryant*, 54 W. Va. 263 (46 S. E. 275); and *City of Winchester v. Carroll*, 99 Va. 727 (40 S. E. 37), in the syllabus of which it is said:

"Acceptance may be by such long use by the public as to render its reclamation unjust and improper. Both dedication and acceptance may be presumed by long user."

See Elliott on Roads and Streets (1st Ed.) 140.

In Pratt and MacKenzie's Law of Highways, at page 35, it is said that:

"When there is no direct evidence as to the intention of the owner, an *animus dedicandi* may be presumed, either from the fact that a way has been maintained and repaired by a public body, or from the fact of public user without interruption."

And later, on page 37:

"The presumption arising from long uninterrupted user of a way by the public is so strong as to dispense with all inquiry into the actual intention of the owner of the soil, and it is not even material to inquire who the owner of the soil was."

The author, in Angell on Highways, at Section 142, points out that no particular formality is required for a dedication, and that:

"It may be made either with or without writing, by any act of the owner, such as throwing open his land to the public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a

highway, or his declared assent to such use, will be sufficient; the dedication being proved in most, if not in all cases by matter *in pais*, and not by deed. The vital principle of dedication is the intention to dedicate,—the *animus dedicandi*; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication.”

In *Rex v. East Mark*, (1848) 11 Q. B. *877, Lord Denman, C. J., in passing on the question, observed that:

“The law, as lately laid down, has led the courts into very inconvenient inquiries. If a road has been used by the public between 40 and 50 years, without objection, am I not to use it, unless I know who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them, and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible.”

In *Dawes v. Hawkins*, 8 C. B. (N. S.) 848, Williams, J., declared that:

“The law is clear that, if there has been a public uninterrupted user of a road for such a length of time as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who the owner of it has been during the time the road has been so used by the public.”

It is clear, from these authorities and many others that might be cited, that an intent to give for a purpose, such as to dedicate for the use as a highway, must be shown to exist,

as well as an acceptance of such gift or dedication; and that these essentials may be established by circumstantial, quite as well as by direct, evidence, and are to be implied from the conduct of the owner and the acts of the public. Persons are presumed to intend the natural consequences of their own acts or omissions; and, if the owner allows the use of a defined strip of his land by the public as a highway, and it is improved as such by the public authorities at the public expense for a long period of time, and all this without objection, the natural and reasonable inference to be drawn therefrom is that he intended to devote said strip of land to such purpose.

In addition to the facts stated, it should be added that there was no proof concerning the right, if any, under which the wye connecting the railroads was held. For all that appears, it may have been held under an

3. HIGHWAYS: ded-
ication by con-
duct.

3. easement, in which event eight years must have elapsed before it reverted to the owner of the fee. See *Remey v. Iowa Cent. R. Co.*, 116 Iowa 133. If held by deed, the ownership during this long period was not proven. Because of the embankment, it may not have been of much use to the owner of the fee or to the owner of the abutting land. This may account for their putting no objection to its use by the public. Nor was the ownership of the land during the period mentioned shown, though it appears that Miller owned the land through which the way extended, at the time of the trial and for some years previous. A highway existed at the east line of the incorporated town, passing over the bridge onto the business portion of Melbourne. The use may have been merely permissive, until the construction of the overhead crossing. In view of all these circumstances, which should be taken into consideration in connection with the long use, we are of opinion that whether there was a dedication of the way as a road should have been submitted to

the jury, under proper instructions, and that the court erred in assuming that from A to B and on over the crossing was a public highway.

The appellant argues that the Chicago, Milwaukee & St. Paul Railroad Company is estopped from insisting that the crossing was not a public crossing, for that they maintained the same, and induced those traveling same

4. RAILROADS: estoppel to dispute public nature of crossing. to make use of it as such. This conclusion is obviated by the fact that, about the first

of July, 1913, the railroad company had taken up the crossing, and the wye had been fenced, and that this condition existed from then on until the collision; and therefore, the doctrine has no application. Because of the error in the instruction directing the jury that the evidence showed conclusively that the crossing was a public crossing, the judgment must be reversed.

Some other rulings are complained of; but, as they are not likely to occur on another trial; it is not necessary to review them. For the error pointed out, the judgment is—*Reversed.*

EVANS, PRESTON, and SALINGER, JJ., concur.

BRENARD MANUFACTURING COMPANY, Appellant, v. J. D. SKETCHLEY STORE et al., Appellees.

PRINCIPAL AND AGENT: Agent's Liability to Third Persons—

- 1 **Contracts.** There is no liability on the part of an agent to a third person, where the contract is in the name of the principal, and there is no claim of wrongful representation or lack of authority to act.

PRINCIPAL AND AGENT: Authority of Agent—Burden of Proof.

- 2 The burden of proof is on one seeking to charge a principal on a contract, to show that the agent had authority from the principal to sign the contract.

PARTNERSHIP: Creation and Requisites—Supplying Building and Funds to Run a Store. Where the owner of a store building supplied the building and funds for the operation of a grocery store, under an arrangement whereby he was to receive rent and interest, and the storekeeper was to have all the profits, the owner retaining title to the stock, a partnership was not created.

PRINCIPAL AND AGENT: Authority of Agent—Contracts—Ratification—Evidence. Evidence reviewed, and held that, where the owner of a store building had supplied funds for the operation of a grocery store, he was not liable on a contract made by the storekeeper for the purchase of pianos and jewelry for use in a trade extension scheme, he never having authorized, approved, or ratified the contract.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

MARCH 14, 1919.

ACTION to recover on a written contract. There was a verdict for the defendants and judgment entered thereon. The plaintiff appeals.—*Affirmed.*

J. M. Blake, for appellant.

Wesley Martin and D. C. Chase, Jr., for appellees.

EVANS, J.—The contract sued on was in the form of an order addressed to the plaintiff, and purported to be signed by the defendants, or one of them. Such order was as follows:

"The Brenard Manufacturing Company (Not Incorporated),
"Iowa City, Iowa.

"P. O., Webster City, Ia., Aug. 24, 1915.

"Brenard Mfg. Co.,

"Gentlemen:—On your approval of this order, deliver to me at your earliest convenience, F. O. B. factory or distributing point, 2 Claxton pianos, watches, silverware and advertising matter described in this and reverse side, in payment for which I herewith hand you my six notes, pay-

able to your order, aggregating \$640. If order is not approved and shipped by you, the notes are to be canceled and returned to me.

"The Brenard Mfg. Co. agrees to send their organizer to us on or before October 10th, for constructive campaign work and for the completion of district organization. Organizer to remain for such a period as Brenard Mfg. Co. may deem necessary, during which time I am to furnish free the necessary conveyance to properly conduct the work.

"You further agree to conduct all the correspondence with district secretaries, etc., in conducting and managing the entire trade extension campaign.

"I agree to furnish you within ten days names and addresses of teachers and directors of all schools in a ten-mile area about our store, with whom you are to take up correspondence immediately.

"I agree to take the shipments promptly, carry out the trade extension campaign plan, promptly meet all obligations entered into under this agreement, keep the pianos well displayed in my store, issue premium deposit checks to the amount of all purchases, and every sixty days of this contract to report to you my gross sales, and promptly furnish you all information you request to enable you to push the trade extension campaign.

"I hereby certify that my last twelve months sales were not less than \$50,000.00, and upon this figure my next twelve months sales to be \$60,000.00, and that if 15/16 per cent of my gross sales do not amount to \$640 for the next twelve months, you will pay me the deficiency in cash, and immediately upon approval of this order, send your bond for \$640.00 to cover this agreement with me.

"In consideration of the special methods set forth in your copyrighted plan and the special terms and agreements herein, this order cannot be countermanded.

"Brenard Manufacturing Co.'s Extension Campaign Order. .

"Consists of the following:

"2 Claxton pianos, mahogany finish, represented and described on reverse side.

"1 book, 'The Brenard Mfg. Co.'s Trade Booster Methods.'

"25 posters, 28x36.

"500 \$5.00 trading books.

"1 set of 'display card' signs.

"1 electroplate of player piano.

"1 instructions for newspaper advertising, which, if done, is to be without expense to Brenard Mfg. Co. .

"36 premium deposit checks in six colors, in denomination of 5 cents to \$50.00.

"1 O-Size ladies' 20-year gold-filled watch, with 15 jewel Elgin or Waltham movement.

"5 O-Size ladies' or gents' 10-year gold filled watches, with 7 jewel Swiss lever movement.

"1 toilet set (comb, brush, and mirror).

"Queen Esther Silverware (Manufactured by Wm. Rogers).

"We warrant for five years; any article will be replaced during that time.

"1 dozen tea spoons.

"1 dozen dessert spoons.

"1 dozen table spoons.

"1 dozen knives, solid handles.

"1 dozen dessert forks.

"1 dozen soup spoons.

"1 child's set.

"1 cream or gravy ladle.

"1 berry spoon.

"1 dozen orange spoons.

"1½ dozen butter knives.

" $\frac{1}{2}$ dozen sugar shells.

" $1\frac{1}{2}$ dozen cold meat forks.

"1 dozen coffee spoons.

"1 dozen butter spreaders.

"1 dozen oyster forks.

" $\frac{1}{2}$ dozen pickle forks.

"1 dozen fruit knives.

"Six due bills for \$375.00, \$365.00, \$355.00, \$345.00, \$335.00, and \$325.00, respectively, each good for one Claxton player piano when accompanied with the difference in cash, as designated by the due bills.

"Or when regular Claxton piano, instead of player piano is desired, six due bills for \$300.00, \$295.00, \$290.00, \$285.00, \$280.00, and \$275.00, respectively, each good for one Claxton piano when accompanied with the difference in cash, as designated by the due bills. Price \$600.00.

"[Signed] J. D. Sketchley, Store Purchaser,

"By T. B. Kearns, Mgr."

Attached to the said order and as a part thereof were six purported promissory notes for a sum total of \$640. In his argument the appellant treats his suit as an action on the promissory notes. It is not such, except in the sense that the notes are a part of the contract above set forth. The plaintiff averred in his petition "that the name of *J. D. Sketchley Store* was a trade name or term, under which J. D. Sketchley and T. B. Kearns were at the time doing business, J. D. Sketchley as proprietor and T. B. Kearns as manager." We find it difficult to get an intelligent conception of the contract above set forth. We quote the following explanation from the brief of the appellant:

"The Brenard Manufacturing Co., of Iowa City, is a concern that is engaged in what they term a trade extension business, whereby they sell to a merchant certain goods, consisting of pianos, jewelry, etc., for certain sum, to be given away by the merchant to the person, school, or so-

ciety purchasing the most goods at the store, as shown by trade coupons, which they furnish, together with a mass of advertising they send out to customers and furnish an experienced canvasser to *organize the territory.*"

From the record as a whole, we gather that the enterprise consisted of some sort of contest, in the nature of a lottery, whereby the plaintiff was to give away to third parties all the articles enumerated in the contract, as a method of so-called advertising for defendants. The contention for the plaintiff is that, under the undisputed evidence, it was entitled to a directed verdict against both defendants. Disregarding, for the moment, the objections of the appellees that appellant's argument is not founded upon proper exceptions, we look to the merits of the controversy.

I. Was the plaintiff entitled to a directed verdict against Kearns?

Kearns signed the contract and the notes as purported "manager" only. The petition specifically alleged that Sketchley was the proprietor, and that Kearns was his man-

ager. Notwithstanding this allegation, the

1. PRINCIPAL AND
AGENT: agent's
liability to third
persons: con-
tracts.

petition prayed judgment against both.

There was no allegation in the petition that sought to charge Kearns with liability on

the ground that he lacked the authority

which he assumed, or that he wrongfully assumed to represent his purported principal, when he had, in fact, no authority so to do. Upon this state of the pleadings, Kearns must be deemed a mere agent; and he was entitled to a directed verdict on that ground alone.

II. Was the plaintiff entitled to a directed verdict against Sketchley? The plaintiff had the burden of proof, as against Sketchley, to show that Kearns was authorized

- to sign the contract. The business which Kearns managed was a retail grocery store. No groceries are included in the contract. The relation between Sketchley and Kearns is not easy of definition. Kearns was a man of business experience, and without capital. Sketchley was the owner of a store building. He supplied the funds to place a grocery stock of goods in such store building, and turned it over to Kearns under an arrangement whereby Sketchley was to receive \$20 a month rent, and 8 per cent interest upon the capital invested in the stock. These charges to Sketchley were to be paid out of the profits, and the remainder was to belong to Kearns. The title to the stock was held by Sketchley as in the nature of security. The arrangement between them, therefore, was not a partnership, nor was it wholly a contract of employment. It may be said, also, that it did involve, to some extent, the relation of principal and agent. What is clear is that there was nothing in the contract between Sketchley and Kearns which could be construed to confer authority, either express or implied, upon Kearns to invest in the name of Sketchley in a lot of pianos and jewelry, for the purpose of distributing them gratis among alleged ticket holders. There was no evidence that Sketchley at any time or in any manner authorized, approved, or ratified the contract in question. The plaintiff named "J. D. Sketchley Store" as a defendant. The evidence is undisputed that there was no such entity. The store was known locally as "Kearns' Grocery."
2. **PRINCIPAL AND AGENT:** authority of agent: burden of proof.
3. **PARTNERSHIP:** creation and requisites: supplying building and funds to run a store.
4. **PRINCIPAL AND AGENT:** authority of agent: contracts: ratification: evidence.

To go further into the record, the contract sued on discloses that the plaintiff bound itself to results in the way of increase of business, as a result of the advertising scheme.

The evidence is undisputed that there were no results, and that there was no increase in business.

We reach the clear conclusion that Sketchley, also, was entitled to a directed verdict.

The trial court was more generous to the plaintiff. It submitted certain issues to the jury whereby a verdict might have been rendered against one defendant or the other, but not against both. The plaintiff complains of these instructions. It is enough to say that they were more favorable to the plaintiff than it was entitled to, as we have already indicated. The plaintiff's case was properly dismissed. The judgment below is, accordingly,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

L. R. FLEENER, Appellant, v. JOSEPH NUGENT, Appellee.

TRIAL: Items of Debit and Credit—Equitable Jurisdiction. That
1 the controversy involves a large number of items of debit and credit which could be more *conveniently tried* to the court is not a ground of equitable jurisdiction.

TRIAL: Proper Calendar—Law Issues—Transfer in Toto to Equity.
2 Where an action is properly brought at law, the defendant, as to the equitable issues tendered by his counterclaim, is entitled to have them transferred to equity, under Section 3435, Code, 1897, but it is error for the court to transfer the entire case.

Appeal from Polk District Court.—THOMAS J. GUTHRIE, Judge.

MARCH 14, 1919.

ON motion of defendant, the entire cause was transferred to the equity side of the calendar. From this ruling, the plaintiff appeals.—*Reversed*.

Chester J. Eller, for appellant.

W. L. Stewart and Miller, Parker, Riley & Stewart, for appellee.

PRESTON, J.—Plaintiff brought his action at law in several counts. One of these was for a balance alleged to be due plaintiff from defendant, under an oral agreement whereby plaintiff was to buy and ship to defendant certain horses; another for ground rent alleged to be due plaintiff from defendant; another, asking to recover on a certain check; others on written contracts for barn rent, wages, and so on. It is not necessary to set out plaintiff's claim more in detail, because appellee concedes in argument that plaintiff, in so far as he states a cause or causes of action at all, brings them within the cognizance of a court of law. Defendant answered, setting up its defenses to the several counts, and asked that each be dismissed. Defendant also filed a counterclaim against plaintiff in the sum of \$215.59, and alleged that plaintiff and defendant had been, for two and a half years, engaged in the purchase and sale of horses and mules; that defendant acted as banker for plaintiff, allowing plaintiff and his agents to check and draw on the general account of defendant, and that, with plaintiff's consent, the accounts were kept in the office of defendant, and upon the books of defendant; that, at various times, defendant presented plaintiff itemized statements of his account, which were accepted by plaintiff; that it would require time and space to set out the various transactions; but that, after allowing all just credits to plaintiff, there is still due and owing defendant on plaintiff's account, the amount last mentioned. It was further alleged, by way of amendment, that there were, from time to time, charged to plaintiff on defendant's books, various items for freight, yardage, feed, commission, insurance, etc.; that, from time to time throughout the period aforesaid, there were credited to plaintiff upon defendant's books, the proceeds arising from the sale of the animals bought by plaintiff and his representatives and turned over to defendant, the amount credited in the case of each animal being determined by the price

at which said animal was sold, and the expense, if any, incident to the keeping and sale of said animals; that, as to certain of the horses, defendant and plaintiff bought, handled, and sold the same, as partners, and such transactions were entered upon defendant's books in plaintiff's said account; that all the items mentioned in the various accounts of the plaintiff, and referred to in the petition, appear in and affect the plaintiff's account with defendant, as the same appears upon defendant's books; that, during the period aforesaid, plaintiff and defendant have had a multitude of transactions, involving the purchase and sale of hundreds of horses and mules, and many thousands of dollars; that the mutual accounts between plaintiff and defendant, as the same appear upon defendant's books, are voluminous; and that many of the items thereof, both of debit and credit, are in dispute; and that, in order to determine the rights of the parties, a mutual accounting must be had; that the account is so voluminous that it cannot be set forth in the pleading, or as an exhibit. The defendant prayed that the court, by itself or through a referee, take an accounting and determine the status of their mutual accounts, and that thereupon, defendant have judgment against plaintiff for the amount before mentioned. Thereafter, defendant moved the court to transfer the cause to the equity calendar and docket, on the following grounds: (1) It appears on the face of the petition that plaintiff's alleged causes of action involve matters of mutual accounting, in connection with the purchase and sale of horses and mules and other business transactions. (2) It appears from the face of the petition that, in relation to some of the transactions, plaintiff and defendant were partners, and that plaintiff's said causes of action involve an accounting between plaintiff and defendant as partners, in respect to said transactions. (3) It appears from the defendant's answer and counterclaim that the parties have dealt with each other as vendor and purchaser.

as principal and agent, and at times as partners, in a large number of transactions involving large sums of money, and extending over a period of about two and a half years; that there are mutual accounts between the parties which are numerous and voluminous, and that the number and nature of the disputed transactions are such as to render it impossible to try said causes to a jury. It further appears from the petition, and defendant's answer and counterclaim, that the mutual accounts between plaintiff and defendant are so voluminous, and involve so many transactions which are in dispute, that the rights of the parties cannot be determined except by an accounting in equity, either by a court of equity or by a referee. The motion to transfer was sustained, and the entire cause was transferred to the equity docket.

In regard to the first two grounds of the motion, the petition itself does not show that the action involves matters of mutual accounting or partnership. As already stated, it is conceded by defendant that the petition states a cause or causes of action at law. This being so, the action was properly brought at law, in the first instance. Code Sections 3432, 3433, and 3434 are cited. The first section provides that an error of plaintiff as to the kind of proceeding adopted shall not cause the abatement or dismissal of the action, but merely a transfer to the proper docket. The next section provides that such error may be corrected by plaintiff on motion. Section 3434 provides that defendant may have the correction made, where it appears that wrong proceedings have been adopted. For the reasons before given, these sections do not apply. Code Section 3435 provides:

"Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity, tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were

such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings."

Appellee contends that controversies between partners growing out of partnership accounts and transactions, and the question as to whether or not a partnership exists, are matters of which equity has jurisdiction, citing *McReynolds v. McReynolds*, 74 Iowa 89, 91; *Erret v. Pritchard*, 121 Iowa 496, 498; 2 Pomeroy on Equity Jurisprudence & Equitable Remedies (3d Ed.), Sections 983-935, and other cases; also that equity has jurisdiction of an accounting proceeding growing out of fiduciary relations (*Dickinson v. Stevenson*, 142 Iowa 567, 571); also that, when the trial exacts the examination of complicated mutual accounts, the cause may properly be transferred to the equity side (*Marks Hat Co. v. Slatnik*, 178 Iowa 370, 372, and cases cited; also *Mitchell v. Beck*, 178 Iowa 786, 794). In the *Marks* case, the motion to transfer was held to have been rightly overruled, because the mutuality exacted to invoke equitable jurisdiction was lacking. As to some of the counts in plaintiff's petition, it is not, and could not be, claimed that there is any question of mutual ac-

1. TRIAL: items of debit and credit: equitable jurisdiction. counts. The fact that the controversy involves a large number of items of debit and credit, arising out of numerous business transactions, which could be more conveniently tried to the court, is not a ground of equitable jurisdiction. *Williams v. Herring*, 183 Iowa 127. It appears that the books of account are in defendant's possession. It may be, and is, doubtless, true that, as to some of the issues tendered by the defendant, he would be entitled to have them tried as in equity, under Section 3435 of the Code; but this would not require the transfer of the entire case to the equity side. If such equitable issues are sustained by the
2. TRIAL: proper calendar: law issues: transfer in toto to equity.

defendant, it might finally determine the case. But that matter would come up later. We think the trial court erred in transferring the entire case. Our conclusion is sustained by the following authorities: *Eller v. Newell*, 159 Iowa 711; *Tinker v. Farmers St. Bank*, 178 Iowa 972; *Duffy v. Hardy Auto Co.*, 180 Iowa 745.

Appellant contends that there is no right to compulsory reference where the items sued upon do not constitute a portion of a continuous account, and that compulsory reference cannot be made in an action at law, because the case does not involve the examination of mutual accounts, and that he may not be deprived of his right to trial by jury. On these several propositions, he cites *Mayo v. Halley*, 124 Iowa 675; *District Twp. v. Bulles*, 69 Iowa 525; *Tufts v. Norris*, 115 Iowa 250; Code Section 3735. But it is unnecessary for us to determine this question, because there was no reference ordered by the trial court. The entire case was simply transferred to equity. Because the court erred in transferring the entire case, the order is—*Reversed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

F. A. HUDDLESTUN, Appellee, v. CITY OF WEBSTER CITY et al., Appellants.

MUNICIPAL CORPORATIONS: Taxation—Agricultural Lands—Electric Light System. Lands within city limits, occupied and used in good faith for agricultural purposes, and not divided into parcels of 10 acres or less, are exempted, under Section 616, Code Supp., 1913, from all city taxes except for road purposes, and cannot be taxed for electric lighting purposes, under Section 894, Subdiv. 6, Code Supp., 1913.

Appeal from Hamilton District Court.—E. M. McCall,
Judge.

MARCH 14, 1919.

SUIT in equity to enjoin the collection of a municipal tax levied upon the agricultural lands of the plaintiff. There was a decree as prayed, and the defendant appeals.—*Affirmed.*

J. W. Lee and J. E. Burnstedt, for appellant.

D. C. Chase, for appellee.

EVANS, J.—The plaintiff occupies a farm of 232 acres, adjoining the city of Webster City. Some years ago, the city limits were extended so as to include 115 acres of such farm. The area so included, however, has never been segregated from the rest of the farm in any manner, and the use of the entire farm for agricultural purposes has been continuous for many years. The city authorities of Webster City included the 115 acres within the taxing district for electric light purposes, under the provisions of Subdivision 6 of Section 894 of the Code; and the tax for electric light purposes was accordingly levied thereon.

The plaintiff predicates his right to an injunction against the levy and collection of such tax upon Section 616 of the Code, which is as follows:

“No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax,” etc.

On its face, the foregoing section seems to fully and unequivocally cover the case. The argument for appellants is that Section 616 applies only to those cases where city taxation is imposed without corresponding benefits. The argument is, also, that the plaintiff, by his close proximity

to the electric light system of the city, is greatly benefited thereby, both directly and indirectly, and that he is actually connected with the electric light system of the city, and receives the benefit of reduced rates common to all patrons. The argument is not without its force; but it should be addressed to the legislature, and not to us. We must take the statute as it is. It is true that it was enacted many years ago, and that later developments and modern conditions may call loudly for its amendment; but we cannot amend it. We see no conflict as between this section of the statute and Subdivision 6 of Section 894. The provision of the latter section that the city council may form a taxing district empowers it to eliminate from the burden of the tax all *city property* which is not so situated as to get the benefit of the electric light system. Section 616 was under our consideration in the recent case of *LaGrange v. Skiff*, 171 Iowa 143. In the case before us, there is no room for dispute as to the good faith of the use of the lands in question for agricultural purpose, and that only. The finding of the district court is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

JOHN J. MONOGHAN, Appellee, v. COLLIE C. BOWERS.
Appellant.

TRIAL: Instructions—Province of Jury—Material Allegations—

- 1 **Failure to Define Issues.** Where the allegations of the petition contained, in addition to a material allegation of a false representation, numerous unnecessary allegations of false representations, an instruction submitting all of such matters to the jury was improper.

APPEAL AND ERROR: Review—Harmless Error—Right to Per-

- 2 **emptory Instruction.** Where the trial court could have peremptorily instructed the jury that the plaintiff was entitled to recover, errors in the instructions in not defining the issues were without prejudice to the defendant.

FRAUD: Damages—False Representations as to Sale of Joint Property. Where one owning property jointly with another was induced by the latter's false representations as to the price being received to join in a sale of the same, he was entitled to one half of the amount for which the property was sold.

Appeal from Webster District Court.—R. M. WRIGHT,
Judge.

MARCH 14, 1919.

ACTION for damages for false representations, whereby the defendant obtained from the plaintiff a relinquishment of plaintiff's interest in certain property owned jointly by plaintiff and defendant. There was a verdict for the plaintiff, and the defendant appeals.—*Affirmed.*

Healy & Faville, for appellant.

Price & Burnquist, for appellee.

EVANS, J.—I. The plaintiff and defendant were severally engaged as real estate agents in Webster County. In November, 1915, they became jointly interested as owners of a certain property known in the record as the "Kepler property," situated in Otho, and incumbered by a mortgage of \$1,000. In February, 1916, the plaintiff relinquished his interest in the property, at the request of the defendant, for a consideration of \$250.

Under the evidence, the one material allegation of false representation in the petition is that the defendant falsely informed the plaintiff that he had sold the property to one Apland for \$1,500,—that is to say, for \$500 over and above the \$1,000 incumbrance; whereas, in truth, the defendant had contracted with Apland for a price of about \$3,500, consisting of \$1,000 in cash, \$1,000 in the assumption of the mortgage, and \$1,450 in two properties situated at Kalo, and worth \$850 and \$600 respectively.

Upon discovery of the alleged fraud, the plaintiff repudiated his alleged relinquishment and his acceptance of \$250 therefor, and claimed to recover from the defendant one half of the proceeds realized from the sale to Apland, less the sum of \$250 already received by him.

Not content with the one material allegation of fraud which we have above set forth, the plaintiff set forth in his petition numerous other alleged false representations, being 12 or 15 in number, and serving no other function than to hamper the court in a concise submission of the case. These additional allegations were set forth by the trial court in its statement of issues as follows:

"And he further avers that, after he and said defendant became jointly interested in said property, the defendant, for the purpose of swindling and defrauding the plaintiff, falsely and fraudulently represented to the plaintiff that said property was worthless, that the people living in said community and in and about Otho were intensely clannish, bore a bitter hatred to the members of the Catholic church, of which plaintiff was a member; and he stated to this plaintiff that the best thing that he, the plaintiff, could do would be to sell said property for little or nothing, or said property would be destroyed, after it became known that plaintiff herein was a part owner of said property; and defendant further represented to the plaintiff that said property was not worth to exceed \$1,500, and that the defendant knew that the said property was not of a greater value than \$1,500; whereupon plaintiff herein informed the defendant that he would take the property at \$1,500.00 and live there himself; and defendant then falsely and fraudulently stated that plaintiff would make a great mistake if he purchased said property and lived in said home, for the people would not tolerate plaintiff and his family in said community, because they were members of the Catholic church; and that the children in and about Otho and

Kalo were of a vicious, criminal kind; that it would not be safe for the children and daughters of the plaintiff to attend said school; that they would be assaulted and abused on their way to and from school; and plaintiff avers that all of said representations were false and well known to be false by the defendant, when he made them, and that the same were made to the plaintiff with the intention to defraud this plaintiff and made him part with the ownership of said property for a sum much less than it was worth; and plaintiff avers that he believed all of said representations of said defendant, and relied upon the truthfulness of the same, and upon the superior information of the defendant as to conditions in Otho."

Instruction 3, given by the court, was as follows:

"You are instructed that the burden of proof is on the plaintiff to establish, by a preponderance of the evidence, *all the material allegations* contained in his petition not admitted by the defendant in his answer: that is, he must establish the truth of each of the following propositions:

"First. That the defendant made to him *certain representations*.

"Second. That *said representations* were false.

"Third. That defendant, on making the said representations, knew them to be false.

"Fourth. That defendant intended that plaintiff should rely upon the truth of said representations.

"Fifth. That plaintiff did rely upon the truth of said representations.

"Sixth. That, by reason of the reliance upon the truth of said representations, the plaintiff made to defendant a transfer of his interest in said property.

"Seventh. That plaintiff has been damaged by reason of his reliance upon the truth of the representations as made by the defendant, and the amount of said damage.

"If plaintiff has established each of the foregoing

propositions by a preponderance of the evidence, he should recover in this case."

The appellant complains of this instruction in that it left the jury wholly in the dark as to which representations were material and which were not; that it advised the jury that the burden was on the plaintiff to prove

1. TRIAL: instructions: province of jury: material allegations: failure to define issues.

"certain representations;" and that no other guide was laid down. It must be conceded that the instruction is subject to criticism in this respect. While pleaders cast much unnecessary work upon the trial judge, by indiscriminate pleading, the duty still remains to the judge to enlighten the jury as to the very questions upon which it must pass. Trial judges should be fearless to separate the wheat from the chaff, and to commit themselves definitely and concretely to the material and controlling issues upon which the jury must pass, in order to render an intelligent verdict. The only wheat in plaintiff's pleading in this case is the allegation already indicated. The others were mere chaff, and should have been sifted out and blown over the tailboard by the instructions. By a later instruction "A." the controlling question was laid before the jury as follows:

"At the request of the plaintiff, I give you the following instruction, numbered A, to which you will give the same force and effect as if the same had been given to you on the court's own motion:

"A. The undisputed evidence shows in this case that the plaintiff and the defendant were the joint owners of the Kepler property, and in this connection you are told that if, in this case, you find that, before the plaintiff parted with his interest in the property in question, the defendant, unknown to the plaintiff, had already sold the property for a greater sum than the sum he represented to the plaintiff he had received for the property, and that the plaintiff was

damaged thereby, fraud would be presumed as a matter of law."

Whether this latter instruction was sufficient of itself to cure the shortcoming of the third instruction, we will not stop now to inquire. An examination of the record discloses the state of the evidence to be such

2. APPEAL AND ERROR: review: harmless error: right to peremptory instruction. as to render the instruction complained of quite nonprejudicial, and we turn thereto. It is undisputed that the defendant did obtain

from the plaintiff a relinquishment of his interest in the property on a basis of a valuation of \$1,500; that the plaintiff believed that such was the price at which the defendant had sold the property to Apland; that the defendant disclosed to him nothing to the contrary; and that the defendant had, in fact, sold the property to Apland for a price greatly in excess of such sum. Plaintiff testified that the defendant expressly stated to him that \$1,500 was the sum that he received. The defendant does not admit this statement, but does admit that he did not disclose the price that he had received. His only excuse for his conduct is that he claims to have had an oral understanding, entered into some weeks before, that the plaintiff would take \$250 for his interest. He does not claim that he had any valid agreement to that effect. This state of the evidence left nothing for the jury at this point. The trial court could have peremptorily instructed the jury that the plaintiff was entitled to recover to the extent of one half the amount realized under the contract already entered into with Apland. This would, of itself, dispose of every question involved in Instructions 3 and A. It would leave nothing for the consideration of the jury but the question of the measure of recovery, to which we next give our attention.

II. By Instruction 4, the trial court instructed the jury that the measure of plaintiff's recovery would be one

half of the amount which the defendant obtained for the property, estimating the Kalo property at its reasonable value, as shown by the evidence, less the \$250 already received by plaintiff. This was a correct instruction. The plaintiff had assented to the Apland sale. He was entitled to one half the proceeds thereof. In legal effect, his share had been converted by the defendant. The measure of his recovery, therefore, was the reasonable value of the property thus converted. No other errors are assigned by appellant. The judgment is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

MULRONEY MANUFACTURING COMPANY, Appellee, v. ANFIN O. WEEKS et al., Appellants.

TRIAL: Instructions—Province of Jury—Material Facts. Instruction 1 submitting to the jury the question as to whether a person was "guilty of any of the *material* false acts or representations charged" was improper, where there was in the instructions no guide to the jury as to *what* false acts should be deemed material.

FALSE PRETENSES: Elements of Offense—Check without Funds for Property. The delivery of a check in payment of goods was a representation that it was good, and would be paid on presentation; and where the buyer securing possession of the goods knew that the check was false, and that there were no funds to pay the same, he was guilty of the crime of cheating by false pretenses.

APPEAL AND ERROR: Review—Harmless Error—Right to Directed Verdict. Where one was, under the issues, entitled to a directed verdict in his favor, and secured a verdict from the jury, error in instructions held nonprejudicial.

BANKRUPTCY: Ownership of Property—Securing Goods by False Pretenses—Rescission of Sale. The seller of goods to an insolvent buyer who obtained possession of the same by giving a

false check has the right, upon nonpayment of the check, to rescind the sale and recover the goods, and can enforce such right against the buyer's trustee in bankruptcy; and a demand upon buyer's assignee for benefit of creditors, who was a former employee of the buyer's, held a sufficient election to rescind; and such a recovery does not work a preference under the Bankruptcy Act.

Appeal from Wright District Court.—H. E. FRY, Judge.

MARCH 14, 1919.

ACTION of replevin against the defendant Weeks and his successors in title to recover property obtained by Weeks from the plaintiff by false and fraudulent representations. There was a trial to a jury, and a verdict for the plaintiff. The defendant appeals.—*Affirmed.*

Kenyon, Kelleher & Hanson, for appellants.

P. F. Nugent and Sylvester Flynn, for appellee.

EVANS, J.—The ultimate defendant, Woodward, is a trustee in bankruptcy, who is entitled, as such, to the possession of the estate of the defendant Weeks, as a bankrupt. Weeks was a merchant, operating stores in the small towns of Holmes and Hardy, each a few miles distant from Fort Dodge. The plaintiff was a manufacturing concern, located at Fort Dodge, and engaged in selling its product to retail dealers. It had dealt with Weeks for two or three years. In July, 1916, Weeks placed an order for goods to the value of \$802.70. He was at that time already indebted to the plaintiff in the sum of over \$600. The plaintiff boxed the goods ordered in July, but refused to part with the same until Weeks should make a substantial payment upon the existing indebtedness. On September 28, 1916, Weeks, desiring to obtain the goods ordered in July, delivered to the plaintiff his check for \$223.47, to apply on the past-due account. The plaintiff, relying upon

the check as being good for the amount, delivered the July order. The check was delivered by Weeks to a traveling agent of the plaintiff's, who sent the same by mail to the plaintiff, and the plaintiff sent the same by mail to the Bank of Holmes, upon which it was drawn, and where it went to protest. There had been no funds there to meet such check on the date thereof, or on any later date. Weeks made an assignment for the benefit of his creditors, and absconded. Later, a petition in bankruptcy was filed, and the estate is now in the bankruptcy court. The claims allowed against it amount to more than \$25,000, and the total assets are a little more than \$3,000. The foregoing are the salient facts in the case.

I. The appellant complains that the instructions of the trial court, in its statement of the issues, embodied the entire petition, without discrimination, and that they did not in any manner advise the jury as to what were the material allegations necessary for the plaintiff to prove, in order to recover. The instructions are fairly subject to criticism in the respect indicated. The petition was rather prolix in its allegations. Under its allegations, a right of recovery could be predicated upon either one of two or more grounds:

(1) That Weeks had obtained the possession of the goods from the plaintiff by false pretenses, in that he had delivered to the plaintiff a false check, knowing it to be false, and knowing himself to be insolvent, and that the plaintiff had received the same believing it to be good.

(2) That Weeks had obtained the goods by false pretenses, in that, knowing himself to be insolvent, he contracted for and received the goods, with an intent not to pay for them.

Other allegations in the petition were quite immaterial except so far as they were evidentiary, and bore upon the grounds here set forth. The question to be determined by

1. TRIAL: instructions: province of jury: material facts. the jury was not well submitted by Instruction 5, complained of, in the broad statement that, "if it is shown that Weeks was guilty of any of the material false acts or representations charged." Other than the foregoing, there was no guide to the jury as to what false acts should be deemed material.

2. FALSE PRETENSES: elements of offense: check without funds for property. Upon the record before us, however, we think that the failure of the instructions in this regard is not available to the appellant for the purpose of a reversal. The first ground upon which the plaintiff has predicated its claim, as we have set forth above, is sustained by the undisputed record. Weeks was insolvent. He presented a false check, knowing it to be false. He obtained thereby the possession of the goods in controversy. The delivery of the check was a representation that it was good, and would be paid on presentation. In obtaining possession of the goods thereby, Weeks became guilty of the crime of cheating by false pretenses. *State v. Foxton*, 166 Iowa 181.

3. APPEAL AND ERROR: review: harmless error: right to directed verdict. The reliance of the plaintiff upon the check is also proven without dispute. We think it clear, therefore, that the plaintiff was entitled to a directed verdict, though it did not ask for one. Having obtained its verdict from the jury, it may defend the same on the same grounds upon which it might have demanded a directed verdict. The fact that it was entitled to a directed verdict renders errors as to other issues nonprejudicial.

We do not overlook that the defendant pleaded the negligence of the plaintiff in not discovering the insolvency. We think this contention has no support in the record. If

4. **BANKRUPTCY:** it did, and if it were found that the plaintiff
ownership of ought to have known of the insolvent con-
property: secur- dition of Weeks, the plaintiff still had
ing goods by
false pretenses: a right to rely upon the genuineness
rescission of
sale. of the check, and to assume that Weeks had
the funds on deposit at the bank to meet the same.

It is also urged by the appellant that there was no notice of rescission given to Weeks, or to his assignee or trustee. There was an immediate demand for the possession of the goods. It was made upon Worra, the assignee and former employee of Weeks. Weeks had absconded. The demand was a sufficient election to rescind. The goods were at that time in their original boxes, unopened, and were in such condition when taken on the writ of replevin. We think the plaintiff was clearly entitled to retake the goods. The exercise of such right by the plaintiff, or the recognition of it by the court, does not work a preference in violation of the provisions of the Federal statute; nor is it inimical in any way to the Federal law. The judgment below is—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

B. F. READ, Appellant, v. BOARD OF SUPERVISORS OF HAMILTON COUNTY et al., Appellees.

DRAINS: Assessments—Failure to Object to Improvement. Where
1 a landowner in a drainage district was notified that the purpose of including his drainage district in a new district was for the improvement of outlet, and the plan and estimate of the cost of the outlet were made known in advance, and he made no objection at time of inclusion, he cannot, as to the assessments made, object that he received no benefit, or that the proposed cost of the new improvement was greater than the proposed benefit to the entire district.

DRAINS: Assessments—Sufficiency of Evidence as to Benefits. Evidence reviewed, and held that a drainage district was benefited by improvement of its outlet through establishment of another district, and that assessment of benefits against lands of owner was moderate, and not disproportionate to the other assessments made.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

MARCH 14, 1919.

APPEAL from a drainage assessment. In the district court, the assessment made by the board of supervisors was confirmed. From such order, the plaintiff appeals.—*Affirmed.*

Wesley Martin, for appellant.

Chase & Chase and *J. M. Blake*, for appellees.

EVANS, J.—The drainage district in question is known as the Hunter Joint Drainage District. This district, in its organization, was made to include a previous drainage district, known as the Read District. The purpose of the inclusion of the Read District was to deepen and extend the outlet for a distance of a few hundred feet. In the original improvement, as made in the Read District, the tile outlet was made to discharge into an open ditch. A bulkhead was constructed at the mouth of the tile. The open ditch extended for a few hundred feet toward a creek. The grade line of the open ditch was nearly level, and the water moved therein very sluggishly; so that it had partially filled up with silt, and had thereby submerged the mouth of the tile outlet. This was the purported reason for improving such outlet, and for including the Read District within the Hunter Joint District. The plaintiff's farm was included within the Read District, and had been heavily assessed for the improvement therein constructed. The

proposed assessments against the 40-acre tracts in his quarter section farm were as follows: \$51.68, \$146.03, \$93.67, \$19.38.

The plaintiff has argued here that the assessments are wholly *void* because of certain irregularities on the part of the commissioners in making the same. The appellees urge upon our attention that no such contention was made before the supervisors. The point of appellees appears to be well taken. We find that the objections presented to the board of supervisors were directed to and were an amplification of two general grounds of attack: (1) That the proposed assessments were excessive; (2) that they were inequitable.

Taking up the second ground of attack first: Were the assessments against the plaintiff inequitable, as compared with other assessments in the district? On this question, the plaintiff himself has testified with a candor which is very creditable to him. He has expressly conceded that his assessments are not higher proportionately than those of other landowners. His claim that the assessments are excessive is predicated upon the theory that *all* the assessments for the outlet improvement are excessive. The testimony of witnesses in his behalf is that the Read District obtained no benefit from the change in the outlet. To put it in another way, it is contended that the cost of the new outlet far exceeded its benefit to the district. The proceedings which included the Read District

1. DRAINS :
assessments :
failure to ob-
ject to im-
provement.
within the Hunter Joint District were regular. The purpose of such inclusion was published; the plaintiff was notified. The plan of the outlet and the estimate of its cost were all made known in advance. The plaintiff made no objection at that time. He is in no position, therefore, to say that he received no benefit. He is likewise precluded from saying

that the proposed cost was greater than the proposed benefit, as applied to the entire district.

Upon the evidence in the record, we are satisfied that a substantial benefit was conferred upon the Read District by the improvement of the outlet. The amount of the actual benefit received could be only a matter of

2. DRAINS: assessments: sufficiency of evidence as to benefits. estimate, and at best, an approximation. The amounts assessed against the various tracts of the plaintiff's farm are apparently moderate. Concededly, they are not disproportionate. The order of the district court is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

CHRISTIAN SORENSON, Appellant, v. WRIGHT COUNTY et al.,
Appellees.

DRAINS: Assessment of Benefits—Reduction of Assessments. Evidence reviewed, and held that assessments made against landowner for the drainage ditch were inequitable, and should be reduced.

Appeal from Wright District Court.—R. M. WRIGHT, Judge.

MARCH 14, 1919.

APPEAL by plaintiff from an assessment of benefits resulted in the dismissal of the petition, and plaintiff appeals.—*Modified and affirmed*.

Berry & Hill, and Nagle & Nagle, for appellant.

Birdsall, McGrath & Archerd, for appellees.

LADD, C. J.—Drainage Ditch No. 19 had been established with its southern boundary extending along the north line of the northwest quarter of the northeast quarter of Section 3 of Township 92 North, Range 24 West of the

5th P. M. From near the northwest corner of this 40, the boundary extended in a northerly and northwesterly direction; and from near the northeast corner of said 40, said boundary extends northeasterly across the Minneapolis & St. Louis Railway, in the southwest corner of the southeast quarter of Section 26, in Township 93. The outlet of this district consists of a tile drain, laid in a depression or creek, beginning about three miles north of the south boundary of District No. 19, where the tile emptied into said creek and flowed in a southwesterly and then easterly and southeasterly direction into the Iowa River, about two miles from the outlet of District No. 19. A petition was filed, August 3, 1914, praying for the establishment of a district south of that above mentioned, and an engineer was appointed to survey and report upon the feasibility of establishing such a district, and of the construction of an improvement for the drainage thereof. He reported favorably thereto, and his report, as subsequently amended, was adopted by the board of supervisors, and the drainage district duly established as No. 117, and the improvement constructed. The area of the district thus established consisted of 2,532.92 acres, and included the following described lands of appellant, which were assessed for benefits by the board of supervisors as indicated:

Description	Sec.	Twp.	Range	Acres	Amount
NE $\frac{1}{4}$ NE $\frac{1}{4}$	3	92	24	51	\$758.50
NW $\frac{1}{4}$ NE $\frac{1}{4}$	3	92	24	49	920.72
SW $\frac{1}{4}$ NE $\frac{1}{4}$	3	92	24	37	599.40
NE $\frac{1}{4}$ NW $\frac{1}{4}$	3	92	24	22	366.25
SE $\frac{1}{4}$ NW $\frac{1}{4}$	3	92	24	15	202.50

The owner had filed objections before the board of supervisors to the commissioners' report, and these were overruled. He appealed to the district court, and, on hearing, the assessments as made by the board of supervisors were confirmed.

The improvement consisted of a tile main, extending from the Iowa River along the creek up to about 50 feet above the tile outlet of District No. 19, a distance of 14,200 feet, the tile being 36 inches in diameter at the river, and 26 inches at the junction with the outlet of District No. 19. There were six laterals, all short except No. 2, which was 11,000 feet in length. The tile main, as will be observed, carries the water gathered in the tile main of District No. 19, and the lands thereof were assessed in order to cover its portion of the expense, or \$6,224.01. The sum of \$18,117.99 was assessed against the lands of Drainage District No. 17, including those of appellant. About 2,000 feet of the 26-inch tile and 1,500 feet of the 28-inch tile were laid in the creek in appellant's land, and a lateral 10-inch tile, 300 feet long, lies wholly in one of the adjoining 40's. The purpose of this was to catch the water coming from the northeast. While the main drains the land within the creek's embankments, it is also valuable in furnishing an accessible outlet, which tends to enhance the value of the land beyond the banks of the creek. The banks of the stream as it enters appellant's land are well defined, estimated to be 12 or 15 feet above the bottom of the creek, and are high all the way through such land. The strip of land between them is drained by the improvement, and is from 12 or 14 to 150 feet wide, extending from near the northwest corner of the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 3, through its west line, then back in a southeasterly direction, then northeasterly into the 40 east, and then in a general southeasterly direction. Its area is estimated to be from 5 to 8 acres. Appellant estimated that about 8 or 10 acres in the northwest portion of his land, "along the road or the county line," were level, and required some drainage, and his son testified that, prior to the improvement, the "water didn't run over the banks of that defined channel, only when we had extra heavy rainfall;" that all

the land in the five 40's was tillable, except 4 or 5 acres in the hog pasture; that some surface water came from the land north, and some from that to the east.

Pritchard swore that the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 3 was high, dry land, with drainage toward the east; that the land of Sorenson is high, except where the ravine is, and there it was wet, but not swampy, and was easily drained.

Lynch thought that every part of the Sorenson land could be cultivated, except that along the creek.

It is apparent, from the evidence of the several witnesses, that the benefits derived from the improvement by the appellant's land, in addition to the drainage of the strip along the creek, are those of being furnished an outlet at a short distance into which to carry the water from about 8 or 10 acres near the north line and the 4 or 5 acres in the hog pasture and from the higher lands, which, competent authorities say, may be greatly benefited by tile drainage. The difficulty of measuring, with any degree of certainty, the money value of the benefits derived and to be derived from an improvement is apparent, and we shall not undertake such measurement. Section 1989-a12 of the Code Supplement, 1913, requires that the entire outlay in establishing the drainage district and constructing the improvement shall be apportioned equitably among the several tracts of land included in the district; and, therefore, the issues are whether this has been done, and if not, what changes should be made in the way of deductions from the assessments against appellant's land, to accomplish this purpose. These can only be ascertained from a comparison of the several tracts of land and the assessments levied against them. The evidence related to the land of but three persons other than appellant, and these may be set out, with name, location, acreage, and assessment:

Name.	Description.	Section	Twp.	Acreage	Amount
E. Luick	SE NE	2	92	35	\$1,180.60
E. Luick	NE NE	2	92	36	734.29
J. H. Reese	SW NW	35	93	31	649.43
J. H. Reese	SE NW	35	93	33	521.94
J. H. Reese	NE SW	35	93	36	442.70
Aug. Hunst	NW SW	35	93	37	639.36
Aug. Hunst	SW SW	35	93	39	639.36
Aug. Hunst	SE SW	35	93	39	442.70

Pritchard was familiar with the land of Luick, and testified that, prior to the establishment of the drainage district, the SE $\frac{1}{4}$ NE $\frac{1}{4}$ was mostly swamp.

"I don't know how many acres, but would say the principal part. I would say 30 acres of it was swamp. Taking the 40 acres just north of the one I have described, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2,—that is partly low, swampy land, and some of it was dry. I should judge that about one half of that would be low and swampy, something like 20 acres. Q. How would the south tract of the E. Luick land compare with the NE NE of Section 3 of the Sorenson land? A. Well, there is no comparison. One is high, dry land, and the other is low, flat land."

The witness then explained that the south 40 of the Luick land is very level, low, and swampy, while the 40 of Sorenson's is quite high, except along the creek, but not swampy; that the wet land of Luick is marsh or swamp, and the dry land thereof is river bottom; that the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 3 beyond the creek's embankment is more level, and the water stands there longer, but may be readily drained into the outlet, though the areas requiring drainage are small; while Luick's 40's were about one half swampy, and untillable before the improvement was made.

Lynch's testimony tended to corroborate that of Pritchard, the former saying that the Luick land was "pretty wet * * * it was awful bad to do anything with

* * * the wild hay was very nice" upon "the east side;" that he didn't know "whether there was much water standing upon that the greater part of the year;" that "it was all cut up with kind of ditches;" that "30 acres of the 80 could have been cultivated."

The Chicago Great Western Railroad Company's right of way extended diagonally over Luick's south 40 and the corner of the north 40, and this accounts in part for an area of only 35 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2 and 36 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ thereof. The tile main passes over the land from east to west. A 350-foot 10-inch lateral connects with this main from the south, and Lateral 2 of 20-inch tile runs from the tile main north near the west line of the 40 and on near the west line of the north 40 a little more than half way, when it turns to the northwest.

It will be noted that Luick's south 40 has more tiling than any 40 belonging to appellant. The north 40 has less than either of the two 40's of the N $\frac{1}{2}$ of Section 3. Indeed, the system provided about the same amount of drainage for the two 80's. Luick's 80 contains 71 acres of land, and that of appellant, 174 acres, but there were swampy and marsh lands in Luick's 80 of about 50 acres; while in appellant's land, there were 5 to 8 acres along the creek bottom, and but 12 or 15 acres outside, requiring drainage. In other words, more than twice as much land in Luick's 80 required drainage as in the Sorenson 80. Moreover, the character of the land was such as to receive much greater benefit per acre than the Sorenson land. And yet, the assessment on the Luick land was nearly \$27 per acre, while that against the entire body of Sorenson land was a trifle more than \$16 per acre. We are of opinion that the assessment levied according to the benefits on appellant's land is proportionately much greater than that against the land of Luick, and that the record so demonstrates.

In comparing appellant's land with that of Hunst and Reese, it should be noted that Lateral 2 crosses the NE $\frac{1}{4}$ of the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 35, belonging to Hunst, in a northeasterly direction through the NE $\frac{1}{4}$ of said quarter section, across the southwest corner of the NW $\frac{1}{4}$ of said section, over its west line, and then curving to the northeast, and following the ravine in a northeasterly direction. Pritchard testified that the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ was "mostly level and rather high," and that the drain ran along a ravine, which became more shallow toward the north; that, "before the water could escape from that land, it would have to go through this tile,—didn't get out naturally until the tile was constructed,—not only a small portion of it;" that the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 3 was very similar to this 80-acre tract of Reese's, "similar in lay of land and character of drainage that would be necessary." The witness thought the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 35 a little dryer than the Sorenson land, and that this 40, with the one west of it, belonging to Hunst, was very similar to the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 3, belonging to Sorenson, with the difference that the latter was a little nearer the outlet. He also thought that the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 35 was similar to the Sorenson land, above described.

Lynch considered "the east part of the Reese land pretty wet. It was flat. Water would stand on there part of the year in ponds, until it dried out." He declared that the north 40 of the Sorenson land was much better than the north 80 of the Reese land; that the Hunst land was "pretty wet, too wet land;" and that the Sorenson land "is lots the best. It is dryer and better in every way, and higher land. The drainage is about alike."

We are not persuaded that the difference in accessibility of Lateral 2 as an outlet for the drainage of the land in the SW $\frac{1}{4}$ of Section 35 is enough to offset the difference

between the character of this land and that of Sorenson, and doubt whether the higher assessment of the $S1\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 35 is sufficient to offset the greater benefits received from the improvement over those enjoyed by appellant. The average assessment per acre on these six 40's of land seems much less proportionately than the assessments against the five 40's of Sorenson; while the assessments against Sorenson's 40's are out of all proportion, as compared with the assessments against Luick's 40's. After a most painstaking examination of the record, we have reached the conclusion that, to equalize the several assessments, those against the land of plaintiff should be reduced \$4 per acre on each 40. The cause will be remanded, with direction that the decree be modified accordingly.—*Modified and affirmed.*

EVANS, PRESTON, and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. C. H. SNYDER, Appellant.

INTOXICATING LIQUORS: Nuisance—Sales By Druggist. Evi-

1 dence reviewed, and held sufficient to sustain a finding that a druggist sold intoxicating liquors as a beverage.

INTOXICATING LIQUORS: Presumptions—Burden of Proof as to

2 Registered Pharmacist. An instruction that the presumption arising from the finding of intoxicating liquors in the place of business of a druggist, who was a registered pharmacist, was that the same were kept for the purpose of illegal sale, held correct, when taken in connection with other instructions that (a) the jury should take into consideration the evidence, if any, of sales, and that (b) the jury could not convict the defendant unless they found that he used said building for the purpose of selling intoxicating liquors therein, or kept intoxicating liquors in said building for the purpose of sale.

INTOXICATING LIQUORS: Nuisance—Burden of Proof as to Reg-

3 istered Pharmacist. While, under Section 2385, Code, 1897, a registered pharmacist can purchase intoxicating liquors other than

malt, for the purpose of compounding medicines that cannot be used as a beverage, yet he is not authorized to manufacture or sell any compound that may be used as a beverage, and the burden is upon him to show that intoxicating liquors found in his place of business are kept for a lawful purpose.

INTOXICATING LIQUORS: Instructions—Liquor Statutes to be
4 **Construed to Prevent Evasion.** Instruction of the court to the jury that the liquor statutes should be so construed by the courts and jurors as to prevent evasion, held correct, under Section 2431, Code, 1897.

TRIAL: Verdict—Impeachment—Affidavit of Jurors. A verdict may
5 not be impeached by affidavits of two of the jurors that, but for a certain instruction, the jury would have returned a verdict of not guilty, or would have disagreed.

Appeal from Polk District Court.—CHARLES HUTCHINSON,
Judge.

MARCH 14, 1919.

THE defendant was indicted, tried, and convicted for the crime of maintaining a liquor nuisance in the city of Des Moines at a drug store called the Victoria Pharmacy. A fine of \$400 was imposed, with an order of commitment until the fine and costs were paid. Defendant appeals.—*Affirmed.*

Herman F. Zeuch, for appellant.

H. M. Havner, Attorney General, and *Ward C. Henry*, County Attorney, for appellee.

PRESTON, J.—1. Briefly, the indictment charges that defendant maintained the place with intent to sell intoxicating liquor, contrary to law, and that he did therein sell intoxicating liquor, contrary to law. No evidence was introduced on behalf of the defendant, except that he took the stand and testified that he was a registered pharmacist. It is not shown that he had a permit to sell intoxicating liquors. A motion to direct a verdict for the defendant

was overruled. The undisputed evidence shows that defendant was a druggist and registered pharmacist, conducting a retail drug store. On July 11, 1917, an assistant to the member of the police department, who had charge of enforcing the law relating to the sale of intoxicating liquors in Des Moines, purchased from the defendant a three-ounce bottle of liquor, labeled Jamaica ginger. In the afternoon of the same day, the same witness went to defendant's drug store, and found a clerk in charge; witness said to the clerk, "That was pretty good stuff, and I will take another bottle; you had better make it two, because one won't last long." The clerk brought the two bottles. These last-named two bottles were labeled Jamaica ginger. The witness paid 25 cents per bottle. The next day, the premises were searched. In the rear room, behind the customary drug store partition, on a sort of prescription counter, was found a gallon bottle of alcohol, about half full; back of this prescription case, and near the alcohol, was a bottle containing tincture of ginger, and about 300 or 400 small, empty bottles. About half of the empty bottles had corks in them. Two five-gallon containers that had been used for alcohol were found. One of them contained two or three gallons of alcohol. Upon analysis, the three bottles of liquor labeled Jamaica ginger contained 90 per cent of alcohol by volume, and 78 per cent by weight. The chemist who made the analysis testified that the liquor which he analyzed would be a tincture of a drug, according to the United States Pharmacopoeia, and that a dose, when used as a medicine, would be about a teaspoonful; that he found the compounds he analyzed to be in accordance with the compounding with the tincture of ginger, as prescribed by the Pharmacopoeia, but he further testified that, because of the alcohol, the liquor labeled Jamaica ginger could be used as a beverage; that it would depend on the person taking it; that a drinking man could drink it.

The instructions are nearly all complained of. They are, for the most part, in the usual form, and we shall not set them out fully. The jury was told, among other things, that, because of the defendant's plea, the burden of proof was upon the State to prove his guilt beyond a reasonable doubt. Other instructions gave the law, as found in Code Section 2384 and other sections of the statute, in regard to the use of any building or place for purposes prohibited by the statute. Intoxicating liquor was defined substantially as any preparation or compound, under any name, form, or device, which may be used as a beverage, and which is intoxicating in its character, including pure alcohol, or any compound which can be used as a beverage, containing sufficient alcohol to be intoxicating. The jury was further told, in substance, that, as bearing upon the question of whether or not defendant kept intoxicating liquor in said building for the purpose of selling the same, the jury should take into consideration the evidence, if any, that sales of intoxicating liquor were made on the premises; and that, if they should find from the evidence, beyond a reasonable doubt, that intoxicating liquor was sold on said premises by defendant, or by his clerk, with his knowledge and consent, this would be proof that defendant was using said premises for the purpose of selling intoxicating liquor thereon. The jury was further instructed that defendant would be guilty if they should find, beyond a reasonable doubt, either one or both of the following propositions: (1) That the defendant used said building or room for the purpose of selling intoxicating liquor therein, either by himself, or through others, with his knowledge and consent; (2) that the defendant kept intoxicating liquor in said building, for the purpose of selling, exchanging, bartering, or dispensing the same. Under the first proposition, and under the evidence, the jury could have well found that defendant sold intoxicating liquor as a beverage, and was, there-

1. INTOXICATING
LIQUORS: nuisance: sales by
druggist.

fore, guilty. See, as having a bearing, *Berner v. McHenry*, 169 Iowa 483. We think appellant has no just cause of complaint of the instructions, so far.

2. We take it that appellant's real contention is that, because defendant was a registered pharmacist, he had a right to keep alcohol and the intoxicating liquors described.

and that the presumption arising, under the statute, from the finding of the intoxicating liquors in such a place, does not obtain. By Instruction No. 6, the court quoted the

2. INTOXICATING LIQUORS: presumption: burden of proof as to registered pharmacist.

statute that the finding of intoxicating liquor in the possession of one not legally authorized to sell or use the same, except in a private dwelling house, shall be presumptive evidence that such liquor was kept for illegal sale, and then told the jury that defendant was not legally authorized to sell intoxicating liquor, or alcohol, and was not authorized to use the same, except for certain purposes; and said further, in substance, that, if they should find from the evidence, beyond a reasonable doubt, that intoxicating liquor or alcohol was found upon the premises in question, in the possession or under the control of the defendant, it would be presumptive evidence that such liquors were kept for illegal sale, and that it devolved upon defendant to show that they were kept for a legal purpose.

The presumption is not conclusive, and may be rebutted; but there was no evidence in the case tending to rebut it. *State v. Wilson*, 152 Iowa 529. Section 2385 of the Code provides:

"Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors for pharmaceutical and medical purposes, and to permit holders for

3. INTOXICATING LIQUORS: nuisance: burden of proof as to registered pharmacist.

use and resale by them, only for the purposes authorized in this chapter; they may also sell and dispense alcohol for specified chemical and mechanical purposes, and wine for sacramental uses. Registered pharmacists, physicians holding certificates from the state board of medical examiners and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage, and which is intoxicating in its character."

Under this statute, a pharmacist could purchase intoxicating liquors, other than malt, for the purpose of compounding medicines, etc., that cannot be used as a beverage; but he is not authorized to manufacture or sell any preparation or compound which may be used as a beverage, and which is intoxicating. Under the evidence in the instant case, the substance sold by the defendant could be used as a beverage, and there was, in addition, a quantity of alcohol that could be so used. There is no evidence that defendant kept the alcohol for the purpose of compounding tinctures, etc., or that he did compound the substance sold as Jamaica ginger. The evidence is only that he was a registered pharmacist. Prohibition is the rule in this state, and it was for the defendant to disclose that the alcohol was kept for a lawful purpose. *State v. Cloughly*, 73 Iowa 626; *Shear v. Green*, 73 Iowa 688; *State v. See*, 177 Iowa 316; *Milhisser v. Gandrup*, 146 N. W. 843 (not officially reported); *Shideler v. Naughton*, 163 Iowa 616, 619. The court, by Instruction No. 6, permitted the presumption to be considered as evidence, in connection with a prior instruction heretofore set out, that, as bearing upon the question of

whether or not defendant kept intoxicating liquor in said place, for the purpose of selling it, the jury should take into consideration the evidence, if any, of sales; and further instructed that defendant could not be convicted unless one or the other of the two propositions heretofore set out was established.

The instructions must all be considered together. So considering them, we think there is no prejudicial error of which appellant may complain. The State argues that, because defendant took the stand as a witness, and testified only to the fact of his being a pharmacist, without denying the State's evidence, or explaining his keeping of the liquor, which was within his own knowledge, this raises a presumption against him; and that the evidence, if produced, would be unfavorable to him; and that the jury was entitled to consider, not only what defendant testified to, but also what was omitted in his testimony, because the material facts were within his own knowledge. Cases are cited in support of the proposition. Other cases are cited, holding that, upon a trial of one charged with selling spirits without a license, if proof be made of the sale, the jury may presume that the defendant has no license, from his omission to produce one. But we are not disposed to discuss these propositions. There was no instruction asked or given on this, as a guide to the jury. The other matters discussed are controlling.

3. The trial court instructed the jury that, under the statute, courts and jurors should construe the statute prohibiting the liquor traffic so as to prevent evasion. This is complained of, the thought being that the construction of statutes is one of law for the court, and not one of fact for the jury. But the statute itself, Code Section 2431, provides that jurors, as well as courts, shall construe the chapter in regard to alleged violations of the

4. INTOXICATING
LIQUORS: in-
structions: li-
quor statutes to
be construed to
prevent evasion.

liquor law so as to prevent evasion. The jurors would know nothing about this statute, if they were not informed by the court, and we think it was proper for the court to give the instruction in question.

4. Affidavits of two of the jurors were filed, in support of the motion for new trial, to the effect that, but for Instruction No. 3, the jury would have returned a verdict of, not guilty, or disagreed. This is a matter

5. TRIAL: verdict: which inheres in the verdict, and may not
impeachment: be shown, or the verdict impeached, by af-
affidavit of fidavits. It is our conclusion that no prejudicial error ap-
jurors. pears. The judgment is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

CHARLES SWANSON, Appellee, v. S. E. SEELANDER, Appellant.

LANDLORD AND TENANT: Construction of Lease—Cancellation—Damages—Evidence. Where a lease of farm lands provided that, if lessor sold the property, the lessee agreed to move off the premises "by the lessor giving the lessee one year's notice or otherwise as may be agreed upon the payment of \$500 in cash by the lessor," *held* that the evidence sustained the finding of the trial court that the parties interpreted the contract in accordance with the claim of the lessee that he was to receive \$500 as damages if the lessor sold the farm, or if he was required to move off without a sale, and not that he could only receive damages if he did not have a year's notice before he was required to move.

Appeal from Webster District Court.—R. M. WRIGHT,
Judge.

MARCH 14, 1919.

ACTION to recover \$500, which plaintiff, appellee, claims is due from defendant, because he, plaintiff, as a tenant, vacated 240 acres of land, pursuant to the terms of a writ-

ten contract. Plaintiff asked a reformation of the contract, which was denied, but the court rendered judgment against the defendant for \$500, and defendant appeals.—*Affirmed.*

Healy & Faville, for appellant.

. *B. B. Burnquist*, for appellee.

PRESTON, J.—The plaintiff's claim is that he rented the land in question of one Johnson, for five years from March 1, 1913. The written lease contained the following provision:

"In case the first party desires to sell said property, and has a purchaser for the same, the said second party agrees to relinquish all his rights in said lease and move off said premises, by first party giving second party one year's notice or otherwise as may be agreed upon by the payment of \$500 in cash by first party."

Plaintiff further claims that the parties hereto, at all times, put a practical interpretation upon said clause, to the effect that, if the said Johnson, or his assignee, should sell the property during the lease, or plaintiff was required to move off the premises, plaintiff should be paid the sum of \$500 in cash, as damages for the cancellation of the lease; that, in August, 1914, Johnson sold the premises to defendant, Seelander; and that, after plaintiff had occupied the premises for a period of nearly one year after the ownership of Seelander, he was ordered and directed to move from said premises, under the terms of the lease; and, pursuant to said order and notice, plaintiff did move therefrom, and demanded from both parties the payment of said \$500; that both parties have, at times, agreed to pay said \$500, but have failed to do so; that defendant, Seelander, took the premises when he purchased the same, with full notice of the lease and the terms thereof, and with full notice of the interpretation and meaning which plaintiff

and Johnson placed upon said clause; and that defendant, Seelander, took the premises subject to the lease, and subject to the interpretation placed thereon. By amendment to the petition, plaintiff alleged that the contract was ambiguous, and asked that it be reformed so as to conform to the meaning and interpretation placed thereon by the parties, including the defendant. The amendment also asks for judgment for \$500, and general equitable relief. The answer denies all allegations of the petition not admitted. Defendant admits the execution of the lease, the purchase by defendant of the premises from Johnson, in August, 1914; that plaintiff remained upon the premises, and that thereafter he moved therefrom at the request and upon the solicitation of said defendant; that he knew of the existence of the lease at the time of and before he purchased the land; and that he purchased the premises subject to the lease. Appellant contends that the meaning of the clause in question is that the landowner had the right to terminate the lease by giving one year's notice; if he did not give one year's notice to terminate, it could be terminated by paying Swanson \$500, and such shorter notice as might be agreed upon.

The trial court might well have reformed the lease; but without reformation, we think that, under the evidence and the interpretation given to it by all the parties, it is susceptible of the construction given it by the trial court, and that such construction should be given to it.

Appellant contends that plaintiff, as a witness, construed the clause substantially in accordance with appellant's contention; but counsel for either party claim for their clients that, because they are Swedes, they did not always express themselves clearly in the English language. In regard to plaintiff's testimony, before referred to, his counsel claim that the reporter did not correctly take down his answer, and, as we understand it, an application was

made to correct the record; but that is not very material now. However this may be, it is quite clear that plaintiff, at the time of the making of the lease, and before defendant bought the land, and at all times, interpreted the contract in the way he now contends for, and as the trial court interpreted it. Indeed, everyone who had to do with giving a meaning to the language quoted, with the possible exception of Chalgren, seemed to have so construed the contract. The defendant himself, as a witness,—though, in different parts of his testimony, he denies it,—yet, taking his evidence altogether, substantially concedes that he so construed and understood the contract, before purchasing the land. He was called as a witness by plaintiff. His evidence is somewhat evasive and contradictory. We shall set out a part of it. He says:

“I am pastor of the Lutheran Church. Have known plaintiff for 20 years. Swanson’s wife is related by marriage to my wife. In May, 1914, I went to see the farm, and saw the plaintiff and his wife at that time; Mr. Swanson showed me the lease at that time. Swanson said to me, in the field, ‘I understand you intend to buy the farm.’ Q. Yes? A. Probably. Q. Yes, sir? A. And he said, ‘Well, then, I will have \$500.’ Q. If you bought it? A. Yes. Q. Oh, that is what he said? A. Yes. Q. He said that the provision in that lease was— He said the provision in that lease was that it would cost you \$500 if you bought the farm? A. Well, he said— Q. You don’t mean that, do you? You don’t mean to swear to this court, do you, that he told you, if you bought this farm, you would have to pay him \$500 for buying it, do you? A. No. Q. What Mr. Swanson told you was that, if you bought the farm, if you had him move off, you would have to pay him \$500, didn’t he? A. No, no. Q. Well, what did he say? A. Yes, sure. He didn’t say it would cost me \$500 to buy the farm. He said, ‘There is \$500 coming to me.’ I went out there before I

bought the place, and when he showed me the lease, he told me that, under that lease, if Johnson or I had him move off, that either I or Johnson would have to pay him \$500. Q. Well, see if this was what was said. Swanson told you, then, that, under the terms of this lease, that if Johnson or you wanted possession of that farm, they would have to give him a year's notice and pay him \$500? A. No, no. Q. Well, they would have to pay him \$500? A. No, no. He said, in accordance with the lease. He said, under this lease, either I or Johnson would have to pay him \$500 if he moved off. Q. And Swanson told you, 'Well, that is the meaning of that lease, and that is the meaning that Johnson and I had,' didn't he? He talked, quarreled with you at that time? A. Yes; that is the meaning Swanson had; yes. Q. Yes? He followed you out to your buggy, before you drove away, and told you that, if you bought the farm 'under this lease, my claim is that Johnson—my claim is that I get \$500 if you make me move off,' didn't he? That is the last thing he told you before you drove away? A. Yes. In accordance with the contract. I had not bought the land then. That was before I bought the land. He told me that was his claim in accordance with the contract before I bought the land. That is, that he should get \$500. Elliott acted for his brother, Johnson, in closing the deal. Q. Now, you had a talk with Elliott, before you closed the deal, as to just what this provision in the lease meant, didn't you? A. No. Q. Yes. You asked Mr. Elliott the question as to what would happen, didn't you, if you should buy the land and ask Swanson to get off, didn't you? You talked about that with Elliott? A. No. I never mentioned it to Elliott. Q. You had no talk with Elliott about that,—you swear to that? A. No—not in that form you say. Q. Well, I don't care what form it was in. A. Yes. But I did talk with Elliott as to what would happen under this lease if I should ask Swanson to get off. Elliott never

talked to me about the meaning. Swanson have several times, about the meaning. I do not pay any intention to their interpretation. Q. You did not care what Swanson told you about the interpretation before you went into this deal, did you? A. No, not a snap. April 6, 1915, I wrote Swanson a letter in the Swedish language, as follows: 'Because you wish that I shall answer immediately and let you know what I intend to do, and then I shall or just now answer your letter. And then in short I know it is a very probable thing, but that I intend to carry out the lease which exists between you and me. I don't dislike anything you say, because I understand that the lease is binding upon both parties; and here is the truth of the proverb that says that "who did not look up with his eyes, has to look out with his pocket book." Greetings from home to home. Friendly, S. E. Seelander.' I received a telegram from plaintiff's attorneys, December, 1915, saying, 'Do you refuse to pay \$500 for possession of your farm March 1st? Wire answer immediately.' The answer I sent was that I received the telegram."

On cross-examination, he says he told plaintiff, in the earlier negotiations:

"It is not so sure that you have to move off the land if I buy the land. Swanson saying all the time has been that \$500 would come to him. First, it was as he said, if the land was sold; but after that, after awhile he changed, and said if he should move off the land, \$500 was coming to him. That has been his saying all the time since the beginning to the end. When we first talked about the lease, Swanson said that he was to get \$500 from the mere fact that the land was sold. I told him that was not in the lease. I told him Chalgren said it was not in the lease. Then he came with his interpretation of the contract, and he said he was to get \$500 if he moved off the place. I did not promise or agree

with Swanson that I would pay him \$500 if he moved off the land."

When asked how he understood the provision in the lease before he bought the property, he said:

"I not put any meaning in the contract; the meaning in the contract came to me what the contract says; I took the meaning that stands in the contract."

The letter of April 6, 1915, was after defendant had given plaintiff notice to vacate the premises, and was in response to plaintiff's demand for the \$500. Swanson testifies that he told defendant, when he was looking over the farm, that he had a five-year lease, and that "there is a part of that lease that says, if I had to move before the term is up, that I should receive \$500." That Johnson so explained the lease to him. That defendant then said, "If I buy this farm, I buy it free from all incumbrances, and in this lease, it says you people are going to have \$500 if you have to move off the farm;" and that, before he would buy the farm, he would have an agreement with Johnson that he should make plaintiff satisfied if he had to move off. That plaintiff then said, "That is the meaning of the lease." He says that, later, he met defendant at Gowrie, and asked him how he got along with the land deal, and that defendant said, "Well, we got along pretty well; that the lease only amounts to \$500, and that don't worry me at all." Plaintiff afterwards said to defendant, when defendant's son was plowing:

"Now, your son is here plowing, and it seems to me you have taken possession of the farm, and it is about time you made some arrangement with that \$500 that I have got coming."

Defendant then said:

"Swanson, you can feel sure I am not going to beat you out of them \$500. Of course, I could just as well feel that I could go in the bank and steal \$500 as I can, accord-

according to the law, beat you out of them \$500. I will not do it."

Plaintiff says he demanded the \$500 at that time. Mrs. Swanson corroborates her husband to some extent, as to the conversation between plaintiff and defendant. D. J. Elliott testifies that he is a brother of G. Emanuel Johnson's; that he closed the negotiations with defendant on behalf of his brother, the owner, in the sale of this land; that, during the negotiations, the lease was talked of between witness and defendant, as follows:

"A. The question came up as to whether Swanson should be asked to get off the property or not; so the question was asked Mr. Seelander by myself and Mr. Chalgren, who was assisting me in making the deal. Seelander was asked the direct question if he intended to ask Swanson to get off the land or not, and he said, 'No, I want Swanson to remain on the land.' Then I said, if Swanson is to leave the land at the request of G. Em. Johnson, G. Em. Johnson is to pay him \$500 in cash; if Seelander purchases the land, which he does, subject to this lease, whenever he wants Swanson to get off the land, he must give him one year's notice and pay him \$500 cash, if he is asked to get off the land prior to the expiration of the lease. Mr. Seelander said, 'I understand that to be so and I accept the proposition.'"

We have not attempted to give all the evidence, or all the contradictions, or circumstances affecting the weight and credibility of the different witnesses; nor have we attempted an analysis of the clause in question. We have attempted to set out enough of the testimony to show that all the parties, at about the time of the sale of the land, and before that, and for a time afterwards, interpreted the contract in accordance with plaintiff's claim and the finding of the trial court. The contract is, as before stated, susceptible of such construction.

The evidence does not vary the contract, but simply gives the construction which the parties have themselves placed upon language which is more or less ambiguous. The decree of the district court was right, and it is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

MARY WALKER BISBY, Appellant, v. JOHN P. WALKER et al.,
Appellees.

ESTOPPEL: Subsequently Acquired Title. A *contingent* remain-

- 1 derman who mortgages the lands in question with warranty of title and seizin, or mortgages the lands without such warranty, but with the asserted intent in the mortgage to convey a fee, is estopped to deny that the subsequently acquired vested remainder inures to the benefit of the mortgagee, even though, after the execution of the mortgage, and prior to the vesting of said remainder, the mortgagor had been discharged in bankruptcy.

REMAINDERS: Nature and Incidents. Contingent remainders may
2 be mortgaged.

BANKRUPTCY: Liens Not Affected by Discharge. Bona-fide mortgage *liens* which antedate the filing of a petition in bankruptcy
3 by four months are not affected by a discharge in bankruptcy.

MARSHALING ASSETS AND SECURITIES: Rule. A mortgagee

- 4 who is entitled to satisfaction from either of two tracts of land shall not so exercise his election as to exclude another and subsequent mortgagee who is entitled to resort to only one of said tracts.

Appeal from Black Hawk District Court.—H. B. BOIES,
Judge.

NOVEMBER 23, 1918.

REHEARING DENIED MARCH 17, 1919.

SUIT in partition resulted in an order for the sale of

the real estate, an order distributing same among the three tenants in common, and the satisfaction of four mortgages executed by one of them, Mary Walker Bisby, on her undivided one third thereof, from her portion of the proceeds. She appeals.—*Modified and affirmed.*

Keithley & Bump and *E. H. McCoy*, for appellant.

Nichols & Nichols, Hager & Blough, A. L. Steele, George Harnagel, C. G. Lee, C. W. Garfield, C. C. Coyle, and Edwards, Longley, Ransier & Smith, for appellees.

LADD, J.—William P. Bingaman died testate in 1888, seized of several tracts of land, and survived by his wife, Mary Bingaman, and daughter, Ellen Walker. After providing in the first clause of the will for the payment of debts, and in the second clause giving to his wife all of his property, real and personal, during her natural life, he disposed of the remainder, in the third clause, in words following:

“At the death of my said wife, or in the event that she should die before I do, I give, devise and bequeath all of my property, real, personal or mixed, to the children of my daughter, Ellen Walker, then living, in equal shares, to have and to hold the same forever, without right of alienation of any of the real estate, during the life of their mother, my daughter, Ellen Walker, and subject to the payment of the sum of one hundred dollars per year to my said daughter, Ellen Walker, during her natural life.”

Ellen Walker died April 23, 1908, leaving surviving three children, John P. Walker, Harvey M. Walker, and Mary Walker Bisby. On August 22, 1911, Mrs. Bisby borrowed of J. B. Roszell \$800, and executed to him her note for that amount, payable on or before five years from date, with interest; and on October 24, 1911, she executed her note to said Roszell for \$700, payable five years from date.

with interest; and on the date of the note first mentioned, executed a mortgage to secure same, reciting that she does "hereby sell and convey unto said J. P. Roszell all our right, title and interest in and to the following described premises" (lands sought to be partitioned); and to secure the payment of the second note, executed a mortgage, wherein she did "hereby sell and convey unto J. B. Roszell" the premises described in the petition. Each of these mortgages contained a covenant that she was lawfully seized of the premises, that they were free from incumbrance, and that she had good right and lawful authority to sell and convey the same: that is, covenants ordinarily to be found in a warranty deed.

On July 15, 1912, she executed a promissory note to Althera Bales White for \$710, payable on or before July 16, 1913; and, to secure payment thereof, executed a mortgage on the land described, reciting that she does "hereby sell and convey unto Althera Bales White" the land described, subject to the preceding mortgages, "the intention being to convey hereby an absolute title in fee simple, including all rights of homestead, to have and to hold the premises above described with all appurtenances thereunto belonging."

On December 12, 1912, she executed a promissory note to R. B. Thode for \$400, payable six months after date, with interest, and executed a mortgage securing the payment thereof, therein reciting that she "does hereby sell and convey unto said mortgagee an undivided one third of the following premises" (describing those in suit, and covenanting that they are free from any incumbrance except as hereinbefore stated, and warranting and defending the title unto the mortgagee). This mortgage was made subject to those heretofore mentioned.

On March 8, 1913, she executed a promissory note to Richard F. Hodson for \$2,100, with interest, payable five

days thereafter, and secured the payment thereof by the execution of a mortgage reciting that she "does hereby sell and convey unto the said mortgagee the following described premises" (here follows a description of the lands so conveyed), and covenanting that said "premises are free from any incumbrance and we will warrant and defend the title unto the said mortgagee, his heirs and assigns against all persons whomsoever lawfully claiming the same, except as above mentioned."

On July 9, 1913, Mrs. Bisby filed a voluntary petition in bankruptcy, and listed all her creditors, including the mortgagees named, and also listed her interest in the several tracts of land under the will; and the bankruptcy court determined that she had no interest in the real estate at that time, and that the trustee took no right, title, or interest therein; and thereafter, on June 1, 1914, she was discharged in bankruptcy.

The testator's widow, Mary Bingaman, departed this life December 27, 1915, and this suit for the partition of the several tracts of realty devised by the testator was begun by Mrs. Bisby on January 12, 1916. She alleged the facts to be as herein recited, and that the mortgages referred to were not claims or liens against the lands, and prayed that title to the undivided one-third interest in said realty be confirmed and quieted in her, free from all liens, and other equitable relief. Each of the mortgagees filed answer and cross-petition, setting up his respective mortgage, and praying that a lien thereof be established on plaintiff's interest in the realty, and foreclosed. On hearing, decree was entered, establishing title in each of the children of Ellen Walker to an undivided one third of the premises, and appointing W. M. Blough referee, with order to sell the property, which he did; and, after payment of the costs, two thirds of the proceeds of the sale were paid over to John P. Walker and Harvey M. Walker, and of the

proceeds, \$4,795.21, together with rent amounting to \$173.84, remain in the hands of the referee, subject to the ruling with reference to the mortgage claims mentioned. The court decreed later, on hearing, that the mortgages were liens on the proceeds of the sale against the several parcels of land in the order of their execution; that the mortgage of Thode was the first mortgage on the \$173.84 rent money in the hands of the referee; and that the mortgage of Hodson, which had been assigned to L. C. Hodson, was a second mortgage on said rent; and that these amounts be paid from said funds; and that any remainder be paid to the plaintiff.

Appellant contends that the court erred in holding:

"(1) That the mortgages were valid liens upon the undivided one-third interest in the realty belonging to Mary Walker Bisby. (2) That the mortgages covered the rents and profits which had accrued after the death of the life tenant. (3) In holding that L. C. Hodson was owner of the mortgage. (4) In reforming the Hodson mortgage to cover all property, when the mortgage described only a part of it, and (5) In allowing attorneys' fees on each mortgage."

I. Were it to be conceded that, prior to the death of the life tenant, the mortgagor, Mrs. Bisby, held but a contingent remainder, it might be and was the subject of the

2. REMAINDERS: several mortgages, and covered thereby.
nature and incidents. *McDonald v. Bayard Sav. Bank*, 123 Iowa

413. The mortgages, then, were valid when executed. If the remainder were to be adjudged contingent, the mortgages thereon, as they purported to convey the fee, with covenants of warranty, attached to and became a lien on the land upon the acquirement of title, when the contingency happened: that is, the death of the life tenant, there being no intervening equities. *Rice v. Kelso*, 57 Iowa 115; *Iowa L. & T. Co. v. King*, 58 Iowa 598; *Whitley v. Johnson*,

135 Iowa 620, 626. In the last-named case, the court pointed out that the rule rests on the doctrine of estoppel, and that:

"It is intended to forbid the grantor who has subsequently acquired an outstanding title from belittling or destroying the effect of his covenants by asserting such title as against his grantee or his privies."

The reason is concisely stated in Bigelow on Estoppel (5th Ed.) 384:

"This after-acquired title of the grantor 'inures,' it is usual to say, by estoppel to the benefit of the grantee. It would, perhaps, more accurately state the situation, under our modern deeds of conveyance, to say that the deed which the grantor engages to warrant and defend is a solemn stipulation that the grantor has the title which he is now about to transfer to the grantee as a purchaser for value. In the face of this, he cannot be heard to say, after making the transfer, that he had not that title at the time. So his new title lies lifeless in his hands against such purchaser."

The doctrine of estoppel, as thus applied, where the mortgage or deed contains a warranty of title and seizin, has the uniform approval of the authorities. The cases, however, are not as numerous where the deed or mortgage is without such warranty, but purports to pass an absolute title, as did the mortgage executed by Mrs. Bisby to the cross-petitioner, Mrs. Althera Bales White, her mortgage reciting the conveyance of the several tracts of land, and "the intention being to convey hereby an absolute title in fee simple." Having pledged the entire estate, the mortgagor will not be heard to say that only a contingent interest has been covered by the mortgage, instead of the entire estate, as pledged and as held by her at the time the contract is sought to be enforced.

"The rule is well established that, where the deed recites or affirms, expressly or impliedly, that the grantor

is seized of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed conveys no covenant of warranty at all." *Reynolds v. Cook*, 83 Va. 817 (5 Am. St. 317); *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297. In delivering the opinion in the last case, Nelson, J., said:

"If the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance."

He then refers to and reviews a number of authorities, English and American, on the subject, and continues as follows:

"The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon

the estate and binds an after-acquired title as between parties and privies."

And the reason, he adds, is that such affirmation must necessarily have influenced the grantee in making the purchase; and hence, the grantor and those in privity with him, in good faith and fair dealing should be forever thereafter precluded from gainsaying it.

"The doctrine," he also added, "is founded upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And although it debars the truth in the particular case, and therefore is not infrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood, * * * and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak."

In *Lessee of French v. Spencer*, 21 How. (U. S.) 228, one Fosgit conveyed by deed purporting to convey the fee in a certain tract of land without warranty, to which he then had no title. Thereafter, a patent was issued in his name by the Federal government, under which he acquired the legal title. After his death, in an action to recover the land by one of the heirs against the heirs of his grantee, to whom, in the meantime, the land had descended, it was held that the plaintiff, claiming under the grantor, was estopped by the deed from disturbing the title or possession of the defendants, the court declaring that the "estoppel works upon the *estate* and binds an after-acquired title as between parties and privies." The doctrine of estoppel, then, is applicable as to each of the mortgages set up in the cross-petition, and the plaintiff cannot be heard to deny that the title subsequently acquired upon the death of the life tenant would not inure to the benefit of the mortgagees.

The operation of this estoppel is in no manner affected by the discharge in bankruptcy, as will appear. All the mortgages were executed more than four months prior to the filing of the petition in bankruptcy, and the *bona fides* of the several transactions is

3. BANKRUPTCY:

Liens not affected by discharge.

in no manner questioned. The only consequence of a discharge in bankruptcy is to suspend the right of action for a debt against the bankrupt person. If the creditors have a lien or equitable claim by mortgage or otherwise upon the property of the bankrupt, such right or rights remain unaffected. The independent collateral agreement given by way of security outlives the remedy on the debt which it was given to secure. Section 67-d, Bankrupt Laws, approved July 1, 1898 (U. S. Comp. St. 1901, p. 3449), provides that:

"Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Plainly enough, then, the liens of these mortgages were not affected by the bankrupt's discharge. *Mallin v. Wenham*, 209 Ill. 252 (65 L. R. A. 602, 101 Am. St. 233); *Citizens Loan Assn. v. Boston & M. R. Co.*, 196 Mass. 528 (82 N. E. 696); *Bridge v. Kedon*, 163 Cal. 493 (126 Pac. 149); *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477 (137 N. W. 412, 42 L. R. A. [N. S.] 292, and note collecting cases at page 295). Nor did the discharge of the bankrupt obviate the attachment of the mortgages as liens on the after-acquired property. Subsequent to her discharge, she asserted her claim in and to the property which the trustee in bankruptcy declined to take, as she might lawfully do, and the property stood in the same relation to the incumbrances thereon as before the petition in bankruptcy had been filed. In other words, the rights of the mortgagor and mortgagees

were precisely the same as before, save that personal liability on the indebtedness might not be enforced in an action personally against the mortgagor as a debtor, owing to her discharge in bankruptcy. We have dealt with the remainder in this portion of the opinion on the theory that it was contingent, but without the design of so determining. Our conclusion is that, whether contingent or vested, the mortgages were rightly found enforceable against Mrs. Bisby's one-third interest in the real estate.

II. Another assignment is that the court erred in reforming the Hodson mortgage so as to cover all the property, whereas only a part of it was covered thereby. But marshaling the assets was prayed, and the

4. MARSHALING AS-
SETS AND SE-
CURITIES: rule.

court should have granted this relief by directing that all the realty covered by the four mortgages superior to that of Hodson be first sold and applied in the order of seniority in satisfaction of said mortgages, and that the realty covered by the Hodson mortgage be separately sold, and out of the proceeds thereof, any deficiency in the satisfaction of the other four mortgages be first paid, and whatever remained be applied in satisfaction of the Hodson mortgage. Instead of so directing, the decree of the court decreed that the five mortgages be paid, in the order of priority, from the proceeds derived from the sale of the entire property: that is, that whatever remained of the fund derived from the sale of plaintiff's one-third interest in the property be applied on the first four mortgages, and that whatever remained after satisfying the same be applied on the amount owing on the Hodson mortgage. The decree in this respect was erroneous.

III. Appellant assigned as error the holding of the court that two of the mortgages covered the rents and profits. The brief contains no propositions or authorities bearing on this point, and the argument merely repeats the

statement that the mortgages do not cover the same. Passing on the only point suggested, we have to say that the mortgages in terms include such rents and profits.

The point is made that the court erred in taxing attorney's fees on these mortgages. The decree does not authorize the taxation of attorney's fees, nor does any order appear of record, though an order by the court to so tax was held necessary in *Perry v. Kaspar*, 113 Iowa 268. In the absence of anything in the abstract indicating that attorney's fees were taxed or ordered taxed, we are unable to pass on the complaint interposed by appellant. If such fees were taxed, possibly the propriety thereof may be raised by a motion to retax costs; but as to this we express no opinion. The costs of appeal will be taxed to appellant, and the decree modified and affirmed, as above indicated.—*Modified and affirmed.*

PRESTON, C. J., EVANS and STEVENS, JJ., concur.

T. J. DUNAHOO, Appellee, v. SIM T. HUBER, Appellant.

CONSTITUTIONAL LAW: Anti-Tipping Law—Employee and Employer in Same Services—Special Privileges and Immunities. Section 5028-u, Code Supplemental Supplement, 1915, is void as applied to an employee of a barber shop, being in violation of Article 1, Section 6, of the Constitution of Iowa, prohibiting the granting of special privileges and immunities; as, under the said law, the employee is prohibited from accepting or soliciting a tip, but his employer, engaged in the same services, is not prohibited from doing so, there being nothing in the situation of such an employer to justify discrimination in his favor, when engaged in the same pursuit as the employee.

WEAVER and EVANS, JJ., dissent.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

MARCH 17, 1919.

A warrant was duly issued and placed in the hands of the defendant as constable, who placed Dunahoo under arrest. Thereupon, he sued out a writ of habeas corpus, and on hearing, was discharged. Defendant appeals.—*Affirmed.*

H. M. Hawner, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *C. G. Watkins*, for appellant.

L. H. Salinger, for appellee.

LADD, C. J.—The plaintiff, who was arrested for receiving a tip, while engaged as an employee in a barber shop, was discharged on hearing in habeas corpus proceedings. The prosecution was for violation of Section 5028-u of the Supplemental Supplement, 1915.

“Every employee of any hotel, restaurant, barber shop, or other public place, and every employee of any person, firm, partnership, or corporation, or of any public service corporation engaged in the transportation of passengers in this state, who shall accept or solicit any gratuity, tip, or other thing of value or of valuable consideration, from any guest or patron, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars, or more than twenty-five dollars, or be imprisoned in the county jail for a period not exceeding thirty days.”

The constitutionality of this statute is challenged on several grounds, among them that it invades rights to property and its protection, and is inimical to Section 6 of Article 1 of the Constitution of Iowa, which declares that “all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens,” and that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States which prohibits a state from denying to “any person within its jurisdiction the equal protection of its laws.” Only these need be considered.

It will be observed, from an analysis of the statute, "that only the employee of a hotel, restaurant, or barber shop" is prohibited from accepting a tip or gratuity. The proprietor of the hotel, restaurant, or barber shop is not interfered with, or prohibited from accepting such gift. While an employee of a person engaged in the transportation of passengers may not receive any gratuity or gift, such person may, under like circumstances, accept favors of this kind. An employee is defined by Webster as "one employed by another; a clerk or workman in the service of an employer, usually distinguished from an official or officer or one employed in a position of some authority;" and a like definition is found in the Century Dictionary. See *Johnston v. Barrills*, 27 Ore. 251 (41 Pac. 656). Under this act, the proprietor of a hotel, restaurant, or barber shop, even though engaged in the same employment, would be perfectly free to accept tips or gratuities or anything of value, while the employee, working at his side and engaged in the same occupation, might be prosecuted for having committed a crime, should he do the same thing. That the proprietor would not be likely to be made the recipient of such a so-called courtesy does not answer the criticism. The present case illustrates the vice of this statute. There were two chairs in the barber shop; the employer, one Murphy, worked at one of these, and defendant at the other. Murphy undertook to pay the defendant \$15 per week and 60 per cent of what he received for his work above said sum, and defendant was to have, according to the custom of the trade, such tips and gratuities as might be handed him. A customer gave him 25 cents in excess of the charges, and he was prosecuted. Had the same amount been handed to Murphy, his employer, no offense could have been charged. Manifestly, there is no reason for such discrimination. For the purpose of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into

classes. Indeed, the greater part of all legislation is of this character, but the authorities agree that the distinction in dividing must not be arbitrary, and must be based on differences which are apparent and reasonable. The classification should be based upon some apparent natural reason,—some reason suggested by necessity,—such a difference in situation and circumstances of the subjects placed in the one class or the other as to suggest the necessity or propriety of discrimination with respect to them.

Classifying the difference between the situations of the persons of the respective classes as employers and employees is not alone sufficient. Reference must also be had to the subject-matter of the legislation affecting the respective classes created. There can be no controversy but that employers and employees may be divided into separate classes for the purpose of legislation on many subjects, but where the evil to be remedied relates to members of one class quite as well as to another, and is quite as obnoxious to good morals, such a classification would be unwarranted. The section of the Constitution quoted exacts that the general assembly shall not grant to any class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens; and this necessarily includes any class into which the citizens may be divided. That the difference between employer and employees is such as to warrant their separate classification for some purposes, would not justify this legislation if, in fact, privileges and immunities are accorded to the one class which, on the same terms, do not equally belong to the other class. We are unable to discover any reasonable ground for saying that employers as a class may accept tips or gratuities, and employees may not, especially in those vocations where they are engaged in the same identical work.

Tipping may be an evil, but this does not justify discrimination between classes in order to put it down. In

so far as the public is concerned, the evil of tipping the employer is quite as obnoxious to good morals as though it were done to the employee. Surely, here there is no ground for discrimination. Nor can tipping the employee be said to work an injury to him, for he is free to decline the gratuity; and if it be claimed that his character be in some way affected thereby, there is no ground for saying that like consequences would not result to the employer under the same circumstances. Nor are we ready to accede to the proposition that tipping is necessarily a wrong by the employee against the employer. That necessarily depends on the nature of the employment. If the employee were working by the piece, or receiving so much for the performance of a particular task, it would be entirely immaterial to the employer whether he accepted a gratuity or not. In such a situation, the employer would not be affected, even though greater care were bestowed or more time given by the employee than were the gratuity not received. It might prove an injury only in those instances where additional time is consumed by the employee when time furnishes the basis of compensation. No such distinction is attempted in the statute. Moreover, the tip or gratuity is customarily paid after the service has been rendered, and there is no ground for saying, in general, that any additional compensation is accepted from the patron at the expense of the employer; rather, the giving of such gratuity is an expression of satisfaction by the patron in whatever service has been rendered. The proprietor of a hotel, restaurant, or barber shop often renders service in connection with employees, and we entertain no doubt that, in permitting the employer, often unknown to the patron to be such, to accept tips or gratuities, and denying a like privilege to the employee, there is unfair discrimination, and such legislation is prohibited by the section of the Constitution quoted. The power of the legislature with reference to classification is

quite thoroughly covered in *State v. Garbroski*, 111 Iowa 496, where the court held that there was no ground for exempting veterans of the Civil War from the necessity of paying a peddlers' tax which was exacted from all others engaged in that occupation. There is nothing in the situation of an employer which justifies discriminating in his favor when engaged in the same pursuit as the employee, and we are of opinion that any law which permits the proprietor of a barber shop to accept a tip or gratuity upon the performance of services to a customer, and at the same time prohibits the employee, engaged in like services in the same shop, from doing likewise, is to be denounced as unjust discrimination, and inimical to the section of the Constitution prohibiting the general assembly from granting to "any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." As applied to an employee of a barber shop, the statute quoted is unconstitutional, and the court rightly discharged plaintiff, for that he was guilty of no offense against the law.—*Affirmed*.

GAYNOR, PRESTON, and STEVENS, JJ., concur.

EVANS, J. (dissenting). I am unable to concur in the majority opinion.

I. The general ground of the holding therein is that the statute in question offends against the Constitution, in that its classification makes unreasonable discrimination. The specific point made is that the prohibition of the statute applies to the employee only, and not to the employer. In my judgment, the argument is unsound. The tipping evil, if such, is, in its very nature, a wrong by the employee against the employer on the one hand, and against the patron on the other. As against the employer, it tends to procure for the patron additional consideration at the expense of the employer. On the question of classification,

we have frequently held that no more definite rule can be laid down than that classification must be natural and reasonable, and not arbitrary or capricious. Our holdings in previous cases on this question are collated in *Hubbell v. Higgins*, 148 Iowa 36. See, also, *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245, and *State v. Fairmont Creamery Co.*, 153 Iowa 702, 703. On this question, there is no variation in our previous utterances.

Whether there was existent a tipping evil, which was injurious to public morals, and whether it was of such magnitude as to justify legislation thereon, was a question for legislative cognizance. It was competent for the legislative body to believe, also, that there was no tipping evil existent, except such as involved an employee. The rule of uniformity requires that the legislation "must extend to and embrace all persons who are or may be under like circumstances." This requirement is met in the statute under consideration. The same person may be an employer in one relation and an employee in another. Indeed, it is broadly true that every person is both an employer and an employee in his various relations. The statute forbids every person, while an employee of another, to solicit tips from the patron of his employer. Surely, this presents a natural and reasonable classification. To say that the statute may not forbid the employee to thus wrong his employer unless the employer is included within the same prohibition, impresses me as quite illogical.

II. The majority opinion lays some stress upon the particular facts involved as between the employer and the employee in this particular case. It is made to appear that the plaintiff's contract with his employer was that he was to receive \$15 per week and 60 per cent of what he received for his work above said sum, and that, "according to the custom of the trade," he was to receive such tips and gratuities as might be given him. Assuming that such a con-

tract could be pleaded by the employee as a defense to the prosecution, it furnishes no reason whatever for striking down the legislation as unconstitutional. If the sum received by the employee was so received pursuant to contract with his employer, and as a part of his compensation, then the most that could be said is that, as between him and his employer, he did not receive it as a gratuity. How far this fact could avail as a defense, either in whole or in part, I do not stop to consider. Nor do I stop to consider whether an implied contract can be predicated upon a "custom of the trade," when such custom is itself illegal, or contrary to public policy. The plaintiff herein made no defense in the prosecution against him. He simply sued out a writ of habeas corpus, and claimed his right to a discharge on the ground of the unconstitutionality of the statute. And it was upon such ground that he was discharged. It will not do, therefore, to use the weakness of the prosecution in its facts in the original case as a reason for holding the statute itself unconstitutional.

While the subject-matter of this legislation appears to some people as trivial, and perhaps to no one as profound or pressing, it is none the less important that this fact shall not become the real stimulus to interference with the just prerogatives of the legislature in the exercise of the police power. Conceding the lack of overweening importance of the legislation itself, I am convinced that it is not an offense against the Constitution.

WEAVER, J., joins in this dissent.

AMERICAN LAUNDRY MACHINERY COMPANY, Appellant, v.
EVERYBODY'S LAUNDRY et al., Appellees.

PLEADING: Issues—Admissions—"Duly Recorded." Where the
1 petition alleged facts showing that a conditional sale contract

was "*duly filed for record*," an admission in the answer formally admitting this allegation, was a concession that it was *properly recorded*, and so executed as to make it eligible for record, and eliminated the question of constructive notice.

PLEADING: Issues—Conclusion of Law—"Faulty and Illegal Acknowledgment." Allegation in an answer that a contract was improperly recorded because of its faulty and illegal acknowledgment, but without any statement of *facts* constituting the fault or illegality complained of, stated a legal conclusion, and raised no issue of fact upon any other allegation of the petition.

SALES: Conditional Sales—Recording Acts—Acknowledgment.

3 Where plaintiff's salesman was authorized to make a conditional sale contract in his *own name*, and signed it in his own name, and was, as far as the purchaser was concerned, a principal in the contract, and his acknowledgment to the contract, as shown by the certificate, was as "*his own act and deed*," the certificate of acknowledgment was sufficient, under Section 2959, Code, 1897, although, in addition to his signature, the contract had the stamped signature of the plaintiff.

SALES: Conditional Sales—Recording Acts. A conditional sale of

4 personal property is valid between the vendor and purchaser; but, to be valid against execution and attaching creditors and purchaser without notice, it must, under Section 2906, Code, 1897, be evidenced by a written instrument acknowledged like conveyances of real estate, and filed for record.

BANKRUPTCY: Liens and Priorities—Unrecorded Conditional Sales.

5 An assignee or trustee is not a *purchaser*, within Section 2906, Code, 1897, providing that, to be valid against execution and attaching creditors and *purchasers* without notice, conditional sales contracts must be recorded; and the claim of a vendor under an unrecorded conditional sales contract is superior to that of the assignee, or the trustee in bankruptcy, both under the state law and the Federal Bankruptcy Act.

BANKRUPTCY: Liens and Priorities—Conditional Sales—Notice of

6 Trustee from Schedules. Where the bankrupt, in his schedules filed, listed property as being secured by conditional sale contract, a trustee thereafter appointed could not be heard to profess ignorance or assert a claim superior to the contract because of the absence of actual or constructive notice of the contract.

Appeal from Black Hawk District Court.—GEORGE W. DUNHAM, Judge.

MARCH 18, 1919.

ON August 14, 1915, the plaintiff, a dealer in laundry machinery, entered into a contract for the conditional sale of certain machinery to one Wilson, doing business under the name of Everybody's Laundry, such machinery to be shipped to the purchaser, at Waterloo, Iowa, but the title to and the ownership of the same to remain in the seller until the agreed price, \$2,642.50, was paid. The terms of the conditional sale, as proposed, were reduced to writing, signed by Everybody's Laundry Company and by the plaintiff, American Laundry Machinery Company, and C. F. Noftzger, salesman. This writing was acknowledged by the said Noftzger and placed on record in the office of the recorder of Black Hawk County. The machinery was shipped to and received by the Everybody's Laundry, and kept in its place of business in Waterloo.

In May, 1917, while having the machinery in its possession, under the terms of the said contract, and while there still remained unpaid upon the purchase price a remainder of \$1,459.61, the purchaser was adjudged a bankrupt, and one F. P. Ballon was appointed trustee of the estate in the bankruptcy proceedings. In the list of creditors filed by the bankrupt in said proceedings, there was included the name of the American Laundry Machinery Company, as a creditor to the amount of \$1,459.61, and in the "description of securities" for said debt, there was a written statement, "Conditional sales contract securing notes." The trustee declining to recognize the plaintiff's right to a lien on the machinery for the unpaid amount of the debt, this action was brought by plaintiff to establish its said claim. After the action was begun, and before the matter came up for hearing, the trustee, by agreement with the plaintiff, sold the property, and the proceeds thereof have been preserved and brought into court, to be disposed of according to the

rights of the parties as they shall finally be determined and adjudged herein.

Trial was had and the case submitted for decision upon the pleadings filed and a stipulation of facts. The court found for the defendants, and the plaintiff appeals.—*Reversed.*

Paulson & Wood, and *Nourse & Nourse*, for appellant.

Williams & Clark, for appellees.

WEAVER, J.—In addition to the matters set forth in the foregoing statement, the truth of all of which is conceded, it should be said that the petition in Paragraph 4 thereof alleges that the written order or contract of conditional sale “was duly filed for record in the recorder’s office of Black Hawk County, Iowa,” and this allegation is formally admitted in Paragraph 4 of defendants’ answer.

In a subsequent paragraph, however, it is alleged “that, on account of the faulty and illegal acknowledgment” of said instrument, it “was improperly recorded, it was not entitled to record, and it imparted no notice to anyone of plaintiff’s alleged rights;” but such allegation is accompanied by no explanation or statement of the fact or facts relied upon as rendering the acknowledgment “faulty” or “illegal.”

It is also stipulated that Noftzger, whose name is subscribed to the contract and who acknowledged the execution, “had full authority from the plaintiff to sign the conditional sales contract in the way he signed this contract, and full power and authority to acknowledge this signature in the form and manner shown by the instrument,” also “full power and authority” to sell said property, either for cash or upon conditional contracts, and to enter into said contracts “either in the name of the plaintiff or in his own name;” but this concession is made with

reservation to the defendant of the right to object to the admissibility of such facts in evidence.

The stipulation further shows that the purchaser was adjudged a bankrupt on May 18, 1917, and that the defendant was appointed trustee in such proceedings on June 1, 1917; and it is agreed that, "previous to such appointment, he had no actual notice of plaintiff's claim;" and there is no evidence that, prior to such date, the creditors of the bankrupt had any actual notice thereof.

In discussing the plaintiff's petition, and confirming the defendants' claim to priority, the trial court based its ruling upon the theory that the acknowledgment of the written contract was insufficient to admit it to record, as provided by statute, and that its record did not serve to impart constructive notice of the plaintiff's right.

In this court, the appellant argues: First, that the acknowledgment is not fatally defective; and second, that, even if the recording did not impart constructive notice, yet, under the admitted facts and circumstances, the trustee takes no other or greater right in the property than was held by the debtor when he was adjudged a bankrupt.

I. Referring to the objection made in argument to the sufficiency of the acknowledgment, the case presents a somewhat peculiar situation. As will be seen from the

preliminary statement, the plaintiff, in its petition, alleges the facts, showing a conditional sale by written bill or contract, and that such instrument "was duly filed for record" in the recorder's office of Black Hawk County; and the defendant, in its answer, formally admits this allegation. Now, an admission that the paper was "duly recorded" would seem to mean neither more nor less than a concession that it was properly recorded, and this necessarily implies an admission that it was in such form, or so executed, as to make it eligible for record; and if so, the question of the sufficiency of constructive notice is not an issue.

1. PLEADING: issues: admissions: "duly recorded."

It is true, as before stated, that in another division of the answer is an allegation that the contract "was improperly recorded," and "was not entitled to record" because of its "faulty and illegal acknowledgment,"

2. PLEADING: issues: conclusion of law: "faulty and illegal acknowledgment."

but there is no statement or specification of the fact or facts constituting the fault or illegality complained of. This is clearly a statement or allegation of a legal conclusion, and raises no issue of fact upon any allegation of the petition (*Plagmann v. City of Davenport*, 181 Iowa 1212), and the sufficiency of the acknowledgment is to be taken as conceded.

II. But even if we assume that the defense has been sufficiently pleaded, we are not persuaded that the objection to the sufficiency of the acknowledgment is well taken.

The substance of the objection is that Nofztger, who made the acknowledgment, was not the vendor, and, therefore, an acknowledgment by him, in his own name, is insufficient; and that, to entitle it to record, the certificate of acknowledgment should have described him as the agent or officer of the American Laundry Machinery Company, and that he acknowledged the execution of the contract to be the voluntary will and deed of such company, as provided in Code Section 2959.

Whether this objection is good depends very much upon the conceded facts as to the relation of Nofztger to the contract of sale. The writing bears the stamped signature of the plaintiff and the written signature of Nofztger. It is admitted that Nofztger was authorized to sell and dispose of the property either in the name of the plaintiff or in his own name, and to enter into contracts of conditional sale accordingly.

This contract is subscribed by both the names of the plaintiff and Nofztger. Whether the name of the plaintiff was attached by Nofztger is not stated in the stipulation; but it is enough, we think, that it is agreed that he had

power and authority to sell, and to make the contract in his own name. Under the admission by the parties, Noftzger was to the purchaser, a principal, a vendor, and not the mere agent of another. In acknowledging the instrument, he did not acknowledge it as the act of the plaintiff nor for the plaintiff, but as his own act and deed; and such is the clear purport of the certificate. If a person goes out with full power to sell and dispose of personal property in his own name, and does sell in that manner, it can hardly be open to question that his bill of sale, or other form of contract made to effect such sale, as between him and the purchaser, is his individual contract, and that the acknowledgment thereof in his own name is all that is needed to make the instrument eligible to record. Under the admitted facts, we are, therefore, disposed to the view that the certificate of acknowledgment was sufficient.

III. That a conditional sale, such as the record here presents, is valid, as between vendor and purchaser, has frequently been held by the court, and is conceded by the
 4. **SALES: con-** appellee. But to be valid as against exe-
 ditional sales:
 recording acts. cution and attaching creditors and pur-
 chasers without notice, the sale must be evidenced by a written instrument, acknowledged like conveyances of real estate, and filed for record. Code Section 2906.

It follows, therefore, that, in so far as this case is affected or controlled by our state or local law, the trustee in bankruptcy acquires no right in the property superior to the plaintiff's claim, unless he comes
 5. **BANKRUPTCY:** within the description of execution creditor
 liens and pri- or attaching creditor or purchaser, and took
 orities: unre- the title of the property in the bankruptcy
 corded condi- proceedings without notice of the conditional character of
 tional sales. the debtor's title, to which, for the purpose of such proceedings, he succeeded. Concededly, he was not a judgment creditor or attaching creditor. The question remain-

ing, therefore, is whether he may be classed as a purchaser without notice.

Still confining our attention to the effect of our own statutes in dealing with conditional sales of personal property, it is well settled by the decision of this court in *Warner v. Jameson*, 52 Iowa 70, and many others of that class, that an assignee or trustee in insolvency cases is not a purchaser, in the terms of the statute last above cited, and that a claim of the vendor in a contract of conditional sale is superior to that of the assignee or trustee, even though the written instrument has never been recorded. In other words, the effect of such holdings is that the assignee or trustee in insolvency takes the debtor's estate as he held it, subject to all the liens now lawfully existing thereon.

This proposition, so far as our local law is concerned, is not open to question; but it is the contention of the appellee that this rule does not obtain in the settlement of a bankruptcy estate under the Federal law and practice. In support of this position, special reliance is laid upon the provision found in Section 67a of the Federal Bankruptcy Act (30 Stat. at L. 564, Ch. 541), as amended by the Act of June 25, 1910 (36 Stat. at L. 842, Ch. 412), which reads as follows:

"a. Claims, which for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

Following the language above quoted, and connected with the same general subject-matter, is Section 67d, as follows:

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice,

shall, to the extent of such present consideration only, not be affected by this act."

Section 47a also provides that:

"Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

But none of these provisions go to the extent argued by the appellees' counsel. Section 67a does no more than to provide that creditors having no valid liens as against other creditors, at the date when debtor goes into bankruptcy, shall have no lien upon the bankrupt's estate. In other words, the relative positions and relative rights of the individual creditors of the bankrupt, as they exist when the jurisdiction of the Federal Court attaches, are to remain unchanged, and claimants or creditors in whose favor there is then no valid lien as against other creditors, cannot thereafter assert such alleged lien as against the trustee of the bankrupt estate. Section 67d recognizes the validity of liens which have been created in good faith, for a consideration, and which have been duly recorded, if record was necessary to impart notice.

Section 47a defines the nature of the rights which rest in the trustee by virtue of his appointment. As to all property in the custody of the bankruptcy court (and the property in the case at bar comes within that exception), he acquires "the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings therein."

This Section 47a, as above quoted, is part of the Bankruptcy Act of 1898, while Sections 67a and 67d were enacted

in their present form in 1910, and all must be read together, to get the effect of the legislative intent.

Discussing Section 47a, Mr. Collier says, in his work on Bankruptcy (9th Ed.), page 659:

"This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies, and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate."

"In other words, the amendment of 1910 simply puts the trustee in his representative capacity in the position of a creditor who has reduced his claim to judgment. Such a creditor, by the settled law, is subject to all latent or secret prior liens or equities in favor of third persons. 23 Cyc. 1377; 2 Freeman on Judgments (4th Ed.), Sec. 368; *Miller v. Albright*, 60 Ohio St. 48 (53 N. E. 490)." *In re S. D. F. & M. Co.*, 208 Fed. 813, 818.

It is true this section gives to the trustee a lien, or the rights of a lien-holding creditor, but it does not profess to affect any existing valid lien. The order of priority of valid liens, if any, including the lien or title of the trustee, remains, as before, a matter for the adjudication of the court, according to the settled rules and principles of law and equity.

When a debtor is adjudged a bankrupt, the court assumes control of his estate, to insure the proper and faithful application of all his assets to the payment of the just claims of his creditors. To that end, the law makes provisions to guard against evasion and fraud by which the debtor may avoid a full and honest disclosure and surrender of his property, or by which one creditor may obtain an unfair advantage or preference over another; but it cannot be presumed that the statement was intended to permit the court or its trustee to subject to the payment of the bankrupt's debts the property of third persons who

are in no way liable therefor, or to deprive any creditor of any valid security which he may hold for the payment of his own claim.

Recurring again to Section 67a of the statute, it will be seen that, as against the trustee, liens claimed by creditors will be disregarded only where, "for want of record or other reasons," such claims "would not have been valid liens against the claims of the creditors of the bankrupt." In other words, this provision does no more than give to the trustee a right to dispute an alleged lien, to the same extent which other creditors could have asserted, had there not been an adjudication of bankruptcy. *Orr v. Kemworthy*, 143 Iowa 6.

So, in Section 67d, the failure to record the claim becomes material only "*if record thereof was necessary in order to impart notice.*"

These references to unrecorded liens are doubtless made in recognition of the fact that, under the laws of some states, recording is essential to existence of a "valid lien," especially upon personal property, and in such case it is manifest that the title of the trustee in bankruptcy is not affected by alleged liens of that character. But, as we have seen, under the law of this state, the claim of the vendor upon a contract of conditional sale is not invalid except as against subsequent purchasers and attaching and execution creditors *without notice*.

For the purposes of this case, if we accept the appellees' contention that the trustee, whose appointment bears date twelve days after the debtor was adjudged a bankrupt, became clothed with the rights of a subsequent purchaser or attaching creditor, as of the date of such adjudication, can it be said that he acquired that status without notice of the plaintiff's prior right, with reference to this maturing? In our judgment, the inquiry

6. BANKRUPTCY:
liens and pri-
orities: condi-
tional sales:
notice of trus-
tee from
schedules.

must be answered in the negative. The statute and rules governing bankruptcy proceedings require of the debtor seeking the relief which this law offers, that he shall, at the very threshold of the proceedings, present to the court a complete and detailed statement of all his property and assets, together with a list of his creditors, the amount of debt owed to each, and if secured, how secured.

Assuming that, in this respect, the debtor does his full duty (and there is, in this case, no evidence that he failed in the performance of such duty, in any manner or degree), the court has in its hands, and upon its own record, substantially all the facts which are necessary to enable it and its trustee, when appointed, to liquidate the estate by converting the assets into money and applying it to the satisfaction of the admitted or proved charges and claims against it.

In obedience to the law, the debtor in the present case did, with his petition to be adjudged a bankrupt, lay before the court a schedule of his property, a list of his creditors, the amount owed to each, and the manner in which it was secured, if at all. It disclosed, in unmistakable terms, the nature of the debt to this plaintiff,—that is, that it was a remainder due upon the price of this machinery bought upon a contract of conditional sale. The debtor thereby informed the court that his right or title to the property was not absolute, but qualified and conditional upon the payment of the unpaid portion of the agreed price, to the amount of \$1,459.61. Had he done no more than to schedule this property as an asset, and to list plaintiff as a creditor for the stated amount, without explanation or qualification, it may be conceded, for the purposes of this case (without so deciding), that the trustee's title thereafter accruing would have precedence over the plaintiff's claim under the contract; but the debtor having, at the very outset, revealed to the court the true nature and

extent of his property right, and the security held by the plaintiff, such showing became a part of the record of the proceedings, of which the trustee, thereafter appointed, could not be heard to profess ignorance, or to assert a claim superior to the contract of conditional sale, because of the absence of actual or constructive notice. Had there been no proceedings in bankruptcy, and a creditor, having reduced his claim to judgment, had placed an execution for its collection in the sheriff's hands, a levy on the property without notice of plaintiff's claim would, of course, be upheld; but if the officer holding the writ should go to the debtor, and demand that he disclose or turn out property on which a levy could be made, and the debtor should give him a list of his assets available for that purpose, and include therein a certain item of property, together with information that this item is subject to a valid but unrecorded chattel mortgage, or a valid but unrecorded contract of conditional sale, there can be no doubt that, under the laws of this state, the lien of a levy so made would not be preferred to that of the mortgagor or vendor. If, then, we should concede, as argued by his counsel, that the trustee in this case acquired the right or position of advantage which would be held by a judgment creditor under the laws of this state, had the debtor not been adjudicated a bankrupt, we are still led to the same inevitable conclusion: that the trustee's title, under the admitted facts, is subject to the plaintiff's prior right under the contract of conditional sale.

That the question as to what shall constitute notice sufficient to protect the rights of a lienholder against accruing claims is to be determined under the law of the local jurisdiction, has been often held. *York Mfg. Co. v. Cassell*, 201 U. S. 344; *Thompson v. Taggart*, 209 U. S. 385; *Bryant v. Swofford Bros.*, 214 U. S. 279, 290.

Further discussion seems to be unnecessary. Upon

the conceded facts, we hold the plaintiff is entitled to have a prior lien upon the property in controversy established and confirmed. The decree of the trial court must, therefore, be reversed. Plaintiff may have final decree in this court, if it shall so elect within thirty days from the filing of this opinion, and if it fails to exercise such option, the cause will be remanded for the entry of decree by the trial court, in accordance with the views herein expressed.—*Reversed.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

ELIZABETH BAADTE et al., Appellants, v. SUSAN WALGENBACH et al., Appellees.

FRANK A. BAADTE, Administrator, Appellant, v. WILLIAM WALGENBACH, Appellee.

EVIDENCE: Presumptions—Confidential Relations—Deeds. That

- 1 the grantee in a deed was the daughter of the grantor and the wife of grantor's confidential agent does not show such a relation of special trust and confidence as to charge her with the burden of rebutting a presumption of constructive fraud.

EXECUTORS AND ADMINISTRATORS: Property Disposed of Be-

- 2 fore Decedent's Death—Payment to Persons Entitled to Funds. Where decedent delivered to his daughter certain funds to be paid upon his death to his heirs in certain designated proportions, and the same had been so paid by her, the administrator of decedent could not recover from her said funds, for the reasons that (a) said money so deposited constituted a trust fund which she was to distribute to designated beneficiaries, and title thereto did not pass to the administrator, and any rights as to enforcement of the trust accrued to the beneficiaries, and not to the administrator; and (b) even if the administrator could maintain an action therefor, there being no rights of creditors or third persons involved, the payment by the daughter to the persons ultimately entitled thereto would be a defense.

APPEAL AND ERROR: Consolidation of Actions—Harmless Error.

- 3 The consolidation of a cause of action brought by an adminis-

trator to recover money, and in which an equitable defense was set up, and where the administrator had no cause of action, with an action by heirs asking that a deed given by decedent be set aside, *held* not prejudicial error.

APPEAL AND ERROR: Presumptions—Disregard of Incompetent Evidence. Where, in an equity case, objections were made by both parties to the introduction of evidence, but the court did not rule thereon at the time, nor were such rulings demanded or entered at the close of the trial, the Supreme Court will presume that the trial court, in reaching its conclusion upon the merits of the case, considered only that portion of the evidence that was competent and material.

Appeal from Sioux District Court.—W. D. BOIES, Judge.

MARCH 18, 1919.

THE nature of the issues and the material facts in the two above-entitled causes, which were consolidated for the trial in the court below, will be found sufficiently stated in the following opinion.—*Affirmed.*

Hatley & Van Steeg, for appellants.

Klay & Klay and *T. E. Diamond*, for appellees.

WEAVER, J.—Dominick Moes, a native of the Duchy of Luxemburg, but for many years a resident and citizen of this country, died December 9, 1914, at the age of 82 years. He had, at one time, owned two farms, of 160 acres each, also certain other property in the town of Hospers, Iowa. Two years before his death, he sold and conveyed one of his farms to a son-in-law for \$24,000, and distributed the proceeds from such sale to his children in equal shares. On April 24, 1914, he made a deed conveying the other farm to his oldest daughter, Susanna Walgenbach, for the agreed consideration of \$23,840, subject to a lease existing therein for the term of his own life, and at the same time, and for the same consideration, made her a bill of sale for certain movable buildings standing upon town property owned by

him, which purchase price was to be paid within one year.

On the same day, the deceased executed an instrument purporting to be his will, in which he named his son-in-law William Walgenbach executor; but it was found to be so defective in form that it was denied admission to probate. After the death of Moes, and before the alleged will was finally adjudged inadmissible to probate, Walgenbach, who had been named executor in said instrument, and his wife disbursed certain moneys which they had received from the deceased in his lifetime, and for which plaintiffs claim they are indebted to the estate. Thereafter, Frank A. Baadte, another son-in-law of the deceased's, having been appointed administrator of the estate, brought an action entitled at law, in his representative capacity, against the said William Walgenbach to recover from him for the use of the estate, the moneys which he had received or held, as above stated. At the same time, the said administrator united with other adult heirs at law of Dominick Moes, in instituting a suit in equity against Susanna Walgenbach and husband, to set aside and declare void the deed and bill of sale to Mrs. Walgenbach, already mentioned as having been made April 24, 1914, on the ground that such conveyances had been procured by fraud and undue influence, and upon the further ground that, on the date named, the deceased was mentally incompetent to make a valid deed or contract.

The pleadings in these two cases are quite tedious and confusing, but the foregoing states, in a brief and general way, the nature of the claims relied upon by the plaintiffs. In the first case mentioned, the defendant alleges that Dominick Moes in his lifetime deposited or placed in the hands of his daughter Mrs. Walgenbach certain moneys to be held in trust until his death, and then to be by her divided in stated proportions among the members of his family; and that, in obedience to such directions, after the death of the

deceased, and before this action was begun, the moneys so received, with accumulated interest, were by her and her husband distributed to and paid over to the several beneficiaries of said trust, who accepted and still hold the deceased, and before this action was begun, the moneys so received and accounted for, he has received nothing belonging to said Dominick Moes or his estate.

In the other entitled case, defendants deny all allegations of fraud and undue influence. Before the issues came on for trial, the court, over the objections of the plaintiffs, ordered the two cases consolidated for trial. Having heard the evidence, the court found for the defendants on both issues, and plaintiffs appeal.

I. Referring first to the attack upon the validity of the deed, we shall content ourselves with stating our conclusions, without going into any extended statement of the testimony. That Moes was an old man, and manifested more or less evidence of the weakening effect of his increasing years, is doubtless true; but that he was incapable of understanding, to a reasonable degree, the nature and effect of the deed made by him, has not been sufficiently shown. In fact, we find it quite clearly disproved. The testimony relating to the circumstances attending the making of the deed shows very satisfactorily that, aside from impairment or loss of eyesight, the grantor manifested no signs of either physical or mental unsoundness affecting his capacity to transact such business intelligently. Moreover, there is nothing in the transaction itself to indicate any marked lack of judgment or business sense on his part. He was selling the land for about \$150 per acre, which, according to the great weight of the evidence, was its fair and full value. His estate was not thereby decreased to any material degree, and it is indeed difficult to understand why this family should involve itself in quarrel and litigation over a deal the defeat of which would be of so little

substantial advantage to anyone. This thought is further emphasized by the fact that the grantee of the land is in court, tendering payment to the estate of the full purchase price. The finding of the court upon this issue is not only well supported by the record, but we think no other conclusion therein could be justified.

Before leaving the subject, however, it should be added that we do not overlook the appellants' claim that, under the circumstances, the burden should be placed upon the defendants to show affirmatively that the deed was not obtained by undue influence.

1. EVIDENCE: pre-
sumptions: con-
fidential rela-
tions: deeds.

This point is made on the theory that there was a relation of confidence and trust between grantor and grantee, of such character as to call for an application of the equitable rule which counsel invokes. It is true that the grantee's husband had, to a considerable extent, attended to the old gentleman's business, during the later period of his life, and, had the conveyance been to him, there would be color of reason for the objection raised; but the reason which underlies the rule does not, in our opinion, extend to the grantor's daughter, simply because she was the wife of the grantor's confidential agent. The deceased was not a member of his daughter's family. He maintained a separate home, although, for some years after his wife's death, he had taken his meals with his daughter, paying her for his board. Altogether, there is shown no such relation of special trust or confidence on her part as will charge her with the burden of rebutting a presumption of actual or constructive fraud. It may be true that, in view of the relation between the grantee and William Walgenbach, the agent of deceased, the court should scrutinize the transaction with care, to see that the agent did not abuse the confidence of his principal for the advantage of his wife; but even in that view of the law, we think it must be said that the fairness of the transaction and the absence

of any undue influence in the procurement of the deed are affirmatively shown.

II. The other issue, upon the claim made by the administrator for an accounting by Walgenbach, or by Walgenbach and wife, for moneys received or held by them belonging to Dominick Moes, turns upon the effect to be given to certain facts, the truth of which seems not to be seriously disputed.

The petition alleges that, in his lifetime, Dominick Moes placed certain sums of money in the hands of the defendant Walgenbach, with instructions to pay or turn over the fund so created to his estate after his death. The answer, in effect, admits that the several sums of money named were by the deceased placed in the hands of Susanna Walgenbach, but alleges that such deposit was made with instructions to hold until the death of the deceased man, and then to distribute the same to his heirs in certain designated proportions. It is further claimed or shown that the money so received was by Mrs. Walgenbach placed in her husband's management; that he held the same until after the death of Dominick Moes; then, in fulfilment of the trust upon which the money was received from the deceased, he did distribute and pay over such fund, with accumulated interest, in strict accord with the terms of the trust, to the designated beneficiaries, by whom such payments were accepted and are still retained, excepting only the share paid to the plaintiff Elizabeth Baadte, who returned it to defendant, who brings it into court for her benefit.

Passing, for the present, the question of the admissibility of the evidence, it is to be said that the version of the facts as stated and relied upon by the defendant is established without controversy. Dominick Moes did, in his lifetime, deliver to his said daughter several sums of money, aggregating something less than \$3,000, directing her, upon his death, to distribute the same to his heirs,

including in that designation one Klein, a stepson. The money thus received was by Mrs. Walgenbach placed in the custody of her husband, and, upon the death of Moes, the fund, with interest, was distributed as directed by him.

Assuming the correctness of this statement, there are two sufficient reasons why the administrator is not entitled to recover:

(1) The fund, as deposited with Susanna Walgenbach, constituted a trust, by the terms of which she was bound to distribute it to the designated beneficiaries after the death of Moes, and the title to such fund did not pass to the administrator, nor was he authorized to demand and receive the possession of it. The fund having been received from the trustee by her husband, he became equally charged with her for the performance of the trust, and this could be accomplished only by its distribution and delivery to the persons designated by the deceased in making the deposit. Had the trustee or her husband failed or defaulted in the performance of the trust, action for an accounting would have accrued, not to the administrator of Moes, but to the several beneficiaries of the trust.

2. EXECUTORS AND ADMINISTRATORS: property disposed of before decedent's death: payment to persons entitled to funds.

(2) Even if it should be held that action in such case would be maintainable by the administrator, it is a good and sufficient defense, where no rights of creditors or third persons are involved, to plead and prove that defendants have made payment and accounting to the person or persons who would ultimately have been entitled to demand and receive it from the administrator himself. *Baldrige v. Evans*, 181 Iowa 204; *Lenderink v. Sawyer*, 92 Neb. 587 (138 N. W. 744, Ann. Cas. 1914A 261). This rule is not questioned by appellant in argument, but its effect is sought to be neutralized by objection to the competency of Walgenbach and wife as witnesses. It is possible that a strict applica-

tion of the statute, Code Section 4604, would require us to disregard some portions of their testimony; but when this has been done, there remains enough to necessitate the result we have mentioned. Indeed, in the absence of the voluntary showing made by the defendant, it is doubtful whether the evidence offered by the plaintiffs themselves, if held to like adherence to the rules, is sufficient to make a prima-facie case for a recovery. The evidence as a whole shows no grounds upon which, under any admissible theory, a recovery of personal property by the administrator could be sustained.

III. One of the chief grounds of complaint by the appellant is the order of the court below, consolidating the two cases for trial. It is true that the action of the admin-

8. APPEAL AND
ERROR: consoli-
dation of ac-
tions: harmless
error.

istrator is entitled as "At Law," when the

suit to set aside the deed is undoubtedly

"In Equity," and it may be admitted that,

if the issues in the first case are clearly

legal only, and those in the second case are equitable only, exception to the order of consolidation would ordinarily have to be sustained. It is very clear, however, that no prejudicial error was here committed.

First. The answer in plaintiffs' law action sets up an equitable defense. While admitting the receipt of money from the deceased, it affirmatively pleads that it was received as trust fund, and asks an accounting thereof, which is a proper matter of equitable jurisdiction.

Second. It affirmatively appears that the administrator had no right of action at law on which he would have been entitled to the verdict of a jury, and even if the order of consolidation was erroneous, he sustained no material prejudice therefrom.

IV. Many objections are urged to the competency and materiality of testimony offered. The trial seems to have proceeded after the manner and practice which have

4. **APPEAL AND ERROR:** presumptions: disregard of incompetent evidence. become usual in equity cases in this jurisdiction: that is, while counsel on either side exercised to the limit their right to make all conceivable objections to each item of evidence, and their objections were duly noted in the record, the court did not rule thereon at the time, nor were such rulings demanded or entered at the close of the trial. Under such circumstances, we think it the rule of this court to presume that the trial court, in reaching its conclusion upon the merits of the case, considered only that portion of the evidence which was competent and material. An examination of this record shows that, although we disregard all the testimony to which the objections appear to be well taken, the strength of the defense is not materially weakened, and no cause appears for disturbing the decree rendered below. The cause appears to have been fairly tried, and the result is equitable.

The decree of the district court is—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

JACOB NELS, Appellant, v. JOHN RIDER et al., Appellees.

NEGLIGENCE: Imputed Negligence—Driver's Negligence Not Imputed to Guest. The negligence of the driver of an automobile cannot be imputed to a guest having no authority or control over the driver.

JUDGMENT: Opening or Vacating—Defaults—Sufficiency of Showing—Discretion. Where counsel, on information from the clerk of the courts, had reason to believe that court would be adjourned *sine die*, on account of no judge's being assigned to hold court, in the absence of the regular judge, and left the county seat on business, and, upon arrival of the judge, default was entered in a case in which said counsel was interested, held that the court did not abuse its discretion in setting aside the default.

INFANTS: Actions—Defense Without Guardian—Default. Where default judgment was entered against a minor, without the mak-

ing of any defense, and without the appointment of a guardian *ad litem*, the judgment was irregular. (Sec. 3482, Code, 1897.)

Appeal from Sioux District Court.—WILLIAM HUTCHINSON
and W. D. BOIES, Judges.

MARCH 18, 1919.

APPEAL from the action of the court in setting aside default judgments. Opinion states the facts.—*Affirmed.*

Hatley & Van De Steeg, for appellant.

Gerrit Klay, and *Klay & Klay*, for appellees.

GAYNOR, J.—This appeal is taken from the action of the court in setting aside default judgments.

It appears that, on the 23d day of July, 1917, plaintiff commenced an action against these defendants to recover damages, alleging that, on the 7th day of July, 1917, he was run into and injured by an automobile run and operated by the defendants. The original notice was served on each of the defendants, requiring them to appear on the 3d day of September, 1917, this being the second day of the September term of the district court. The defendants, and each of them, failed to appear or plead, and default was entered against them on the 7th day of September, 1917, and on the same day, judgment was entered against each and all of them in the sum of \$600, with 6 per cent interest.

On the 14th day of September, one of these defendants, Grace McCrum, appeared and filed a motion to set aside the default and judgment, and at the same time filed her answer, denying liability, and alleging, among other things, that the machine was operated by the defendant John Rider, and that she was a mere passenger in the automobile, a guest of the driver, riding at his invitation; that

she had no authority or control over the operation of the machine.

We have to say that this answer filed by the defendant presents a good defense as to her. The action against her is predicated on negligence. If she is able to show, as she

alleged in her answer, that the machine was operated by the defendant Rider, and that she was a mere passenger in the machine, a guest of Rider's, occupying a seat in the machine on invitation only, and that she

1. NEGLIGENCE:
imputed negli-
gence: driver's
negligence not
imputed to
guest.

had no authority or control over the operation of the machine, she cannot be charged with any negligence traceable to the conduct of Rider.

The record discloses the following facts, upon which this defendant predicates her right to have default and judgment set aside: The court was scheduled to open on the 2d day of September. Judge Boies was as-

2. JUDGMENT: open-
ing or vacating:
defaults: suffi-
ciency of show-
ing: discretion.

signed to hold that term. Before the opening of court, however, he was directed by the Supreme Court to go to another coun-

ty, and preside over the trial of a case there pending. This left no judge assigned to hold court in Sioux County for that term, and no judge was appointed by the court until later. The court opened as usual on the 2d day of September, and the clerk of the court adjourned the term from day to day, awaiting the arrival of a judge to preside at the sitting. No judge arrived until the 6th. In the meantime, the attorneys attending that term of court were present, awaiting the arrival of a judge, among whom were counsel representing this defendant. Her counsel was informed by the clerk of the court that he had no information as to whether a judge would arrive at all, and that, if a judge did not arrive, the September term would be adjourned *sine die*. On the morning of September 5th, this defendant's counsel was informed by the clerk that he had as

yet received no word from the Supreme Court in regard to the appointment of a judge, and that the court would be adjourned on that evening until the October term, under the provisions of the statute; that this defendant's counsel had, prior to this time, been drafted into the service of the government of the United States, as a member of the County Defense Committee of Sioux County, and had been appointed chairman for that county. On the evening of the 4th, he received instructions to go to Des Moines in connection with his office, and he left for Des Moines before the arrival of a judge. On the 6th of September, a judge appointed by the Supreme Court to preside in the absence of Judge Boies arrived, and opened court regularly. In the absence of this defendant and her counsel, on the 7th day of September, the court entered the default and judgment complained of.

Counsel, on information from the clerk, had reason to believe that court would be adjourned *sine die* on the evening of the 5th. The judge, however, arrived on the 6th, and the work of the court was begun in the absence of counsel. Neither the defendant nor her counsel was responsible for the conditions that existed. The delay in sending a judge to Sioux County to take the place of Judge Boies was due to the difficulty encountered by the Chief Justice in securing a judge who was unengaged, to go to Sioux County and preside.

We think the court did not abuse its discretion in its action. See *Hueston v. Preferred Acc. Ins. Co.*, 161 Iowa 521; *Gray v. Bricker*, 182 Iowa 816.

The other defendants, Bessie and Marie Smith, were minors. Section 3482 of the Code of 1897 provides:

"The defense of a minor must be by his regular guard-

3. **INFANTS:** actions: defense without guardian: default. ian, or by one appointed to defend for him where no regular guardian appears, or where the court directs a defense, by one appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian."

No guardian appeared; no defense was interposed; no guardian ad litem was appointed. The default judgment, therefore, was irregular. See *Drake v. Hanshaw*, 47 Iowa 291; *Hoover v. Kinsey Plow Co.*, 55 Iowa 668.

Upon the whole record, we think the court was right, and its judgment is—*Affirmed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

D. G. PYLE et al., Appellants, v. H. S. STONE, Appellee.

PROCESS: Original Notice—Service—Overcoming Return. The

1 presumption is in favor of the return of the officer serving an original notice, and this presumption can only be rebutted upon clear and satisfactory evidence, and the burden is upon the party attacking the return to show, by direct and satisfactory evidence, that the presumption is not well founded. Evidence chiefly by witnesses interested held insufficient to overcome this presumption, which was also supplemented by positive testimony of the officer that service was made, and by other corroborative testimony.

APPEAL AND ERROR: Trial De Novo—Influence of Finding of

2 Trial Court. On trial of case *de novo* in the Supreme Court on conflicting evidence, weight must, of necessity, be given to the finding of the trial court, in determining the credibility of witnesses.

Appeal from Humboldt District Court.—N. J. LEE, Judge.

MARCH 18, 1919.

AN appeal from the action of the court in refusing to

set aside a decree of foreclosure. Opinion states the facts. Plaintiffs appeal.—*Affirmed.*

Clyde C. Coyle and A. D. Pugh, for appellants.

Lovrien & Lovrien, for appellee.

GAYNOR, J.—This is a suit in equity, to cancel and set aside a judgment and decree of foreclosure, and to cancel and set aside a sale made under such foreclosure proceedings. The ground on which this is asked is that the court had no jurisdiction, because of the complete absence of the service of notice on the appellants. The defendant admits the mortgage and decree of foreclosure and sale, and denies all the balance of plaintiffs' petition. The court dismissed plaintiffs' petition on the merits, and plaintiffs appeal; and the only error assigned is that the court erred in doing so. The decree and judgment attacked were entered in the Humboldt County district court.

The record shows that, prior to the 3rd day of March, 1916, an original notice in due form was forwarded to the sheriff's office in Polk County, with directions to serve the same upon these plaintiffs, who then resided in Des Moines; that, upon receipt of the notice at the sheriff's office, it was turned over to one Mr. Henderson, a deputy sheriff, for service, and the record on file shows a completed service as to the plaintiff, Henry Pyle, in these words:

"State of Iowa, Polk County, ss.:

"Received the within notice this 3d day of March, 1916, and on the 3d day of March, 1916, I personally served the same on the within-named defendant, Henry Pyle, by leaving a copy at the house of Henry Pyle, in Des Moines Township, Polk County, Iowa, the same being his usual place of residence, with D. G. Pyle, a member of the family over

fourteen years of age, said Henry Pyle not being found in Polk County, Iowa, after a diligent search.

"[Signed] S. M. Henderson.

"Subscribed and sworn to."

As to Mrs. Henry Pyle, known in the record as D. G. Pyle, the return was as follows:

"State of Iowa, Polk County, ss:

"Received the within notice this 3d day of March, 1916, and on the 3d day of March, 1916, I personally served the same on the within-named defendant, D. G. Pyle, by offering to read the original to D. G. Pyle, which she waived, and delivered to her a true copy thereof.

"[Signed] S. M. Henderson.

"Duly verified."

This is purely a fact case. There is a direct conflict in the evidence on all material matters, and the credibility of the witnesses is directly involved. The record discloses, without any dispute, that the plaintiffs,

1. Process: original notice: service: overcoming return.

Henry Pyle and his wife, D. G. Pyle, were residents of Des Moines, up to and including the 5th of March. Their testimony is that they were residents of Des Moines until the 5th of March. There is no controversy in the record that, prior to the 29th day of February, they resided on Grand Avenue in said city, at what is known as No. 2411, and had resided there for a number of years prior to that date. Henderson, the deputy, who served the notice, testified that he had a distinct recollection of serving this notice; that he served it on Mrs. Henry Pyle, known in the record as D. G. Pyle, as stated in his return; that the service was made at No. 2411, where it is conceded that, prior to February 29th, Henry and his family made their home; that he recognized her as the same person he saw at No. 2411 on the morning of the 3d of March, 1916, and the same person on whom he made the service, as indicated by his return: and he was

very positive in his testimony that Mrs. D. G. Pyle, who was then in court, was the same person on whom he served the notice, as indicated by his return. We will not trouble to set out his testimony in full, but it shows that he had a clear recollection of the person on whom he served the notice, and that that person was the plaintiff in this case, Mrs. D. G. Pyle, and that the service was made on her at No. 2411.

It appears that W. V. Pyle, we think a brother of Henry Pyle's, lived at No. 2413, on the same street, and immediately west of Henry. Mrs. W. V. Pyle was called for the plaintiffs, and testified that, on the 3d day of March, a notice was served on her at No. 2413, in the morning of that day, by some officer, and she thinks it was this Mr. Henderson. She waived the reading, did not examine the notice, and laid the copies away. She says that her husband was not at home at the time this service was made; that the notice was not read to her, nor did she read it; that copies were left with her; that she had company, and did not care to have the notice read in the presence of the company; that she laid the copies aside, thinking to read them later; that her husband always got home the last of every week; that, when he came home, she looked for the papers, but could not find them, and never has found them.

Now the 3d of March was on Friday. This would bring the husband home on Saturday. The disappearance of these papers, if they were ever served on her, or if she ever received any papers of the character testified to, is exceedingly unfortunate for the plaintiffs in this case, or fortunate, and, at least, very peculiar. The service of notice by a sheriff or by his officers is not an everyday occurrence. It would have a tendency to arrest attention. If any papers were served, as she states, she makes no explanation of why or how they could have disappeared. She says she looked for them the next day, to show them to her husband, and

could not find them, but does not claim to have looked for them since. She fixes the date of service by saying she knows that the plaintiffs in this suit left on the 5th of March, and that the service was two or three days before that time; so she figures that it was the 3d of March that these notices were served on her, copies of which have been lost.

Mrs. Henry Pyle, known in the record as D. G. Pyle, testifies that, on the night of February 29th, she stayed at W. V. Pyle's home; on March 1st, at W. C. Biggs' home; that, on the 3d of March, she was at the Biggs' home until after lunch, then went down town, saw her husband and Mr. Biggs, and went back from the office to W. V. Pyle's home, and stayed there that night; that her husband was with her; that she was not at No. 2411 at any time during the 3d, and no one served any papers on her at either place. Both she and her husband, Henry, testified that all the household goods in No. 2411 were removed from the place on the 29th of February; that they never occupied the place after that; that it was vacant, and the blinds pulled down.

That certain goods were removed from No. 2411 on the 29th of February, is also shown by the testimony of an employee of the Merchants Transfer Company, who says he hauled three loads of household goods from No. 2411 on the 29th day of February, and put them in a car on the Minneapolis & St. Louis Railway Company's tracks; that they were not packed that day; that there had been packers there for three or four days; and that he took everything but a few old beds.

Neither of the Biggs was called as a witness, and their absence is not accounted for.

The Pyles all testified that the plaintiffs in this case left for Texas on the 5th of March, and they all testified that No. 2411 was vacant after the 1st of March.

Against this testimony is the testimony of Henderson,

who says that he called at No. 2411 on the morning of the 3d of March; that Mrs. D. G. Pyle came to the door; that he told her he had a notice from Humboldt County to serve on D. G. Pyle and Henry Pyle; that he asked her where Henry Pyle was, and she said, "In Texas;" that he asked her if she wanted the notice read, and she said, "No," and waived the reading; that he never served any notice at No. 2413; that, at the time he served the notice at No. 2411, he was in the house, and there was furniture there.

To this is added the testimony of one George Tymony, who says he was a chauffeur for Dr. Smouse, at 2323 Grand Avenue; that he was well acquainted with these plaintiffs, especially Mrs. D. G. Pyle; that he saw her around the premises at No. 2411 until at least the 5th of March; and that he thinks he saw her there later than that; that Dr. Smouse returned from California on the 1st of March; and that he cooked for the doctor about two weeks after that; that he saw Mrs. D. G. Pyle and her daughters come through their driveway to the street car real often,—every day,—while he was cooking for the doctor. He swears positively that Mrs. Pyle and her daughters were around No. 2411 as late, anyway, as the 5th of March; that he was well acquainted with Mrs. Pyle's daughters.

The burden of proof was on the plaintiffs. All presumption is in favor of the return of the officer. He was a disinterested party. He was charged with the duty of making an accurate and truthful return. The return is not conclusive, however, but may be rebutted; but it requires clear and satisfactory evidence to overcome this presumption, and we think that has not been done in this case. The return is supplemented by the sworn testimony of the officer, who, having no motive to falsify, states positively that the service was made as stated in his return. The burden is on the plaintiffs to show, by direct and satisfactory evidence, that the presumption in favor of the return is not well

founded. See *Bowden v. Hadley*, 138 Iowa 711; *Mosher v. McDonald & Co.*, 128 Iowa 68; *Farnsley v. Stillwell*, 107 Iowa 631. The witnesses were before the court. All the

2. **APPEAL AND ERROR:** trial *de novo*: influence of finding of trial court.

witnesses for the plaintiffs, except Ride-nour, show interest, and this interest tends to affect their credibility. While the case is triable *de novo* here, we must, of necessity, when there is a conflict, give weight to the finding of the trial court, who had an opportunity of observing their demeanor while upon the stand, in trying to solve the conflict and to arrive at the truth. As said before, this is purely a fact case. Its solution depends upon the credibility of the witnesses and the weight to be given to their testimony.

We find no reason for interfering with the judgment of the court upon the facts. In fact, we find much reason for discrediting the testimony of the plaintiffs and their witnesses.

The judgment and decree of the district court are—*Affirmed.*

LADD, C. J., PRESTON and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. GUST KILLGREN, Appellant.

CRIMINAL LAW: Trial—First Objection on Appeal. Objection to 1 part of an opening statement cannot be made for the first time on appeal.

CRIMINAL LAW: Trial—Remarks of Counsel—Failure to Prove 2 Claims Made in Opening Statement. Failure of the State to prove the claim made in good faith by the county attorney in his opening statement to the jury, that the State expected to prove that the defendant had in his possession liquor, a few days before the sale for which he was on trial, did not constitute reversible error.

WITNESSES: Corroboration — Evidence. Where a witness testified that a bottle of liquor which he purchased from defendant had been drunk by himself and another person, testimony of the other person that, on that day, he drank with the purchaser, who appeared to be intoxicated, whisky from a bottle, was admissible, as corroborating the purchaser in his statement that he had purchased the whisky, and also as showing that the contents of the bottle were intoxicating.

Appeal from Winneshiek District Court.—W. J. SPRINGER, Judge.

MARCH 18, 1919.

THE defendant was charged with selling intoxicating liquors, was convicted, and appeals.—*Affirmed.*

E. R. Acres, for appellant.

H. M. Havner, Attorney General, for appellee.

GAYNOR, J.—The defendant was indicted and convicted of the crime of selling intoxicating liquors in violation of law, and appeals. He bases his right to a reversal upon two grounds:

1. **CRIMINAL LAW:** First, that the county attorney, in his trial: first objection on appeal. opening statement to the jury, said, in substance, and among other things:

“I believe we will be permitted to show that this defendant procured, just prior to that time, or a few days prior to it, consignments of whisky, and that those consignments of whisky were delivered to him at the express office just across the line in Prosper, Minnesota.”

No evidence was offered by the State to sustain this statement, and it is claimed that the statement was prejudicial to the rights of the defendant. The trouble, however, with defendant's contention is that no objection was made and no exceptions taken to it at the time; and, although plaintiff filed a motion for a new trial, no reference

was made to this statement, nor was the conduct of the county attorney called to the attention of the court in any way, or at any time, and the court was not asked to pass upon it. Complaint is made for the first time in this court, and it is not available to the defendant now, nor do we find reversible error in the statement itself. So far as this

record shows, the county attorney in good faith believed that such fact was true, and, if true, it was competent to be shown, as sustaining the charge that defendant sold intoxicating liquors. A sale involves a part-

ing with the title and possession of the thing to another. This statement was to the effect that, a few days prior to the time when it is charged the sale was made, defendant had whisky in his possession, and that consignments of whisky were delivered to him at the express office. This would tend to support and confirm any evidence offered by the State that sales were actually made. The failure of the State to prove all its claims does not make the claim ground for reversal.

It is next contended that the court permitted improper evidence to be introduced upon the trial, over defendant's objection.

J. B. Kingsley was called, on behalf of the State, and testified that he purchased a quart of whisky in a round bottle from the defendant, and paid him \$3.00 for it. He was then asked the question, "Now, did anybody drink any portion of your whisky?" He answered: "Jack Keefe. I drank some of it." Thereupon, Jack Keefe was called, and, over the objection of the defendant, was permitted to say that, on the day on which it is claimed and on which the evidence tends to show the liquor was purchased, he was with the prosecuting witness, J. B. Kingsley; that Kingsley had a bottle of whisky with him; that he appeared to

2. CRIMINAL LAW :
trial: remarks
of counsel :
failure to prove
claims made in
opening state-
ment.

3. WITNESSES :
corroboration :
evidence.

be under the influence of intoxicating liquor; that he (the witness) drank some of it; and that, in his opinion, it was whisky.

This was a circumstance tending to corroborate the witness Kingsley that he purchased a bottle of whisky. This proof tended to show that, right after the time he claims to have purchased liquor from the defendant, he was seen with a bottle of whisky in his possession. It further tended to show that the contents of the bottle were intoxicating, and for that purpose was competent.

It is further claimed that the evidence does not support the verdict. There was positive testimony that the defendant had sold liquor to Kingsley, as charged. We think the evidence amply supports the verdict.

Since we find no reversible error in the case, the cause is—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

STATE OF IOWA, ex rel. H. M. HAVNER et al., Complainants.
v. C. W. MULLAN, Judge, Respondent.

INTOXICATING LIQUORS: Contempt — Conviction — Certiorari—

- 1 **Clear Preponderance of Evidence Sufficient.** Conviction upon charge of contempt in violation of liquor injunction does not require proof beyond a reasonable doubt. A clear preponderance is sufficient.

INTOXICATING LIQUORS: Contempt — Conviction — Certiorari—

- 2 **Rules of Review.** On certiorari to review finding by trial court upon charge of contempt in violation of liquor injunction, the finding of the trial court is not final or conclusive upon the question whether the injunction has been violated, and the Supreme Court will look into the evidence; and if, in its judgment, after due consideration of the conclusion reached by the trial court, the contempt is clearly and satisfactorily established, it will not hesitate to reverse an acquittal.

INTOXICATING LIQUORS: Contempt—Certiorari—Evidence. Evidence reviewed, and held to show, by a clear preponderance of the evidence, that defendant was guilty of contempt in violating liquor injunction.

Certiorari to Black Hawk District Court.—C. W. MULLAN, Judge.

MARCH 18, 1919.

THE opinion states the case.—*Judgment annulled.*

H. M. Havner, Attorney General, J. W. Kindig, Assistant Attorney General, and E. J. Weimer, County Attorney, for the State.

Pickett, Swisher & Farwell, for respondent.

WEAVER, J.—A petition was filed by the county attorney of Black Hawk County, Iowa, charging one L. O. Heiber with the keeping and maintenance of a liquor nuisance, and asking that the same be enjoined. A temporary writ was issued, and thereafter, upon final hearing, the injunction was made permanent. Later, the county attorney filed an information, charging the defendant, Heiber, with a violation of the injunction, and asking that he be punished for contempt. This accusation being denied, the issue came on for trial to the district court, presided over by the respondent herein named. The testimony having been heard, the court dismissed the complaint and discharged the defendant. Thereupon, the State, by its attorney general, instituted this proceeding for a writ of certiorari to review the action and judgment of the trial court. In this petition for the writ, the State, among other things, alleged, in substance, that, although the alleged violation of the injunction was established by a preponderance of the evidence, the trial court held and ruled that the proceeding was criminal in its nature, and that the charge of contempt could be sustained only on proof of the violation of the injunction, be-

yond a reasonable doubt. On application of complainants, and order thereon, respondent was required to amend his return by certifying whether he had held that conviction of the accused could not be had on proof of guilt by preponderance of evidence, and whether he had discharged the accused because of failure to prove his guilt beyond reasonable doubt. Respondent made return in words following, in so far as pertinent:

"I further certify that said action was tried before me, upon oral testimony, produced in behalf of the State and in behalf of the defendant. That, upon the conclusion of the testimony and the argument of counsel, I reached the conclusion that the State had not established, even by a preponderance of the credible evidence, that the defendant Heiber was guilty of a violation of the injunction issued by me."

On the trial of the contempt proceedings, the State produced as witnesses two state agents in the service of the department of justice, who testified that, on two different occasions in June, 1917, the 13th and 14th, they purchased intoxicants from the defendant, Heiber, at his place of business in Waterloo; that he took same from his soda fountain; and that samples of the liquor so procured were submitted for analysis to the chemist of the state food and dairy department. The chemist was also produced, and testified that the liquor, on analysis, proved to contain alcohol to the extent of 5 per cent or more by volume. Proof was also made that, two days after the last sale, the defendant's place of business was searched, and under the marble board of a soda fountain, there were found 32 one-ounce bottles, filled with whisky. It also appeared that defendant had been previously convicted and fined for violation of the liquor laws, and that a permanent injunction had been entered against further offense of that nature by him within the jurisdiction of the court.

The defendant Heiber testified in his own behalf that said agents asked him for ginger high balls, and he told them he had none to serve, and on their request, sold them ginger ale; denied having made any sale of liquor on the premises since his last conviction of such offense in April of the same year; denied that he had any liquor in the store on the day of the search and seizure; and testified that he knew nothing of the liquor in the small bottles until they were brought in in the search,—that he did not own them, and did not place them in the soda fountain. One Horch testified that he was a clerk in the service of the defendant, and that the liquor in the small bottles belonged to him, and that he placed them in the soda fountain for the use of himself and a friend, one Gehrig, upon a fishing trip which they had arranged for the following day. Gehrig also testified to the proposed fishing excursion, and that Horch had promised to “furnish the ammunition.” This is the substance of all the testimony, except that of a clerk or two in defendant’s store, who denied all knowledge of the sale or keeping for sale of liquors by the defendant.

I. It is evident from the record that, in suing out this writ of certiorari, the first purpose of the relators was to test the correctness of the ruling which they understood the trial court to announce: that, to sustain a

1. INTOXICATING
LIQUORS: con-
tempt: conviction: certiorari:
clear prepon-
derance of
evidence suffi-
cient.

conviction for contempt, a violation of the injunction must be shown by the evidence beyond a reasonable doubt. The respondent concedes that, in disposing of the case, he did make use of the language attributed to him, but further certifies that, in his judgment, after hearing all the evidence, the accusation against the defendant did not have the support of a preponderance of the evidence. While precedents from other jurisdictions upon this question are in more or less confusion, it is settled in this state that conviction upon charge of contempt does not

require proof beyond a reasonable doubt. A clear preponderance is sufficient. *Nies v. Anderson*, 179 Iowa 326, 331; *Sawyer v. Hutchinson*, 149 Iowa 93; *Hake v. People*, 230 Ill. 174 (82 N. E. 561).

II. The relators further argue that the evidence in support of the charge of contempt is so clearly preponderating that the ruling of the trial court should be set aside, and the defendant adjudged guilty. On the

2. INTOXICATING LIQUORS: contempt: conviction: certiorari: rules of review. other hand, it is contended for the defendant that the finding of the trial court is conclusive, and not subject to review upon appeal or certiorari.

It is, however, the settled doctrine in this state that contempt proceedings based upon an alleged violation of an injunction issued by authority of the statute to restrain violations of the prohibitory liquor law are reviewable by this court. Indeed, the general statute upon the subject of contempts, requiring the court to preserve all the evidence taken and certify it to this court in making return to a writ of certiorari, carries with it the implication that it may be made the subject of review. *Keenhold v. Dudley*, 178 Iowa 526, 533; *Wells v. District Court*, 126 Iowa 340. Moreover, whether it has been expressly pointed out or not, it is true that we have, in practice, recognized a distinction between proceedings to punish violations of injunctions authorized by statute to restrain acts forbidden by law, and others in which the contempt is more directly and exclusively against the authority and dignity of the court. In the latter, the chief purpose is to vindicate the court's authority and enforce the respect due to it; while in the former, there is the further and paramount purpose to secure obedience to the statute. The cases in which we have reviewed proceedings of this latter class, and in which we have reversed both convictions and acquittals in contempt proceedings, are too numerous to call for any citation of the precedents. Whether the hearing in this cause is

de novo, in the sense in which that term is used in equity cases, it is unnecessary to consider. In *Sawyer v. Hutchinson*, 149 Iowa 93, after some reference to our earlier cases, this court, speaking by Deemer, J., said, "Doubtless under these decisions the trial here is *de novo*." In a later case, without referring to the first cited case, it is said, "On the whole, we think the rule is that the review is not *de novo*" (*Nies v. Anderson*, 179 Iowa 326, 331), a statement which is followed by the further holding that, "while the finding below has weight, it does not have as much as has a verdict; and that, while evidence to sustain a finding of guilty must amount to more than the mere preponderance which sustains an ordinary recovery on the law side, it is not required to prove violation of an injunction beyond a reasonable doubt." Both statements involve the rule that this court will look into the evidence, and if, in its judgment, after due consideration of the conclusion reached by the trial court, the contempt is clearly and satisfactorily established, it will not hesitate to reverse an acquittal; and if guilt be not so shown, it will reverse a conviction. This right and authority we have constantly exercised, ever since the enactment of the first statute providing for such injunctions, by the twentieth general assembly. It matters little what technical name be given it; it is sufficient that the finding by the trial court is not final or conclusive upon the question whether the injunction has been violated. The statute under which liquor injunctions are authorized is a departure from the rule heretofore existing that the writ would not issue to prevent the commission of a public offense, and its purpose would often be frustrated if proceedings to punish disobedience to such writ were not reviewable. In ordinary cases, in the absence of statute, it is entirely within the discretion of the trial court whether it will take notice of a contempt of its writ or order; but, where violation of a statutory injunction is clearly established, the

court has no discretion to ignore it or to discharge the offender without punishment.

In support of the finding below, the respondent invokes the rule that, upon doubtful findings of fact and the veracity of witnesses, this court will accord proper weight to the findings of the trial court. This proposition

3. INTOXICATING
LIQUORS : con-
tempt : certi-
orari : evidence.

tion has often been asserted by us, and we have no inclination to recall it; but we have never given it such extreme effect as to permit it to control our judgment when the record is so clear and conclusive as to produce in our own minds a thorough conviction that the ruling of the trial court was wrong. The record is brief, and we have given it repeated and careful examination, and can reach no other conclusion therefrom than that the charge of contempt made against the accused was so clearly established that to dismiss it will amount to a manifest failure of justice. The proof discloses all the familiar earmarks and subterfuges which accompany and characterize the conduct of a persistent violator of our liquor laws. It is true that defendant denies the charge in general, but his denial is clearly overcome by the testimony offered by the prosecution. Two unimpeached witnesses testify to purchases of intoxicating liquors from the defendant at his place of business on two different days, and that the liquor so sold them was taken from or prepared at a soda fountain in the room. They also testify that they preserved samples of the liquor, which were produced on the trial, and shown to contain over 5 per cent of alcohol. It was also shown without dispute, as we have already noticed, that, on searching the place, within a day or two after these sales, there were found 32 ounce bottles filled with whisky, in or under the soda fountain. The time-honored explanation by defendant's self-sacrificing clerk that he owned this whisky, and had himself prepared and placed it in the fountain in preparation for a Sunday

"fishing trip," is too flimsy to merit serious consideration. Just why he should carefully distribute it into a multitude of small bottles containing such a moderate-sized drink, he does not explain; but, had he assured the court that the bass in the Cedar River at Waterloo were educated to strike at such bait, it would add little, if anything, to the inherent improbability of his story. There was no impeachment of the character of the State's witnesses; their testimony is clear and consistent, and of such nature that we must either accept it as substantially true, or say we believe they committed wilful and deliberate perjury. Were the issue to be considered as resting solely upon the testimony of these witnesses, as against the simple denial of the defendant, it is possible that the court might, with some hesitation, adopt the view that there was no such preponderance as to justify a finding of defendant's guilt; but they are corroborated by too many significant circumstances to permit such result.

We hold that the record clearly establishes the defendant's guilt of the contempt charged, and the judgment dismissing him will be annulled and set aside, and the proceeding will be remanded to the trial court, with directions to enter judgment in harmony with this conclusion.—*Annulled.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

J. H. BILICK, Appellee, v. H. W. DAVIDSON, Appellant.

FRAUD: Fraudulent Representations—Value and Acreage of Land.

- 1 Evidence reviewed, and held to sustain finding of misrepresentation by defendant of the number of acres and the value of land transferred to plaintiff.

BOUNDARIES: Navigable Waters—High-water Mark. The bounda-

- 2 ry line of property bordering on a navigable river is the high-water mark of the river.

FRAUD: Fraudulent Representations—Defenses—Evidence. That, 3 in the exchange of properties, plaintiff misrepresented the value of his property, would not have any tendency to show that defendant did not misrepresent his property to the plaintiff.

Appeal from Poweshiek District Court.—HENRY SILWOLD, Judge.

MARCH 20, 1919.

ACTION at law to recover damages on account of alleged misrepresentations concerning land conveyed to the plaintiff. There was a verdict for the plaintiff, and from the judgment entered thereon, the defendant appeals.—*Affirmed.*

U. M. Reed and J. H. Patton, for appellant.

Thomas J. Bray and J. G. Shifflet, for appellee.

WEAVER, J.—At the time of the transaction in question, plaintiff and defendant were both residents of Brooklyn, in Poweshiek County, Iowa. Plaintiff was a farmer, and the defendant was in business as a real estate agent. The former owned a house and lot in the city of Des Moines, and defendant, or his wife, owned a tract of Des Moines River bottom land in Polk County, Iowa. Plaintiff had never seen, and had no personal knowledge of, the land of the defendant or of its quantity or quality, and the defendant had never seen and had no personal knowledge of plaintiff's city property; and without making personal examination on either side, they entered into an agreement for an exchange. Each property was subject to a mortgage incumbrance of \$1,000. The contract was reduced to writing, and provided for an exchange of conveyances, the grantee in each instrument assuming payment of the existing incumbrance on the property so acquired; and the plaintiff, in further consideration of such exchange, undertook to give

defendant his note for \$1,000, and to secure its payment by an additional mortgage on the land. The contract was purely one of exchange, there being no price fixed for either property, and no statement or estimate of the value is found in the writing. A short time after the making of the contract, deeds were exchanged by the parties. In both contract and deed, the land conveyed to plaintiff was described as follows:

"Government Lot Five (5) in Section Twenty-two (22), Township Seventy-eight (78) North, Range Twenty-three (23) West of the 5th P. M., Iowa, being all that part of the Northwest Quarter ($\frac{1}{4}$) of the Southeast Quarter ($\frac{1}{4}$) of said Section Twenty-two (22) lying south of the Des Moines River."

The expressed consideration named in the deed to plaintiff is "one dollar and other valuable considerations." In his petition, plaintiff alleges that, at the time of the exchange, he had no knowledge or information concerning said land, and was compelled to rely, and did rely, upon the statements and representations concerning it made to him by the defendant; that, to induce him to make said exchange and accept said conveyance, defendant falsely represented that the tract contained $34\frac{1}{2}$ acres, and was of the actual market value of \$175 per acre, when, in truth and in fact, there were but 17 acres, and its actual market value was not to exceed \$75 per acre. Other false representations are also alleged, but the contest upon the trial centered more particularly about those we have just specified, and we will confine our discussion to that issue.

The defendant admits the exchange, but denies all charges of fraud and false representation, and makes counter charges of false representations by plaintiff of the quality and condition of the Des Moines property.

With the verdict for plaintiff, the jury returned spe-

cial findings upon interrogatories submitted by the court, which findings may be condensed as follows:

1. That defendant, in negotiating said exchange, did knowingly and falsely represent to plaintiff that the tract of land contained $34\frac{1}{2}$ acres, when in truth it contained but 17 acres;

2. That defendant did knowingly and falsely misrepresent to plaintiff the actual market value of the land;

3. That said false representations were made by defendant for the purpose of deceiving plaintiff and inducing him to make the exchange; and

4. That plaintiff believed and relied upon said representations as true, and was thereby induced to make the exchange and accept the conveyance of the land upon the terms stated in the contract.

As grounds for reversal of the judgment below, it is argued:

I. That there is no sufficient evidence to support a finding that defendant misrepresented the acreage of the land conveyed to plaintiff. This proposition is not sustained by the record. The plaintiff testifies specifically that defendant said there were $34\frac{1}{2}$ acres in the tract lying south of the river, and that it was worth \$200 per acre.

Defendant, while denying that he said there were $34\frac{1}{2}$ acres, admits that he told plaintiff that the "deed called for $34\frac{1}{2}$ acres." He further says he had no actual knowledge of the true measurement, but, from a hasty examination when he bought it, he thought there must be 30 acres of it. On cross-examination, he answered that, when the contract of exchange was made, he knew that plaintiff was not getting $34\frac{1}{2}$ acres of land. He further admits that he told plaintiff that the land was on the south and west sides of the river, and we think he admits sufficient to corroborate the plaintiff's story that he represented the

1. FRAUD: fraudulent representations: value and acreage of land.

tract as containing $34\frac{1}{2}$ acres. On this record, it cannot be held that the evidence of misrepresentation by the plaintiff is insufficient to take that question to the jury.

Reference should perhaps here be made to the appellant's contention that, because the record of the original survey indicates that Lot 5, as then measured, contained 34.53 acres, the testimony of plaintiff's witness who made a record of the survey that he found only 17 acres south of the river is without competence or value, unless it be shown that the course of the stream has been changed to the south by gradual and imperceptible encroachment upon the land, or by sudden break or avulsion; and that, in the latter event, a part of Lot 5 may be found on the north side of the river, or covered by its waters, and should be included in the survey and measurement of the land conveyed. It is a sufficient answer to this objection to say that there is no proof that the river has changed its course since the original survey, either gradually or by avulsion, except as a change may be inferred from the fact that the original plat shows the river as covering or cutting off a strip on the north side of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 22, leaving 34.53 acres of that subdivision as Lot 5, south and west of the river; while the present survey shows the river somewhat further to the south, and only 17 acres in said tract. There is no absolute or irrebuttable presumption that the original plat or survey is without error; nor does the fact that but 17 acres of the tract are now found south of the river demonstrate, as a matter of law, that the stream has changed its course.

Defendant undertook to sell and make to plaintiff a deed by which he professed to convey to him a named tract of land "lying south of the Des Moines River." He admits, as a witness, that he told plaintiff that the land lay south or south and west of the river. That description was given and representation made as applicable to conditions

2. BOUNDARIES :
navigable wa-
ters : high-
water mark.

as they existed at the time, and not as to conditions which may have existed 70 years ago. The Des Moines River is by statute classed as a navigable stream, and its high-water mark on its south side is the north boundary of Lot 5, and the plaintiff is under no obligation to seek any of his land on the bottom of the river or upon the north side of it.

The proof shows that there has been no apparent change in the course of the river since defendant conveyed the land, and, for reasons already stated, we think it immaterial what change, if any, had occurred in the location of the channel before the transaction now in question. If it should be thought otherwise, and that the showing of either a gradual or sudden change in the course of the stream would serve in any degree to relieve the defendant from liability for his misrepresentation of existing conditions, the burden would certainly be upon him to allege and prove it. He has done neither.

As is well known, there are river bottom lands in this state which undergo frequent, if not constant, changes by erosions and overflows and flood deposits, until tracts showing full measurements in the government survey have wholly disappeared, or have been diminished to mere fractions of their former area. Now, if one holding title to a body of land which has been thus reduced to a mere fragment of its original proportions, sells to a buyer having no knowledge of the facts, concealing the truth as to these conditions, and representing the land as containing its full original measurement of acres, would the courts accept it as a good defense that the representations were in strict accord with the record of the government survey? In such case, if plaintiff proves the false representations, would the court make it necessary to his recovery of damages that he assume the burden of showing a change in the course of the stream and the particular manner in which the change had come to pass? To hold in the affirmative upon either

proposition is to make the court an active aid in the perpetration of fraud, instead of an efficient agency in its prevention and punishment.

II. What we have said in the foregoing paragraph sufficiently disposes of the exception taken. A paragraph in the court's charge is to the effect that the north or north-east boundary line of the property conveyed to the plaintiff was identical with the high-water mark on the right bank of the river. This, we think, is true, for the purposes of this case, whether it be true or not, as counsel infer, that the course of the stream had been changed between the date of the original government survey and the date of the deed to the plaintiff.

III. Defendant requested the trial court to instruct the jury that, if they found that the plaintiff represented his Des Moines property to be much more valuable than it actually was, then it would be proper to consider that fact "as tending to discredit plaintiff's claim that false representations were made by defendant," or that he relied upon them. This request was refused.

If the plaintiff misrepresented his property to the defendant, we are wholly unable to see how that fact could have any tendency to show that defendant did not misrepresent his property to the plaintiff. It is

3. FRAUD: fraudulent representations: defenses: evidence.

true, probably, that, if it appeared that both were guilty of misrepresentation, it would tend very legitimately to show that neither was acting with any special reliance on the representations of the other; but this is not what the proposed instruction states.

It is also argued that the damages awarded, \$2,505.73, are excessive. The verdict, though liberal, is well supported by the special finding of the jury, and by the charge of the court upon the measure of damages,—an instruction which

is not challenged by counsel,—and we cannot properly interfere with it.

The case involves no intricate or doubtful questions of law, and the issues of fact were for the jury alone.

The judgment below is—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, J.J., concur.

JULIA E. CUTSHALL, Appellant, v. CITY OF KEOKUK,
Appellee.

MUNICIPAL CORPORATIONS: Obstructions by Reason of Repairs.

A city, in repairing its streets, may, in so far as reasonably necessary, place *plainly visible* obstructions therein, and is not liable for injury to a pedestrian who, in full possession of sight, on a clear day, and, with no diversion of mind except such as is purely voluntary, falls thereover. So held where the obstruction was an ordinary fire hose laid on a smooth walk.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

DECEMBER 14, 1918.

REHEARING DENIED MARCH 20, 1919.

ACTION to recover damages for injuries claimed to have resulted from a fall upon defendant's sidewalk. At the conclusion of plaintiff's evidence, the court directed a verdict for the defendant. Plaintiff appeals.—*Affirmed*.

Hazen I. Sawyer, and *Boyd & McKinley*, for appellant.

T. A. Craig, *E. W. McManus*, and *J. R. McManus*, for appellee.

GAYNOR, J.—This action is brought to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of a fall upon defendant's sidewalk, caused, as she says, by the negligence of the defendant in

permitting the sidewalk to be obstructed at the point where she fell. For a better understanding of the conditions present at the time of the fall, we will say that Main Street runs east and west. Eighth Street runs north and south, and crosses Main Street at right angles. On the east side of Eighth Street, at the intersection of Eighth and Main, is what is known in the record as the undertaking establishment of Hawks and Holbrook. At this place, the sidewalk is 17 feet wide on Main and 14 feet wide on Eighth. It is a smooth, concrete walk. Main Street is one of the principal and main traveled streets in the city. At the time plaintiff fell, and prior thereto, the city was having North Eighth Street paved between Blondeau and Main. Blondeau is north of Main, and runs east and west, paralleling Main. In connection with this paving, water was taken from a hydrant, situated near the outer edge of the sidewalk on Main Street, near Eighth, at a point which would be touched by an extension of the east line of the sidewalk on Eighth. A hose was attached to the outer opening of this hydrant, and then extended in a short circle therefrom, crossing the sidewalk on Main, then out onto Eighth Street, and up to the place where the water was being conducted and used in mixing mortar, for the purpose of laying a concrete foundation for paving that was to be laid thereon. So far as this record shows, the hose was being used at that time in the prosecution of the work of repairing Eighth Street at the point indicated.

It is not material for the purposes of this case how long the hose had been used. It was being then used by the city. The city, therefore, had notice of its location and use, and of the conditions which it produced. It was being used as an instrument in the repair and betterment of its streets.

Plaintiff, at the time of the injury, was walking with her daughter westward on the north side of Main Street.

Her daughter was walking at her left, next the curbing. They were proceeding towards Eighth. As she came to this hose, she stubbed her toe and fell, and this fall, she says, caused the injury of which she complains. On the morning of the accident, she and daughter had been down town, shopping, and were returning home, about two o'clock in the afternoon. At the time of the accident and prior thereto, she and her daughter were engaged in conversation. She had just been showing her daughter some of her purchases. She was engaged in putting back in her purse whatever article it was that she had taken out of her purse to show her daughter, at the time she fell. She says she did not know the hose was there. She says she didn't see it; that she could have seen it, had she looked. It appears there was nothing to obstruct her view. Though this was a main traveled street, it does not appear that any pedestrians were on the street between her and the hose as she approached. It does not appear that there was any object that intervened between her and the hose at any time for a distance of 80 feet before she reached the point where she said she stumbled over the hose. Her mind was occupied with her own affairs. It was not diverted by anything except that which proceeded from her own volition. She was not attracted or distracted by anything, so far as this record shows.

At the conclusion of all the evidence, the court directed a verdict for the defendant; and from this, plaintiff appeals, claiming that the evidence was sufficient to justify the submission of the case to the jury, both on the question of the negligence of the defendant and the contributory negligence of the plaintiff. Both questions were in the case. We are asked to reverse the case on the ground that the record presented a fair question for the jury, both as to the negligence of the city and the contributory negligence of the plaintiff. The burden rested on the plaintiff to establish negligence on the part of the city, and that, by her own in-

difference to her own safety, she did not contribute to her fall and the injuries consequent thereupon.

It will be noted from what we have said that the city, at the time, was using this hose for a legitimate and lawful purpose. It was repairing its streets. This was an instrument apparently necessary in making the repairs. The record shows that water was necessary in order to mix the concrete that was used in preparing the foundation for the pavement that was being laid. It is not shown that there was any other hydrant within reach of the work that was being done. The hose was used for the purpose of carrying water to the point where the concrete was being mixed. It was laid on the surface of the sidewalk. It was plainly visible. It was laid there for a legitimate and proper purpose. It is not claimed that the streets were being put to a wrongful use, or that the sidewalk itself was out of repair or defective, or that the placing of the hose across the walk created a nuisance. The whole theory of plaintiff's case is bottomed on the thought that it is the duty of the city to keep its sidewalks in a reasonably safe condition for travel for the use of pedestrians who may attempt to use them in the ordinary way; that this hose rendered the sidewalk dangerous and unsafe for travel; and therefore, that the placing of it on the sidewalk was a violation of some duty that the defendant owed to the traveling public.

We have said, over and over again, and emphasized it in the saying, that it is the duty of a city to keep the sidewalks which it has opened for public travel, in a reasonably safe condition, and that it owes a duty of inspection to see that they are so kept. This rule means nothing more than that the city owes a duty in respect to its sidewalks, and to see that they are in a reasonably safe condition for travel by pedestrians.

We will first consider the negligence of the city, as charged. Was the city negligent in permitting this hose to

remain upon its sidewalks for the purpose of carrying water to that point on Eighth Street where the water so carried was used in repairing the street?

Defendant had a right to do this, unquestionably. It had a right to use its streets for the purpose of carrying out those duties which it assumed to the public in the care and maintenance of its streets. The very act of rebuilding or repairing a public highway, in and of itself, necessitates the interference with the ordinary travel upon the street while the repairs are being carried on. The right to use the street for these legitimate purposes inheres in the city, because, without the right, it cannot discharge the duties imposed. Now, then, we take it that it will not be controverted that the city had a right to use so much of its streets as was reasonably necessary for the purpose of doing work to which, at the time, it was devoting its energies. It had a right to use its streets, in so far as was necessary to use them, in the discharge of this duty. It cannot be said that the doing of the thing, in and of itself, constituted an actionable wrong. The wrong, if any, must be found in the manner of the doing. The record is barren of any evidence tending to show that the work that the city was engaged in, could have been performed in any other way. The hose was laid in the open. It was broad daylight. There was nothing to obscure it from the public view, or from the view of travelers upon the street. It would tax one's credulity to believe that a due regard for the safety of the traveling public required that this small hose, while being used for a lawful purpose upon the sidewalk, should be fenced or guarded in order to protect the citizen in the exercise of his right to use the streets. It was plain to be seen, and suggested to a traveler upon the street the danger and hazard that were incident to its position; and the means of avoiding injury from it were just as open as the danger itself. A question very similar to

the one here under discussion was before this court in *Ryan v. Foster*, 137 Iowa 737, in which this phase of the case was considered, but not disposed of. It was intimated, however, in that case, that there could be no liability predicated upon the doing of the thing complained of. See, also, *O'Connell v. City of Davenport*, 164 Iowa 95. We pass that question, however, without determining it definitely at this time, though the writer hereof is of the opinion that no actionable negligence is shown.

This brings us to a consideration of the second proposition: Was the plaintiff guilty of contributory negligence? Did she owe any duty to pay heed or take notice of the condition of the walk before her, as she proceeded on her journey?

It is true that this court has said that it is the duty of the city to keep its sidewalks in a reasonably safe condition for travel; that the pedestrian, in using the sidewalk, has a right to assume that this duty has been performed, and he need not be on the lookout constantly for defects in the street that imperil his journey; that he may assume that the city has performed its duty in keeping the streets in a reasonably safe condition. These rules, so announced by this court, do not mean that one, in traveling upon the streets, may proceed blindly, in the faith that the city has performed its public duty. This court has gone far to hold cities liable for injuries resulting from defective streets and pavements, but it has never gone so far as to say that it is not the duty of the traveler to exercise ordinary care. It has said that the care that should be exercised when the party has ground for believing that peril attended his journey, need not be observed in traveling upon a walk, for the reason that the pedestrian has a right to assume that the municipality has discharged its duty in not permitting defects that imperil the safety of the user to exist in the sidewalk. But we have never said

that the pedestrian may abandon the use of his senses entirely, and proceed forward in blind faith that the city has done its duty. We have said that it is not possible for a city to keep its streets in such a condition, all the time, as to make them entirely free from conditions that may produce accidents. If the city permits defects *to remain in its sidewalks*, and the pedestrian, through no fault of his, is prevented from seeing the defects, whatever they may be, which it is the duty of the municipality to correct, and injury results to him, he is entitled to compensation. But a different question arises where the condition in the sidewalk complained of is one that the city had a right to permit to exist, and is so situated that the objectionable thing can be easily seen and observed by passers-by. Then the burden rests on the party complaining to show that conditions not produced by, and outside of, himself prevented him from seeing the defect, in order to excuse himself from not observing it. If such conditions exist rightfully at the point where the injury occurs, he cannot excuse himself on the theory that "he walked by faith and not by sight." While it may be that he has a right to assume that the city has not left defects in its sidewalks that imperil the safety of a traveler, he has no right to assume that the city may not be using its walks for legitimate purposes, and cannot excuse himself for not observing, on the mere ground that he was then occupied with his own affairs, and was giving no heed to what lay before him. The accident occurred at two o'clock in the afternoon of September 24th, and we will take judicial notice of the fact that one walking directly west, on a 17-foot walk, was not blinded by the sun's rays, or prevented from seeing what was before him, on account of the sunlight.

In *Ryan v. Foster*, *supra*, this court said:

"Plaintiff's attention was in no manner diverted, and, had she used her eyes, she could not have failed to see it.

[In this case, the horse.] She either did see it, or was negligent in not seeing it. If she saw it, and attempted to pass over it, she was negligent; and if she did not see it, as she says, then she was clearly negligent. Streets and sidewalks may be temporarily obstructed, and the traveler must be on the lookout for such obstructions. In this respect, the case differs from one where there is a defect in the sidewalk itself. For this a traveler need not be on the lookout; for he may assume that no defects exist. But as to proper obstructions the rule is different. If this were not so, one might blindly walk into an obstruction, and say that he was not obliged to look out for it, and, therefore, was not negligent. The distinction we have pointed out has been recognized in many cases, although, perhaps, not heretofore succinctly stated. That plaintiff was guilty of such negligence as should defeat recovery, see *Mathews v. City*, 80 Iowa 465; *Bender v. Town of Minden*, 124 Iowa 685; *Barce v. City*, 106 Iowa 426."

See, also, *O'Connell v. City of Davenport*, 164 Iowa 95, and *Lerner v. City of Philadelphia*, 221 Pa. St. 294 (70 Atl. 755).

Upon the whole record, we think the court was right in directing a verdict for the defendant, and the case is—*Affirmed*.

LADD, WEAVER, and STEVENS, JJ., concur.

PRESTON, C. J., dissents.

JOE DOLLISTER, Appellee, v. W. J. PILKINGTON, Appellant.

JUDGMENT: Opening or Vacating—Defaults—Notice of Time and
1 Place of Holding Court. A party must take notice of the time and place of holding court and of the position of his case on the calendar and the state of the calendar.

JUDGMENT: Opening or Vacating—Defaults—Sufficiency of Showing—Negligence of Party. Where a party knew that, in reply to his motion, a cost bond had been filed, and knew that his attorney had withdrawn from the case and had turned over the papers to him, and employed no counsel, took no action, did nothing to protect his interests thereafter, and had no reason to expect further courtesy to him by opposing counsel, *held* that he was not entitled to have a default judgment set aside, entered 31 days after the filing of said cost bond.

Appeal from Polk District Court.—LAWRENCE DEGRAFF,
Judge.

MARCH 20, 1919.

APPEAL from the action of the court in refusing to set aside default.—*Affirmed.*

Hunn & Jones, for appellant.

Dunshee, Haines & Brody, for appellee.

GAYNOR, J.—This is an appeal from the action of the court in refusing to set aside a default judgment entered on the 9th day of November, 1917.

In the original action in which the judgment was entered, the plaintiff, who was a citizen of Racine, Wisconsin, claimed that, about the year 1910, the defendant was the owner of 200 acres of land in Howell County, Missouri; that, in the year 1913, he subdivided this land into 10-acre tracts, and solicited purchasers for the same; that, on the 29th day of October, 1913, plaintiff purchased from the defendant one of these 10-acre tracts, and paid to the defendant down on the purchase price the sum of \$750 in cash, and executed to the defendant his four promissory notes, three for \$500 each, and one for \$750; that, to induce plaintiff to purchase the same, the defendant falsely represented that these 10-acre tracts had been sold at \$2,600 apiece, that they had peach orchards on them, and that these orchards yielded between \$600 and \$700 an acre over and

above expenses; that said representations were not true; that the defendant knew they were not true; and that they were made for the purpose of deceiving the plaintiff; that they did deceive the plaintiff, and he was induced to make the purchase aforesaid; that the plaintiff was entirely unacquainted with that portion of Missouri in which the land was situated, and had no knowledge whatever of the value of land in that vicinity; and that he relied wholly upon the statements of the defendant, who, at that time, was editing a retail merchants' journal, circulated among merchants, among whom was this plaintiff; that defendant had also been engaged in the business of delivering addresses before various retail merchants' associations over the country, and had, by reason of his addresses, and of the fact that he was the owner and editor of a merchants' trade journal, attained a high standing among the retail merchants throughout the United States, and with this plaintiff; that the land conveyed to the plaintiff was practically worthless. He prayed that the contract be set aside, and that he have judgment for the amount paid the defendant, and that a decree be entered, enjoining the defendant from transferring any of the notes given him by the plaintiff.

This petition was filed on the 28th day of April, 1916. Due notice of the filing of the petition was served on the defendant. On the 2d day of May, 1916, the defendant appeared by W. A. Graham, an attorney, and asked for time to plead. Time was granted, and no further action taken by the plaintiff then to enforce his claim.

On June 20, 1916, the president of the United States called on the National Guard of Iowa for service on the Mexican border. This attorney, Graham, was then a captain in the Third Infantry, and on that day was ordered to Brownsville, Texas, arriving there on July 24, 1916, and did not return to Polk County until January, 1917. During his absence, this case remained *in statu quo*, on the request of

defendant's attorney, made in this way: In the latter part of August, or early in September, Mr. Graham asked plaintiff's attorney that the cause remain *in statu quo* until his return, to which the attorney replied, "All right." Graham, however, returned, as said before, on the 10th day of January, 1917, and was mustered out of service on the 20th day of January, 1917, and resumed practice shortly thereafter. No talk was had with plaintiff's attorney about this case until after the beginning of the March term, 1917, when plaintiff's attorney requested the filing of an answer, saying that he would like to try the cause. Defendant's attorney replied that he was not yet able to get the run of things; that, during his absence, his brother, his partner in the law business, had removed their office to another building, and that his papers had been misplaced. Shortly thereafter, in the latter part of the March term, attorneys for the defendant consulted with defendant about trying the cases, there being two cases, one in law and one in equity. The defendant thereupon directed his attorney to file an application for a cost bond, to which the attorney for the defendant demurred, because of the courtesy that had been extended to him by plaintiff's attorney. Defendant, however, insisted, and a motion was drawn and filed in one of the cases. During the summer, plaintiff's attorney twice asked defendant's attorney to file answer. Defendant's attorney proposed to him to file his answer immediately, and proposed to set up in his answer all the facts and matters relied upon, so that the merits of the case could be determined on demurrer. To this end, he obtained from plaintiff's attorney, all the papers necessary to do so, and started to prepare the answer, but informed counsel for the plaintiff that he would not file it until the cost bond was furnished.

On the 20th day of July, defendant's attorney was appointed major and judge advocate of the Reserve Corps,

and on August 7th, was directed to report at Washington for duty. He left on August 9th. Before leaving, however, he turned over to the defendant all the papers in his possession, including all the papers in this case, and then phoned to the clerk of the district court, and found that his application for a cost bond had not been filed in the equity case (the suit here in controversy). He then took a copy of it, and told defendant to file it, which was accordingly done. After Mr. Graham had turned over all the papers to the defendant, the defendant said that he would have to get someone else to look after the matter; that he would get Mr. Hunn. He was told that that would be all right. The attorney went to Washington, and was ordered back to Des Moines on the 25th day of August as division judge advocate, which position he occupied thereafter at Camp Dodge. Before leaving for Washington, he met plaintiff's attorney, who said, "What about the Dollister case, now that you have gone back into the army?" This attorney replied:

"I have turned all the papers over to the defendant, and it is my understanding that he will have Hunn look after it. You see Hunn about the further progress of the case. I don't expect to have any further connection with it."

Plaintiff's attorney replied, "All right."

It appears that defendant did not employ Hunn or anyone to represent him, after the departure of Mr. Graham. A cost bond was filed by the plaintiff in this case, in pursuance of the motion, on the 9th day of October, 1917. No further appearance was made for the defendant, and no pleading was filed; and on the 3d day of November, the plaintiff filed a motion for a default, which was sustained; and on the 9th day of November, 1917, judgment and decree was entered in favor of the plaintiff, to which a supplemental decree was filed on the 12th day of November, 1917. Nothing further was done by the defendant until the 5th

day of December, 1917, when this motion to set aside the default and judgment was filed.

This record discloses these ultimate facts:

The original petition in this case was filed on the 28th day of April, 1916. Due notice was served for the May term. The cause being in equity, that was not the trial term, but the term for making up the issues. Defendant entered an appearance by attorney. Through courtesy to the attorney, it was not insisted that the issues be made up at that term. While the case so stood, it passed the May term without issues' being joined. The next was the September term, at which the plaintiff would not only be entitled to have the issues made, but the cause set down for trial. However, on June 20th, defendant's attorney was called into the service of the United States, and ordered to the Texas border. On his request, the attorney for the plaintiff consented that the case might remain *in statu quo*, without pleading, until the return of this attorney. This courtesy was undoubtedly extended because of the fact that the opposing counsel had been called into the service of his country. Defendant's attorney returned from the Texas border on the 10th of January, and was mustered out of service on the 29th day of January. The plaintiff still held in abeyance his right to press his suit, until the March term, 1917. At this time, the attorney for the defendant had returned, and was engaged in active practice. Plaintiff's attorney requested him to file his answer; informed him that he desired the cause to be tried. An excuse was made that, in the absence of defendant's attorney, the papers had been mislaid. Defendant's attorney, however, consulted with the defendant about trying the cause, and the defendant, notwithstanding the courtesy which had been extended to him by plaintiff's attorney, insisted on the filing of a motion for a cost bond. This was done over the protest of his own attorney. It appears that a motion was then filed in one

of the suits, but was not filed in this particular suit. Still, the plaintiff's attorney did not insist upon his rights. On July 20th, more than a year after the cause had been commenced, and several months after the attorney had returned from the Texas border, he was again called into the service of the United States, but did not leave until the 9th of August. Just before leaving, he discovered that the motion for a cost bond had not been filed in this case. It was then filed. He turned all the papers over to the defendant, and told him he would have to employ another attorney, to which the defendant acceded. The cost bond was filed by the plaintiff, in pursuance of this motion, on the 9th day of October. No appearance was then made for the defendant. He employed no counsel to represent him. He knew that his attorney had turned all the papers over to him, and had withdrawn from the case. The defendant then took no action until the 3d day of November, when the motion for a default was filed. Action was still delayed until the 9th day of November, when plaintiff took decree and judgment. Then, for the first time, defendant employed his present counsel to represent him, and on the 5th day of December, filed a motion to set aside the judgment.

It has been frequently said by this court, and it is a rule necessary to be observed in order that the work of the court may be expedited and the interests of parties litigant properly protected, that the party and his attorney must take notice of the time and place of holding court, and the position of his case on the calendar, and the state of the calendar. He is presumed to know and is held to know what is necessary to protect his interests. As said in *Williams v. Wescott*, 77 Iowa 332, 339:

1. JUDGMENT:
opening or vacat-
ing: defaults:
notice of time
and place of
holding court.

"A due regard for the dispatch of business requires of litigants a prompt attention to the preparation and prosecution of their causes."

Even conceding that the courtesy extended by plaintiff's counsel to defendant's counsel extended as late as the March term, 1917, and that plaintiff could not, in good faith, have insisted upon a default for want of plea, yet it appears that, from March until August 9th, this attorney, Graham, was here; his attention had been called to the condition of the record; he knew that the plaintiff was insisting upon a trial; yet no papers were filed to protect the defendant against adverse action in the court. It is claimed that a motion for a cost bond was prepared to be filed in this case, but it appears it was not filed until some time in August, 1917; that, after the filing of this motion, defendant was informed that his counsel was about to depart for service in the government of the United States. All the papers were turned over to him. He knew that he had no right to rely upon further forbearance from plaintiff's counsel, and yet he took no action. He was charged with notice that the cost bond was filed on the 9th of October, 1917; yet he took no action, employed no counsel, and did nothing to protect his interests.

A review of this record satisfies us that plaintiff's counsel acted in good faith with the defendant in this case; that the courtesy and indulgence extended were far beyond what defendant could rightfully ask or expect; that, for a month before the judgment was entered, defendant knew that he filed a motion for a cost bond, and a cost bond had been filed. He knew his attorney had gone back into the service of the United States. He knew that his attorney had retired from the case. He knew that it was essential to procure further counsel to protect his interests. He had no reason to expect the extension of further courtesy to him by plaintiff's counsel. The plaintiff was clearly within his right in taking judgment against the defendant. De-

2. JUDGMENT:
opening or va-
cating: de-
faults: sufficien-
cy of show-
ing: negligence
of party.

fendant has nothing to complain of on the part of counsel for the plaintiff. Whatever he suffers of wrong in this case is due to his own negligence and carelessness, and it is axiomatic that a man cannot predicate right to relief upon his own negligence.

Though we are not called upon to determine the merits of this controversy, we think the plaintiff has made a very satisfactory showing of merits. At the time the decree and judgment were entered, the plaintiff was here with his witnesses. One of the witnesses was Davidson, who had charge of the property involved in this suit for the defendant, who testifies in the suit for the plaintiff.

Upon the whole record, we think the court was right, and its judgment ought to be, and is,—*Affirmed*.

LADD, C. J., PRESTON and STEVENS, JJ., concur.

WILLIAM HALLORAN, Appellee, v. QUAKER OATS COMPANY,
Appellant.

APPEAL AND ERROR: Assignments of Error—Sufficiency. Assign-
1 ments of error which only refer to paragraphs of the charge will not be considered where the charge, as set out in the abstract, is not separated into paragraphs, nor its parts or divisions numbered.

SALES: Sales by Sample—Acceptance of Part of Goods. The ac-
2 ceptance by the buyer, under a contract of sale of a certain amount of corn, of part of the corn, which was delivered, after knowing it was of inferior quality, precluded him from objecting, when the remainder was tendered, that it was of such inferior quality; and it was immaterial that, before accepting the part delivered, the buyer objected to its quality, or that the seller had sought to adjust the dispute by making a new contract, which, however, was not made.

Appeal from Lyon District Court.—W. D. BOIES, Judge.

MARCH 20, 1919.

ACTION at law upon an oral contract for the sale of corn. Verdict and judgment for the plaintiff, and defendant appeals.—*Affirmed.*

S. D. Riniker, for appellant.

E. C. Roach, for appellee.

WEAVER, J.—Plaintiff alleges that, being the owner of about 1,500 bushels of corn in the ear, he entered into an oral contract with the defendant, by which he undertook to sell said corn and deliver it to the defendant at its elevator at the agreed price of \$1.85 per bushel, the kind and quality of the corn being shown by sample, which the plaintiff then and there exhibited. He further alleges that, in pursuance of said contract, he did shell the corn and began the delivery of it as agreed; that he delivered and defendant received and accepted 439 bushels and 36 pounds of said corn; that he also hauled and tendered to defendant at its said elevator the remainder so sold, to the amount of about 1,000 bushels, but such tender was refused, and defendant refused to accept, receive, or pay for the corn, except at a reduced price, which plaintiff declined to accept; and he was obliged to haul the corn back home, and thereafter sold it at the best obtainable market price, which was \$1.75 per bushel. Upon the claim thus stated, plaintiff asks judgment against defendant for the agreed price of the corn delivered, and damages for the refusal to carry out the contract for the purchase of the remainder, or a total amount of \$928.35.

The defendant admits having negotiated with plaintiff for the purchase of 1,500 bushels of corn, but alleges that plaintiff exhibited to it a quantity of corn which would grade "No. 2 White," and represented it to be a fair sample of the corn he desired to sell; and, relying upon said representation, defendant offered him \$1.85 per bushel for

all he had of that grade; but that, in truth and in fact, the corn actually delivered, as well as the corn actually tendered, was inferior in quality to the sample shown by plaintiff, and graded only "No. 3 Mixed;" and for that reason only, defendant refused to accept it except at its market value, which was only \$1.75 per bushel. Defendant admits having received 439 bushels and 36 pounds of the corn, and, although it was of inferior grade, yet, since it was received, it offers and tenders payment therefor at the contract price of \$1.85 per bushel, but denies all liability on its part on account of the corn it refused to accept.

The cause was tried to a jury, which found for the plaintiff, and assessed his recovery at \$930.05. Defendant appeals.

As will be seen from the foregoing statement, the contract of defendant to purchase the corn is admitted, and the single defense set up by the answer is that the corn tendered in fulfillment of such contract was inferior to the sample exhibited by the plaintiff. That this was purely a question of fact, and that, in the absence of prejudicial error in some of the rulings of the court, the verdict is conclusive, is not denied. To avoid this result, how-

1. APPEAL AND
ERROR: assign-
ment of error:
sufficiency.

ever, and as grounds for a new trial, it is urged by counsel for appellant that prejudicial error is to be found in the court's charge to the jury. In support of that proposition, our attention is called to "Paragraph 3," "Paragraph 4," and "Paragraph 6" of the instructions; but unfortunately, on referring to the abstract, we find that the charge is not separated into paragraphs, nor are its parts or divisions numbered; and, while we are not disposed to be over-technical in the interpretation or application of our rules, it can hardly be thought unreasonable to ask an appellant who insists that error has been committed to point

out with some reasonable degree of definiteness that portion of the record where the error appears.

The objection made in this case, so far as it refers to "Paragraph 3" of the instructions, is made somewhat more intelligible by the quotation of certain language attributed to the court, to the effect that the defend-

2. SALES: sales by sample: acceptance of part of goods. ant, having received the first delivery of the corn without objection, knowing its alleged inferior quality, could not be heard to raise that objection to the remainder of the quantity tendered. In other words, the jury was told, in effect, that the contract was entire, and that, if defendant desired to reject the corn because it was not of the quality of the sample, it was bound to do so when the first delivery of the corn was made, and the real quality of the corn discovered. Assuming that this is the holding to which appellant takes exception, we think it is not erroneous. The defendant's agent, who made the contract, admits that he was present when the delivery was made, and examined the first load, and claims that he then discovered that the corn was inferior to the sample; and, while he did raise some objection to it, in talking with the drivers of the loads, and threatened a refusal of any further delivery, he did receive the 439 bushels and 36 pounds mentioned in the pleadings; and for this, the obligation to pay according to the contract is confessed. In view of this record, there was no error in the instruction. It is a well-settled rule that, upon sales by sample, where the contract is entire, the buyer cannot accept the benefit of the contract in part and rescind it in part. And this is especially true where the alleged inferiority to sample is visible to or discoverable by the purchaser when the first delivery is made. 2 Sutherland on Damages (4th Ed.) Section 650; 35 Cyc. 222, 229; *Hirshhorn & Co. v. Stewart*, 49 Iowa 418; *Gilbert v. Lichtenberg*, 98 Mich. 417 (57 N. W. 259). A mere verbal dec-

laration of dissatisfaction with the quality of the thing delivered is of no avail, if the delivery is, in fact, accepted. If there be an exception to this rule where the quality of the article is not visible upon a casual inspection, or where the purchaser has not had reasonable opportunity to ascertain the quality, it cannot affect the result in this case; for it appears without dispute that the defendant did examine the corn and did ascertain its quality and grade before it received the first delivery. It was then its duty to exercise its option to accept and pay for the corn according to contract, or to refuse the offered delivery. The fact that the delivery was not made by the plaintiff in person, but by his sons or employees, is immaterial. Nor is it material, as counsel seem to think, that, when defendant refused to receive or accept the remainder of the corn, plaintiff sought to adjust or settle the dispute by proposing or suggesting a new contract, which was not, in fact, made or agreed to.

A different result would be possible if there was any showing that the corn tendered for the second delivery was in any way inferior to that which had already been accepted by the defendant. There is not only no such testimony, but, on the contrary, the defendant's agent who made the purchase expressly says, "The corn which plaintiff offered which I refused to take appeared to be the same as the eight loads I took."

No reversible error is shown, and the judgment appealed from must be affirmed, with costs. Appellee's motion for assessment of penalty or damages for delay, in addition to taxable costs, is denied.—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

MARY M. HERRICK, Appellee, v. MARY E. MOORE, Appellant.
CITY OF OTTUMWA, Appellee, v. MARY E. MOORE,
Appellant.

HIGHWAYS: Estoppel Against Public in re Obstructions. Estop-
1 pels against the public to demand the removal of valuable build-
ings or other like improvements which are within the public
highways, rest essentially on the fact of prior express or implied
consent by the public authorities to the erection of such im-
provements. Ten years' maintenance of such improvements (in
analogy to the statute of limitations) *ipso facto* establishes such
consent. In the absence of such ten years' maintenance, the
owner must show that he had such consent *when the improve-*
ments were erected.

ADVERSE POSSESSION: Right Equal to Fee. Adverse possession
2 for the full period of ten years matures a right equal to a fee.

LIMITATION OF ACTIONS: Non-Applicability to Public. The
3 statute of limitations may not be invoked against the public.

BOUNDARIES: Acquiescence—Non-Applicability to Public. The
4 doctrine of acquiescence may not be invoked against the public.

Appeal from Wapello District Court.—C. W. VERMILION,
Judge.

DECEMBER 14, 1918.

REHEARING DENIED MARCH 20, 1919.

THIS case involves the right of the city to enjoin the
defendant from the use of a certain strip of land claimed
to have been occupied by the defendant for ten years. The
strip occupied was a part of the street. The defendant
claimed that she had acquired some right to it by adverse
possession, acquiescence, or estoppel. Decree for the plain-
tiff in the court below. Defendant appeals.—*Affirmed.*

A. W. Enoch, for appellant.

J. J. Smith, M. C. Gilmore, and J. A. Lowenberg, for appellees.

GAYNOR, J.—The plaintiff, Mary M. Herrick, and the defendant, Mary E. Moore, occupy adjoining properties in the city of Ottumwa. Each faces on what is known as Market Street. This street runs northeast

1. HIGHWAYS:
estoppel
against public
in re obstructions.

and southwest; but, for the purposes of this case, it will be considered as running north and south. Gara Street runs east and west, and crosses Market Street at right

angles. Defendant's property is at the intersection of Market and Gara Streets, east of Market Street and north of Gara. Both tracts are in what is known in the plat as Lot 11. Lot 11, on Market Street, is $131\frac{3}{4}$ feet, north and south; on Gara Street, $65\frac{1}{3}$ feet east and west. Defendant owns the south 79 feet of Lot 11, which, described by metes and bounds, commences at the corner of the lot on Market and Gara Streets, runs north on Market Street 79 feet, and east on Gara Street $65\frac{1}{3}$ feet. The plaintiff, Mrs. Mary M. Herrick, owns that portion of Lot 11 lying north of defendant's property.

Two actions are submitted here, one by Mary M. Herrick, as adjoining property owner, alleging a special interest in the matter in controversy; the other by the city. Both are brought to enjoin the defendant, Mary E. Moore, from erecting, as a part of an apartment house, then under construction upon the ground owned by her, a porch which, it is alleged, extends over the lot line into Market Street; and the relief asked is that she be enjoined from so doing, and also that she be required to remove the same from the street. Mary M. Herrick's action was commenced first, followed by an action on the part of the city, both seeking the same relief.

At the time the action was commenced, the porch was then under construction. No temporary writ of injunction was asked, and the defendant, notwithstanding the commencement of the actions against her, proceeded to the completion of her building as planned. A decree was entered as prayed, in favor of both plaintiffs, requiring the defendant, Mary E. Moore, to remove all of the first story of her porch, or part of her building, which extends outside of her lot line and encroaches upon Market Street, within six months of the entry of the decree. She was further perpetually enjoined and restrained from maintaining any part of the first story of her building on any part of Market Street on and after six months from that date. From this the defendant, Mary E. Moore, appeals.

Although there is much said by counsel for defendant in argument touching the sufficiency of the evidence to show the dividing line between the street and the defendant's property, we are satisfied, from an examination of the record, that Market Street, as platted and dedicated, was 66 feet wide, opposite defendant's property, and that she has passed the east line of this street in the construction of her building, and that the building, if permitted to remain, will extend into the street as dedicated and platted.

Defendant, Mary E. Moore, purchased in 1911 the lot which she now occupies, and by her purchase acquired the south 79 feet of Lot 11. This would cover territory limited as follows: Commencing at the corner of Lot 11, at the intersection of Market Street and Gara Street, thence north along the east side of Market Street 79 feet, and on the north side of Gara Street, from the same point, $65\frac{1}{3}$ feet. This is all she purchased. This is all that her grantors down the line, so far as this record shows, claimed to own under their deeds of conveyance. One who takes possession of real property is presumed to take it

under the right acquired through the instrument which creates in him the right of entry. He is not presumed to intend to take possession of more territory than is included in the boundaries fixed in the instrument under which he enters. When a territory is platted into lots, and sold, as this was, by lot numbers, the party purchasing takes only so much territory as is within the limits of the lot as platted; if by metes and bounds, then within the limits as fixed by the metes and bounds in his conveyance. Therefore, at the outset, we must assume that, after this lot was platted and was sold by number, the purchasers intended to take, and took, only so much territory as was within the limits of the lot as platted. It appears, so far as this record shows, that all conveyances preceding and including the conveyance to the defendant were only of the south 79 feet of Lot 11. Therefore, if more is claimed, it must be on some theory not evidenced by the conveyance. It must be a claim to territory not conveyed, and to which the party has no right, under his conveyance. Necessarily, it must involve the taking of the property of others, and an enlargement of the territory included in the instrument of conveyance. When

one seeks to enlarge the territory granted,
2. ADVERSE POS- he seeks the invasion of another's right.
SESSION: right
equal to fee. and he must have some good, legal ground
for the invasion, or he must show that the invasion, though originally wrongful, has been continued or acquiesced in for such a length of time by those whose rights have been invaded that the courts will presume that there was a grant of right of invasion, or that the invasion was made and the possession held under such circumstances that it would be inequitable now to deny the right. Or he may show that the one whose property has been invaded has acquiesced in the invasion by consenting or agreeing to a dividing line beyond the limits of the invader's right, for such a length of time that the courts will assume that the

line so agreed upon is the true line—the true dividing line—between the parties, and hence no invasion.

To justify the invasion, therefore, proof is called for either to show adverse possession for such a length of time that the court will presume a grant, or that the adverse party, if he had any title during this period of time, would have asserted it against the person in possession. This adverse possession is in the nature of a rule of repose, and denies the right to the complainant to say that he had any such right, after he has allowed the other party to remain in open, notorious, and visible possession, under claim of right or color of title, for ten years. Thus the presumption would seem to be either that the person in possession had a grant, some time, of right to the possession, or that the other party claiming against him never had any right; or if he had, he would have asserted it earlier. Whichever way we treat this rule of adverse possession, it has finally resolved itself into this: That the party who has held the adverse possession for the statutory period stands with some sort of indisputable right to it which is equivalent to a grant in fee.

The rule of acquiescence also is a rule of repose, and means simply that, where adjoining property owners agree to a line as the dividing line between their property, and this agreement has stood unchallenged for ten years, the line so agreed upon becomes, as a matter of law, the true dividing line, though, as a matter of fact, under governmental subdivisions or metes and bounds, it is made manifest that one has invaded the rights of the other. It says simply to the complaining party: "You have agreed to this line, and it has stood for ten years unchallenged. You are now estopped to claim that any other is the true line."

The theory of estoppel is that, where one has invaded the right of another, thinking he is within his own right, and that invasion is known to the other, and the other

stands by and sees him make valuable improvements upon the invaded territory, under the supposition that it is a part of the possessions of the invader, equity will thereafter deny to the invader the right to object to the invasion, and will not grant his prayer to have the improvements destroyed or removed, when such act would be greatly to the prejudice of the invader. This estoppel comes pretty near to the rule of adverse possession, though, by its application, one may be estopped though the ten years essential to adverse possession have not expired.

As we have said before, the strip of land in controversy was never a part of Lot 11, but was, when the plat was made and the land dedicated, a part of Market Street. It is true that the plat does not show the width of Market Street, but the dimensions of the territory included in the plat and on the opposite side of Market Street are given. The street is simply the space between. This space is ascertainable by any competent surveyor, and was ascertained in this case. So we say that the street was 66 feet wide, and this strip of land is in the street and the city is entitled to it, unless the defendant has sustained her right to it by the defense which she has interposed.

Defendant bases her right to the territory on three grounds:

- 1st. Adverse possession for the statutory period.
- 2d. That the city has acquiesced in the line as the east line of Market Street, over which she has not passed in the construction of this building.
- 3d. That the city is now estopped to require her to remove her porch from the line, even though she has not acquired right to the territory, because of the facts appearing in this case.

As to the first two propositions, we have to say that, as against the public, it has been repeatedly held by this court that adverse possession, as generally recognized and

3. LIMITATION
OF ACTIONS:
non-applica-
bility to
public.

enforced, cannot be invoked against a municipality. We need not discuss the basis of this holding. It has been clearly asserted in more than one case by this court. In *Kuehl v. Town of Bettendorf*, 179 Iowa 1.

this court said:

"Plaintiff claims that he is entitled to the strip by adverse possession, and by reason of defendant's acquiescence in the line as marked by the fence. One trouble with this contention is that the statute of limitations does not run against the town, or against the public; and the doctrine of acquiescence, as between individuals, does not apply when one of the parties is a governmental agency and the subject-matter is one in which the public has a vested interest."

In *Johnson v. City of Shenandoah*, 153 Iowa 493, this court said:

"The rule now unquestionably is that the doctrine of adverse possession does not apply to municipalities or other bodies exercising governmental functions, for the reason that the statute of limitations does not run against the state or any of its instrumentalities so as to prevent the exercise of its proper governmental functions. * * * Again, we are now committed to the proposition that the lines and boundaries of highways, streets, and alleys between the public and private owners cannot be established by acquiescence, for the reason, among others, that no one is authorized to represent the state or its instrumentalities in making any such agreements, or to acquiesce in a given line."

Since neither adverse possession nor acquiescence is available to the defendant, what has she in her plea of estoppel that can be successfully invoked in her behalf?

The home, as originally constructed, was wholly with-

4. BOUNDARIES:
acquiescence:
non-applica-
bility to
public.

in the limits of the lot as platted. However, more than ten years before this action was begun, a porch was built, by the then owner, on the Market Street side, extending over the lot line into Market Street about 18 inches. This porch was torn down in 1913, and a second porch built in its place, extending about 3 feet farther into the street. In the winter of 1915 and '16, the house was partially destroyed by fire, though the porch was not consumed. In the spring of 1916, it was torn down, and the erection of the porch in controversy was begun, in connection with the rebuilding of the house. This porch was 8 feet 2 inches wide, and extended over the lot line. The house to which this porch was attached, as reconstructed, was, therefore, about 5 feet 10 inches from the street. Early in the spring of 1916, after the frame was up and the sides partially enclosed, a controversy arose between the defendant and the plaintiff, Mrs. Herrick, over the location of the porch, Mrs. Herrick claiming that it extended over the lot line into the street. Thereupon, Herrick caused a survey to be made, and the street line definitely determined and pointed out to the defendant, and the true line indicated to her by the surveyor upon the ground. Upon this showing, the further construction of the porch was stopped by the defendant, Mrs. Moore, and not resumed until after notice of suit was served upon her. Before or about the time the building of the porch was renewed, the city served notice on the defendant, requiring her to remove the obstruction from the street, and soon thereafter, the suit here presented was commenced by the city.

It will be seen, therefore, that, before the defendant had completed her structure, she had notice of the true lot line, and that she was extending her building over the line and into the street, and that the city denied her right to do so, and would contest her right to do so. She went on, however, and built the porch.

In *Bell v. City of Burlington*, 68 Iowa 296, the holding is only that, though the street, as originally laid out, was 90 feet wide, yet, as the city had, by its conduct, indicated a purpose to occupy 60 feet only, and abutting property owners, relying thereon, had occupied up to the street line, as used, for 30 years, and had made valuable improvements, it would be inequitable to allow the city to claim and occupy and use more than it had indicated its purpose to accept and use. This on the ground that to permit the city to do so would work a great wrong to the property owner, who relied upon the conduct of the city, and had built valuable improvements upon this disputed strip. The same holding is found in *Orr v. O'Brien*, 77 Iowa 253, in which it is said, in substance, that, relying on the line as created, the plaintiff had made valuable improvements, so located that, if the road be moved, these valuable improvements would be seriously impaired.

In *Bridges v. Incorporated Town of Grand View*, 158 Iowa 402, it was said:

"While an estoppel will not be found from the erection of fences or the planting of trees and shrubs alone, it may be established from the erection of substantial improvements by the owner of the lot with reference to a given line, with the knowledge and acquiescence of the town."

It will be noted in this case that the element of time is not considered. The case is based upon the thought that, *before the buildings were erected*, the plaintiff city had knowledge that it was about to be erected, and of the line on which it was to be erected, and acquiesced in its building, and therefore ought not to be permitted to insist upon the removal, where the effect of such removal would be to greatly prejudice the builder. It will be noted that it says:

"Her houses were built, porches erected, sidewalks laid, fences constructed, and general improvements made

with reference to a given line, which corresponds with that on the block to the north, *with the knowledge and acquiescence of the town and its officials.*"

It is apparent that, if the city, like an individual, knows that another is about to build on a certain line, knows that the line upon which the structure is to be erected is over the true line, does something active to indicate that it consents to the contemplated act, and acquiesces in that line as the true line for the purposes of the structure, and then a structure is erected on that line, in good faith, relying upon the consent of the city, the city cannot afterwards, by any proceedings, order the removal of the building, when the effect of it would be greatly to the prejudice of the one who, in good faith, relied upon the act of the city in making his improvements.

Time is considered in this estoppel only in analogy to the statute of limitations. The estoppel is not created by time. The estoppel is created by the consent and acquiescence of the city in the doing of the thing complained of, the undoing of which would greatly prejudice the doer, and the ten years is applied only as a basis for a conclusive presumption that the city did so agree at the time of the erection of the improvements. The ten-year period brings a conclusive presumption that the city consented to the invasion before or at the time of the invasion. It makes the rule of right the same as it is between individuals. That is, should a property owner see his neighbor, in good faith, assume a line to be the true line, and act upon that assumption, and build valuable improvements, and he makes no objection, and consents to the neighbor's so doing, the law steps in and says:

"You should have spoken when you saw the act being done, which would not have been done except for your conduct. It is apparent, if you now are permitted to speak, a great wrong will be done to the other, who, relying upon

your consent or acquiescence, has done a thing the undoing of which, if he were required to undo it now, would work great hardship and injury to him. You should have spoken when you knew the act was to be done, and now you must forever after hold your peace. You are estopped."

The whole doctrine of estoppel, as applied to cases like this, rests upon the thought that the city, through its proper officers, or those authorized to act for it, has consented to the doing of the act of which it now complains, and this consent is conclusively presumed after ten years' silence. The estoppel rests on the consent, or the presumption of consent, and not upon the statute of limitations. This doctrine is recognized in *Johnson v. City of Shenandoah*, 153 Iowa 493, 495.

It will be noted that the building, as originally constructed, was all upon the lot as platted. The first building did not extend over 18 inches beyond the lot line. The second building and the porch in question have not been where the defendant now claims a right to put them, for the statutory period. There is no evidence that the city has consented to the erection of this porch over the lot line at the point and to the extent to which the defendant now is asserting her right, and time has not passed sufficient to create a conclusive presumption that the city did so consent.

Upon the whole record, we think the court was right, and the judgment is, therefore,—*Affirmed as to both cases.*

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

ANNIE HOLDORF, Appellant, v. CHARLES HOLDORF, Appellee.

ASSAULT AND BATTERY: Injury from Fright. A simple assault
1 is actionable (a) when willfully committed, (b) when accompanied by violent conduct evincing an intention to carry the

assault to the point of a battery, and (c) when some physical injury results, *even from fright only*, to the one assaulted.

PLEADING: Statute of Limitations. The statute of limitations 2 must be specially pleaded.

Appeal from Pottawattamie District Court.—J. B.

ROCKAFELLOW, Judge.

DECEMBER 14, 1918.

REHEARING DENIED MARCH 20, 1919.

ACTION for damages. Directed verdict for defendant. The material facts are stated in the opinion.—*Reversed.*

Cullison & Wyland, and F. A. Turner, for appellant.

Preston & Dillinger, for appellee.

STEVENS, J.—Plaintiff brings this action to recover damages caused by an alleged assault upon her by the defendant, resulting in a miscarriage, accompanied by severe and painful lacerations. The defendant denied the assault, and contends in argument that whatever injuries, if any, plaintiff is shown to have suffered, were due solely to fright, for which no recovery can be had. According to the testimony of plaintiff, defendant came to the farm where she was living with her husband, in the latter part of August, 1914, where the following transpired:

“This trouble arose in August, 1914. It was on the farm where we, my husband and I, were living. My husband was down by the barn when it happened. The barn was about 200 feet southeast of the house,—something like that. Well, he, the defendant, drove into the yard. He and Orrin was on the running gear of a wagon, and I was by the well, pumping a bucket of water; and as he drove into the yard, he said ‘Good morning.’ and I said ‘Good morning;’ and then, when he was even with me, he

1. ASSAULT AND
BATTERY: in-
jury from
fright.

said, 'Whoa,' and he stopped and got off the wagon and picked up a club and shook it at me. He says, 'You are making trouble between my kids,' and I said I wasn't; and he says, 'You are,' he says, 'the ponies,—you are going to pay a hundred dollars for the ponies; the ponies are mine, and the buggy is mine, too,' he says. And he come up towards me, and he did as if he was to strike me, and he struck three times. And he come up close to me, and there was a watering trough in between us. He was about a foot and a half from me, when he offered to strike. I stood stiff. I was scared so I couldn't move. At that moment, I was pumping water in a bucket for house use. I went out there to get the bucket of water, and I was at the pump when he began to talk to me. When he made his last effort to hit me, he was about a foot or two away. He acted like he was mad. After he went down to the barn, I went to the house. I walked. I did not take the water with me. I felt like everything gave way in my abdomen, and began to feel sick. I was scared. Yes, sir, I was afraid of him. I was in the family way at that time. I had been that way for about six months."

She further testified that, upon arrival at the house, she experienced severe pain in her abdomen, which continued at intervals, with increasing violence, until on or about the 5th day of September, when a physician was called, and she gave premature birth to a child. The court, at the close of plaintiff's evidence, directed a verdict in favor of the defendant, and plaintiff appeals.

I. Plaintiff and her husband resided as tenants upon a farm owned by defendant, who was engaged in erecting a barn thereon, at the time of the transaction complained of. The first contention of counsel for appellee is that, under the evidence of plaintiff, defendant, at most, committed a simple assault upon her, for which, in the absence of some physical injury, nominal damages alone could be

recovered. An assault has been variously defined by this court; but acts threatening violence to the person of another, coupled with the means, ability, and intent to commit the violence threatened, constitute an assault. The evidence does not disclose that defendant made verbal threats of violence, or that he touched her person; but he was apparently very angry, and approached plaintiff in a manner, and with demonstrations, well calculated to inspire in her the fear and belief that he intended to make a violent assault upon her person. The force relied upon as constituting the alleged assault was not quiescent, but was accompanied by all of the manifestations of an intended battery. His acts and conduct were a clear violation of the plaintiff's rights, and the results following the assault were such as might reasonably have been expected, under the circumstances, to follow therefrom. We have no hesitation in holding that, if plaintiff suffered some physical injury, an actionable assault was committed upon her.

II. It is, however, contended by counsel for appellee that no physical injury was inflicted upon plaintiff, and that, if she suffered damages, it was due to fright alone, for which no recovery can be had. The authorities are not in harmony upon this point, and it has often been held that no recovery will be permitted for damages resulting solely from fright caused by the negligence of another, in the absence of some physical injury. *Lee v. City of Burlington*, 113 Iowa 356; *Mahoney v. Dankwart*, 108 Iowa 321; *Zabron v. Cunard Steamship Co.*, 151 Iowa 345; *Kramer v. Ricksmeyer*, 159 Iowa 48; *Cleveland, C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374 (56 N. E. 917); *Braun v. Craven*, 175 Ill. 401 (51 N. E. 657); *Driscoll v. Gaffey*, 207 Mass. 102 (92 N. E. 1010); *Kennell v. Gershonovitz*, 84 N. J. L. 577 (87 Atl. 130); *Arthur v. Henry*, 157 N. C. 438 (73 S. E. 211); *Cook v. Village of Mohawk*, 207 N. Y. 311 (100 N. E. 815). But, as holding to the contrary, see

Spearman v. McCrary, 4 Ala. App. 473 (58 So. 927); *St. Louis S. W. R. Co. v. Murdock*, 54 Tex. Civ. App. 249 (116 S. W. 139).

The rule, however, denying liability for injuries resulting from fright caused by negligence, where no physical injury is shown, cannot be invoked where it is shown that the fright was due to a willful act. *Watson v. Dilts*, 116 Iowa 249; *Johnson v. Hahn*, 168 Iowa 147; *Engle v. Simmons*, 148 Ala. 92; *Pullman Co. v. Cox*, 56 Tex. Civ. App. 327 (120 S. W. 1058); *Pankopf v. Hinkley*, 141 Wis. 146 (123 N. W. 625); *Green v. Shoemaker & Co.*, 111 Md. 69 (73 Atl. 688); *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239 (47 L. R. A. 325); *May v. Western Union Tel. Co.*, 157 N. C. 416 (72 S. E. 1059); *Lesch v. Great Northern R. Co.*, 97 Minn. 503 (106 N. W. 955); 1 Sutherland on Damages (4th Ed.) Section 24; *Bouillon v. Laclede Gas Light Co.*, 148 Mo. App. 462 (129 S. W. 401).

In *Watson v. Dilts*, supra, this court held that plaintiff could recover for damages to her nervous system resulting solely from fright, upon the theory that the injuries suffered were physical in character. In that case, the defendant wrongfully and stealthily entered the home of plaintiff, went to the second story for the apparent purpose of committing a felony, entered the room of plaintiff's husband, with whom he engaged in an encounter, causing the fright complained of. No physical violence was inflicted upon the plaintiff. The doctrine of this case is reaffirmed and fully sustained by *Johnson v. Hahn*, supra. The holding in the above cases is easily distinguished from that in *Lee v. City of Burlington*, *Mahoney v. Dankwart*, *Kramer v. Ricksmeier*, and *Zabron v. Cunard S. Co.*, supra. In the first two of the above cases, negligence alone was charged; while in *Kramer v. Ricksmeier*, no assault was charged; and in *Zabron v. Cunard S. Co.*, the only injuries complained of were mental pain and suffering; whereas, in

the case at bar, if the testimony of plaintiff is to be believed, defendant made a willful assault upon her, at a time and under circumstances from which, if he knew her condition, he might reasonably have anticipated the very consequences which, it is charged, followed. If a party whose nervous system has been so injured by fright as to produce nervous prostration and other unfortunate consequences is permitted to recover upon the theory that a physical injury is shown, we are unable to see why a woman who has undergone the pains of premature childbirth, accompanied by severe and painful lacerations, should be denied recovery upon the ground that no physical injury is shown. According to the testimony, plaintiff was severely frightened, and almost immediately began to suffer intermittent physical pains. Physicians, testifying in her behalf, said, in answer to proper hypothetical questions, that a miscarriage might well have been expected to follow the treatment accorded plaintiff by the defendant. The jury could have found that the act of the defendant was willful, if not malicious. The danger to be apprehended from permitting recovery for damages of the character, and under the circumstances detailed, is that it tends to encourage the prosecution of trumped-up and ill-founded claims, which permit the jury to enter the field of speculation, and which admit of no certain or positive proof to overcome; but the danger to be thus apprehended should not be allowed to provide a shield for the wrongdoer, to protect him from the consequences of a willful assault upon a woman in the condition of plaintiff, and under the circumstances shown. The law should afford no such protection to a willful wrongdoer. Of course, plaintiff can recover damages only for such injuries as were the natural and proximate result of the acts complained of; but this is a question of fact, to be submitted to a jury under proper instructions. In our opinion, the motion for a directed verdict should have been overruled.

III. Plaintiff's petition was filed more than two years after the assault occurred. A demurrer was sustained to her original petition, upon the ground that her cause of action was barred by the statute of limitations. She amended her petition, however, and alleged that, during most of the time after the assault, the defendant had resided in the state of Colorado, but offered no evidence to sustain this allegation of her petition. Defendant did not, however, plead the statute of limitations. By the failure to do so, same was waived. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156 Iowa 104.

For the reasons indicated, the judgment of the court below must be, and is,—*Reversed*.

LADD, WEAVER, and GAYNOR, JJ., concur.

PORTER AUTO COMPANY, Appellant, v. FIRST NATIONAL
BANK OF GILMORE CITY, Appellee.

BANKS AND BANKING: Deposits—Right of Bank to Offset Indebtedness—General Deposit. A bank holding a matured indebtedness due it from a depositor has the right to offset its indebtedness against the balance due the depositor; and where the bank did not know that a deposit was made for the purpose of paying a check, to be drawn later, to pay for automobiles, the deposit was general, and not special, and the bank had a right to offset its matured indebtedness against such deposit.

Appeal from Humboldt District Court.—N. J. LEE, Judge.

MARCH 20, 1919.

ACTION at law to recover the proceeds derived from the sale of an automobile, deposited in defendant bank by a retail dealer, who purchased the same from plaintiff upon a conditional sale contract, providing that title should remain

in the seller until payment of the purchase price. The facts are fully stated in the opinion. The case was transferred, and tried in equity, resulting in the dismissal of plaintiff's petition. It appeals.—*Affirmed*.

Sylvester Flynn, and *John Cunningham*, for appellant.

J. M. Berry and *Lovrien & Lovrien*, for appellee.

STEVENS, J.—Plaintiff is a copartnership, composed of J. W. Porter, A. A. Smith, and H. W. Paine, and is engaged in the business of selling automobiles at wholesale and retail at Eagle Grove, Iowa. J. A. Rasmussen, at the time of the transaction involved in this litigation, was, and had been for several years, engaged in selling automobiles at retail at Gilmore City, Iowa, under the name of the Gilmore Auto Company.

Prior to the arrangement under which the car in question was delivered to the Auto Company, a bill of lading, with sight draft attached, had been forwarded by plaintiff to defendant with each shipment of automobiles, and, upon payment of the draft, the bill of lading was delivered to the Auto Company. As the result of this arrangement, the Auto Company became indebted to the bank for advances, and the bank, in 1914 or 1915, refused further payment of plaintiff's drafts. Thereupon, plaintiff and Rasmussen, in the name of the Gilmore Auto Company, entered into an arrangement by which the former delivered to the latter automobiles, upon the execution of a note payable on demand, and a conditional sale contract providing that title to the car should remain in plaintiff until payment of the purchase price.

On August 23, 1916, the Gilmore Auto Company purchased a Velie car of plaintiff, for which it executed a conditional sale contract and note for \$925, payable on demand. None of the conditional sale contracts were acknowledged or

recorded. The car in question was sold by the Gilmore Auto Company, for which it received in payment a note for \$800 and a Ford car. The company sold the Ford car for \$200, receiving \$25 in cash and a note in its favor for \$175. Both notes were discounted at the defendant bank, and \$963.30 credited to the account of the Auto Company. Many checks payable to plaintiff were drawn on this account in payment of automobiles and supplies, and paid by defendant. The account shows a continuous series of transactions, including several deposits of small amounts. Numerous checks were also drawn to various parties, and paid by the bank. On September 19th, the date of the deposit in question, the bank held matured indebtedness of the Auto Company in excess of the balance on deposit therein to its credit, and on this date, charged its account with \$929.78, and credited the same upon its past-due note, balancing its account, which was slightly overdrawn before this deposit was entered,—which accounts for the discrepancy in the deposit and the credit entered on the note.

It is conceded that a bank holding matured indebtedness due it from a depositor may offset the same against a balance due such depositor from the bank. The contention of counsel for appellant is that \$925 of the amount deposited out of the proceeds of the sale of the notes received by the Gilmore Auto Company, from the purchasers of the Velie and Ford cars, was placed in the bank with its knowledge,—and the case is argued upon this theory,—for the specific purpose of paying a check, to be drawn later, in favor of plaintiff; and that the transaction comes within the rule announced in *Dolph v. Cross*, 153 Iowa 289, and *Smith v. Sanborn State Bank*, 147 Iowa 640. The officers of the bank testified that they knew nothing of the conditional sale contracts, or the terms upon which cars were being sold and delivered by plaintiff to the Gilmore Auto

Company. Concerning notice to the bank, Rasmussen testified:

"I had told Lorenson, cashier, about the carload of cars, at the time the Porter Auto Company took up the sight draft. I do not remember that I went over the arrangements I made. Nothing was said about how I was going to continue to handle cars for the Porter Auto Company. I do not know that I have said anything until after this check (meaning the one in controversy) was turned down. I do not think that I had any conversation with any of the officers of the bank after I made this arrangement. * * * I did not say anything to the bank about the Porter Auto Company having money in the car. I did not disclose to the bank that all I had in them was my commission."

Mr. Smith testified to a conversation with an officer of the bank, in which he claims to have told him that plaintiff was selling cars to the Auto Company upon contract, but did not go into details. This conversation is denied by the bank officer.

It is not claimed that the bank was informed by Rasmussen, at the time the notes were discounted to the bank and the proceeds credited to his account, that the money was deposited for the purpose of paying a check to be drawn in favor of plaintiff, and we find no satisfactory evidence in the record that any of the officers of defendant bank knew the terms upon which plaintiff was selling cars to the Auto Company. One of the members of plaintiff co-partnership testified that it was the understanding between the plaintiff and Rasmussen that he had permission and authority to sell or exchange the cars in any way he saw fit, and pay therefor when sold. It is not claimed that the money was deposited in the bank in pursuance of an agreement between plaintiff and Rasmussen that it was to be used only in payment of checks drawn in favor of the for-

mer, nor did plaintiff undertake in any way to direct the disposition of the money received by the Auto Company from the sale of cars. The proceeds derived therefrom were generally deposited in defendant bank; and if notes were received, instead of cash, they were discounted to the bank, and credit given the Auto Company for the proceeds. Doubtless, Rasmussen intended to forward check to plaintiff in payment for the Velie car purchased and sold by the Auto Company; but the record does not sustain appellant's contention that the money was deposited in defendant bank for the specific purpose of assuring payment thereof, or that the officers of defendant had knowledge of such intention upon his part, or of the manner in which the business between plaintiff and the Auto Company was conducted. The deposit was general, and not special, and the bank did not hold it in trust for plaintiff, and therefore had a right to offset its matured indebtedness against the balance due the Auto Company from the bank. *Smith v. Des Moines Nat. Bank*, 107 Iowa 620; *Smith v. Crawford County St. Bank*, 99 Iowa 282; *Kimmel v. Bean*, 68 Kan. 598 (75 Pac. 1118); *Cunningham v. Bank of Nampa*, 13 Idaho 167 (88 Pac. 975).

The facts in the case at bar clearly distinguish it from *Dolph v. Cross* and *Smith v. Sanborn State Bank*, supra. In our opinion, the decree of the lower court is right, and should be—*Affirmed*.

LADD, C. J., EVANS and GAYNOR, JJ., concur.

F. N. ROWE, Appellee, v. L. B. TOON, Appellant.

CONTRACTS: Restraint of Trade, Etc. An agreement by a physician not to practice his profession for ten years in a named county is not legally objectionable, either as to the element of time or territory, or because of the fact that no tangible property is in any wise covered by the contract.

EVIDENCE: Burden of Proof—Illegality of Contract in Restraint of
2 Trade. He who claims that an apparently unobjectionable contract in restraint of trade is violative of public policy, by reason of matters *dehors* the contract, must assume the burden to so show.

PHYSICIANS AND SURGEONS: Effect of Improper Filing of Certificate.
3 Failure of a duly certified physician to file his certificate of authority in the office of the county recorder, as provided by law, does not render unenforcible his contract with another physician by which the latter agreed to refrain from practicing his profession in a certain locality and for a stated time. (See Sec. 2580, Code, 1897.)

INJUNCTION: Violation of Contract in Trade Restraint. Injunction
4 will lie to prevent the breach of an enforcible contract in restraint of trade.

Appeal from Crawford District Court.—M. E. HUTCHISON,
Judge.

NOVEMBER 23, 1918.

REHEARING DENIED MARCH 20, 1919.

ACTION in equity to enjoin the defendant from pursuing the practice of medicine and surgery in Crawford County, Iowa. Decree as prayed, and defendant appeals.—*Affirmed.*

L. H. Salinger and Clement L. Welch, for appellant.

Conner & Powers, for appellee.

WEAVER, J.—For some years prior to the 18th of September, 1912, the defendant, Toon, was engaged in the practice of medicine and surgery at Dow City, in Crawford County, Iowa. In July, 1912, the plaintiff, a young man who was a graduate of the medical department of the Iowa State University, and holder of a certificate of due qualification from the state board of medical examiners, came to Dow City, and entered into negotiations with Dr. Toon for the purchase of the latter's business. The parties reached

an oral agreement, whereby, in consideration of the sum of \$1,000, to be paid by the plaintiff, part down, and remainder in one or more deferred installments, the defendant would relinquish his business to the plaintiff, and retire from practice in Crawford County for a period of ten years. As plaintiff would not be ready to move to Dow City before the following September, it was also agreed that defendant should continue his practice there until plaintiff arrived, and for a period of thirty days thereafter would remain with plaintiff, introducing him to his patrons, and giving such proper assistance as he could in getting plaintiff started in the practice there. At the time of the oral agreement, plaintiff paid defendant \$100, it being understood that a further cash payment was to be made when the plaintiff arrived in September, and the remainder at a later date. Plaintiff reached Dow City early in September; but, finding that another doctor had settled there, he complained to defendant that he was as yet without sufficient introduction to the people of the vicinity, and that his purchase of defendant's business was not likely to give him any proportionate advantage over the other stranger competing for local patronage. For the purpose of strengthening plaintiff's position in this respect, and to enable him, if practicable, to overcome or eliminate the unexpected competition, the parties agreed to enter into a nominal partnership for the period of one year, when defendant was to retire from practice in that county. It was also agreed that plaintiff would pay down the further sum of \$200, and give defendant his promissory note for \$700, due in one year, which sum, with the \$100 paid in July, made up the amount of the original agreed consideration. As witnessing this agreement, the parties signed a contract, prepared and written by the defendant, as follows:

"Dow City, Iowa, September 18, 1912.

"I, L. B. Toon, party of the first, and F. N. Rowe, party

of the second part, enter into an agreement to form a partnership for the practice of medicine and surgery in the town of Dow City and vicinity for the period of one year. This partnership can be terminated sooner by mutual consent. At the expiration of one year, the party of the first part is to retire from the practice of medicine and surgery for the period of ten years in Crawford County. The consideration the party of the second part is to pay the party of the first part \$200.00 cash on hand and promissory note for \$700.00 payable one year from date. In the event of failure to pay this note the contract is null and void at the expiration of one year from date and the party of the first part can continue the practice of medicine and surgery in the town of Dow City. Either party can have reasonable vacation. They are to pay equally in the livery teams.

"L. B. Toon

"F. N. Rowe."

Plaintiff and defendant continued for a time occupying the same office, and to some extent practicing together, and apparently holding themselves out as partners; but there seems to have been no division of earnings, each collecting and retaining the income derived from patients to whom he was called. In the spring of 1913, and before the year had expired, defendant withdrew from Dow City and settled in Denison in the same county, where he pursued and still pursues the practice of his profession. When the note given by plaintiff was about to fall due, defendant wrote him, giving notice he would expect payment thereof. Plaintiff answered, saying that defendant had not kept his agreement, and that he (plaintiff) did not propose to buy any more "blue sky," pay him for his practice, and "still allow him to remain in the territory and carry on his practice." To this, defendant replied that plaintiff could not expect him to live up to his contract until plaintiff paid the note; that the thing for him (plaintiff) to do was to pay the note,

and he would then be in a position to enforce the contract; and that, when the note was paid, he (defendant) was prepared to leave the territory. Thereupon, plaintiff paid the note in full, since which time defendant has remained in Crawford County, and continues to practice his profession therein. The plaintiff also introduced evidence tending to show that the defendant is insolvent, and that a judgment against him for damages would be uncollectible. The defendant did not testify in his own behalf, nor did he offer any other evidence relating to the negotiations or contract between himself and the plaintiff. On this showing, the trial court found for the plaintiff, as we have already indicated.

Confining our attention to the points argued by the appellant for a reversal, they are as follows:

I. That the contract sued upon is unreasonable and oppressive in its restrictions, in that the area within which the defendant is to be excluded from the practice of medicine bears no just relation either to the practice which the defendant theretofore enjoyed or to the practice which the plaintiff could reasonably expect to acquire or obtain if left free from competition by the defendant.

1. CONTRACTS :
restraint of
trade, etc.

That equity will refuse its aid to enforce a clearly unreasonable or oppressive contract of this nature may be admitted, but there is nothing upon the face of this particular agreement indicating that it is unreasonable or inequitable in any respect. It excludes the defendant from practice in Crawford County only. All the rest of the wide world is open to him. And even in Crawford County, the period of exclusion is limited to ten years. We cannot say, as a matter of law, that the restriction, either as to territory or to time, is unreasonable. It is not an unheard-of or very unusual thing for a well-established physician, of good repute, to enjoy a practice co-extensive with his coun-

ty; and even a young physician, whose present practice is comparatively limited, both in the number of his patients and in the area in which he finds his patrons, may yet reasonably hope, if well qualified, to extend his practice much beyond the immediate vicinity of his office or home. The

2. EVIDENCE:
burden of
proof: illegality of
contract in
restraint of
trade.

contract sued upon not being unreasonable on its face, plaintiff was not required to negative the existence of possible conditions rendering it void or voidable. Defendant offered no testimony tending to show that the restraint provided for by his own volun-

tary agreement was materially greater than was necessary for the protection of the plaintiff in the enjoyment of the fruits of his contract, and the argument that such agreement operates oppressively, or in a manner to offend against public policy, finds no support in a fair and candid reading of the terms agreed upon and reduced to writing by the defendant himself, or in the nature or effect of the prior negotiations leading up to it. This conclusion has the support of the great weight of authority, as indicated by the precedents to which we shall soon refer.

But counsel say that, while there is a class of contracts by which the seller of a business may validly agree to reasonable restrictions against his re-entry into the same business in competition with his purchaser, yet such rule is not available to defendant in this case, because the defendant's agreement not to continue practice in Crawford County "is not incident or ancillary to any other contract of lawful purchase and sale," but is "no more than a bald agreement to pay a man not to practice his profession or exercise his trade." If we understand this somewhat cryptic statement, it is to the effect that a valid contract to refrain from a lawful business or occupation, even for a limited time or in a limited territory, can be made only where it is entered into as incident to or a condition of the sale of something

more substantial and tangible than the sale by a physician of his professional practice. The inference would seem to be that, unless the seller is disposing of some tangible property, like an office, or residence, or stock of instruments, medicines, or supplies, used by him in and about his business, there is nothing to support the so-called ancillary agreement to retire from his practice in that neighborhood. The position so taken cannot be successfully maintained. It is true, it is a generally recognized rule that a mere agreement to retire and refrain from a given business, and no more, is of no validity, and to sustain such a contract, it must appear that the agreement was made in support of some other agreement,—ordinarily, a sale or transfer of something which the law recognizes as property or property rights, which may be lawfully bought and sold. The purpose of such auxiliary agreement is the protection of the purchaser in the benefit of his contract against competition by the seller; and in many instances, this protection is a matter of prime importance, without which the purchaser would not think for a moment of investing any money in the purchase of a business. That such protection for the purchaser of a professional practice may be lawfully contracted for is thoroughly well settled. *Holbrook v. Waters*, 9 How. Pr. (N. Y.) 335; *Doty v. Martin*, 32 Mich. 462; *Pickett v. Green*, 120 Ind. 584; *Gilman v. Dwight*, 79 Mass. 359; *Cole v. Edwards*, 93 Iowa 477; *Smalley v. Greene*, 52 Iowa 241; *Bunn v. Guy*, 4 East 386; *Timmerman v. Dever*, 52 Mich. 34; *Cook v. Johnson*, 47 Conn. 175; *Dwight v. Hamilton*, 113 Mass. 175, 177; *Brett v. Ebel*, 29 App. Div. 256 (51 N. Y. Supp. 573); *Gordon v. Mansfield*, 84 Mo. App. 367; *Wolff v. Hirschfeld*, 23 Tex. Civ. App. 670 (57 S. W. 572); *Hoyt v. Holly*, 39 Conn. 326; *Ryan v. Hamilton*, 205 Ill. 191 (68 N. E. 781); *Tichenor v. Newman*, 186 Ill. 264 (57 N. E. 826); *Hauser v. Harding*, 126 N. C. 295 (35 S. E. 586). A business or professional good will may be the sub-

ject of lawful sale, even when unaccompanied by the transfer of any so-called business plant or other tangible property. *Brett v. Ebel*, 29 App. Div. 256 (51 N. Y. Supp. 373). Such, also, is the effect of our own holding in *Roush v. Gesman Bros. & Grant*, 126 Iowa 493, where it is said, in substance, that, while one doing business as a real estate agent cannot, as incident to a sale of such business, transfer to the purchaser his authority as an agent, or vest him with the right to act for the seller's principals or patrons, he can, by selling his business and retiring therefrom, grant to the purchaser an opportunity to obtain such patronage without the handicap of his competition. This, we said, is a valuable right, which the seller can lawfully transfer, and is one which the courts will protect and enforce. It is too clear for argument that a person having an established practice as a lawyer or physician may sell his business, and, by binding himself to refrain from all competition with his purchaser for a reasonable time, and within reasonable territorial limits, he can vest his purchaser with a valuable opportunity; and that such an agreement is not to be condemned or avoided, as without consideration or as being forbidden by any sound principle of public policy. True, the lawyer cannot (in this way) sell his clients, or the doctor sell his patients or their individual patronage or their individual good will; yet he can, by such sale and by an honest observation of his covenant not to embarrass his purchaser by competition, confer upon him a real advantage, and hasten the acquisition of business by him on his own account; and the courts should be slow to establish any rule or precedent by which any person can make a pretense of such sale, and, having received the stipulated price therefor, immediately repudiate its obligation, and take from his purchaser the sole and only consideration upon which he parted with his money.

II. It is said in argument that, upon the plaintiff's

own testimony, the transaction was not the purchase of the defendant's business or of its good will, but a mere agreement by the defendant to leave Crawford County; and that such an agreement is clearly void. The plaintiff does state that defendant was to leave the county, or promised to leave, and that he paid the money, or agreed to pay it, in consideration of such promise, or words to that effect. It is perfectly manifest, however, when one reads all of plaintiff's testimony, in the light of the undisputed facts, that, while defendant did say that he would leave the county, it was only another form of expression for his promised withdrawal from the practice of his profession in the county; and it is with this thought only that plaintiff makes use of the language on which counsel seek to defeat his claim to relief. Had defendant remained in the county and withdrawn from practice therein, as he agreed to do, plaintiff would have had no ground for complaint, and we may safely assume that this action would not have been brought. *Haldeman v. Simonton*, 55 Iowa 144.

The further point is made that the contract between the parties and the payment of money was in pursuance of an unlawful conspiracy in restraint of trade. This argument is based upon plaintiff's testimony that, when he returned to Dow City to complete the deal with defendant, and found that another physician had settled there, the agreement made in July previous was modified, or rather, was supplemented, by the agreement for a nominal partnership and for defendant to remain at Dow City a while longer, to introduce the plaintiff to the people and aid him in getting started, hoping thereby to head off competition by the new practitioner, and perhaps to induce him to abandon the field. What the result was in this respect does not appear, nor is it material. The partnership, whatever its character or extent, was abandoned before the year was out, and defendant removed to Denison. There is nothing

in the agreement of an unlawful character. There was no undertaking to interfere in any manner with the business or practice of the physician referred to, or to reflect upon his character or standing or professional capacity. Plaintiff's agreement to pay the \$1,000 had been made two months before the incident above mentioned, and the writing made in September was no more than the consummation of that agreement, with the added arrangement for a form of temporary partnership. It affords no ground for defense against the plaintiff's demand for a performance of the contract.

III. While the trial was in progress in the district court, it incidentally appeared that, although plaintiff had been duly admitted to the practice of medicine, and held a

3. PHYSICIANS
AND SURGEONS:
effect of im-
proper filing
of certificate.

proper certificate of his authority to practice from the Iowa Board of Medical Examiners, he had mistakenly filed the same for record with the clerk of the court for Crawford County, instead of with the recorder of the county, as the statute directs. And, somewhat singularly, it further appeared that the defendant had also made the same mistake, and that his certificate of authority to practice was filed in the clerk's office, and not in the recorder's office. Upon this discovery, the plaintiff at once filed his certificate in the proper place. Thereupon, the defendant amended his answer, by alleging that plaintiff had never complied with the statutes of the state regulating the practice of medicine, and that because thereof, the court should deny him any relief in the premises.

We think there is no merit in this defense. The plaintiff was concededly a duly qualified physician and surgeon. He held the proper certificate which conferred upon him "the right to practice medicine and surgery," and was conclusive evidence of such right. Code Section 2576. It is true that, by another section (Code Section 2580), it is

made the duty of the practitioner to file his certificate for record with the county recorder; and by failing so to do, he becomes chargeable with a technical misdemeanor in entering upon the practice, even though he acted in good faith in making his filing with the clerk; and it is true, also, that for his professional services while the record was in that condition, he could not have enforced collection of fees or compensation by legal proceedings. *Lynch v. Kathmann*, 180 Iowa 607. All this may be admitted, without leading to the conclusion for which appellant contends. At the time when the contract was made, and when the money was paid and when this action was begun, plaintiff, as we have before said, was a duly admitted and duly certified practitioner of medicine. If his certificate had not been filed of record in the proper office, he was entitled to file the same forthwith, and enter upon the practice; and we are not prepared to say that, if otherwise qualified to practice, the mere fact that his certificate had not been recorded in the county would be sufficient ground for denying him relief in this action. Let us, for illustration, suppose plaintiff to have been a newly admitted and properly certified physician, who came to Dow City in search of a location, and had entered into a contract for the purchase of the business of the defendant, and, in consideration thereof, and of defendant's agreement to forthwith withdraw from practice, plaintiff paid him \$1,000 in money. Let us further suppose that plaintiff's certificate had not yet been filed for record anywhere, and he was withholding it from record until he had secured a suitable location. Now if, immediately upon getting plaintiff's money in his pocket, defendant had announced his repudiation of all obligation to comply with his agreement, and his purpose to continue in practice, would it have been incumbent upon plaintiff to first file his certificate for record, before he could properly begin and maintain a suit to enjoin defendant's breach of the con-

tract? We cannot so hold. It has been held, in a not very dissimilar case, that, to make a prima-facie case in such an action, it is not even necessary for plaintiff to show his possession of a license or certificate from the state board of examiners. *Tichenor v. Newman*, 186 Ill. 264 (57 N. E. 826). In the present case, plaintiff did show his admission to practice and a proper certificate from the board of examiners, and this was not only undisputed, but is admitted of record. The controversy is not between physician and patient, and the question of recovery of fees for professional services is not involved. The contract sued upon did not contemplate any illegal act on the part of either party. Defendant had the legal right, as we have already shown, to sell his practice, and plaintiff had the legal right to buy it. Having sold his practice, and received his pay for it, it does not lie in the defendant's mouth to declare his contract void, because plaintiff, in entering upon the practice so purchased, mistakenly filed his certificate in the wrong office. It may be that, by such mistake, though committed without conscious wrong, plaintiff technically became chargeable with a misdemeanor, and rendered himself unable to enforce by law the collection of fees earned before the mistake was corrected; but from the outset, he possessed the right to correct the filing. It is not necessary to consider or decide whether such delayed filing would, for any purpose, be considered as *nunc pro tunc*; it is enough to say that no principle of law or equity clothes the man who sold the practice with the right to violate his contract, and be immune against an action thereon because of such omission. The same court which, as between the state and plaintiff, might assess the latter with a penalty for his mistake, will, as between him and the defendant, protect him in his right to correct the mistake.

IV. Counsel for defense declare their "earnest belief that the time will come when the mere fact that the subject

of any such bargain as this case exhibits is one of the professions, will vitiate it;" and their argument, in large part, consists of an ingenious attempt, not alone to sustain the defense in this case, but to undermine and discredit the principle on which the doctrine of the precedents is based. This is a field of academic discussion upon which we do not care to enter. It is enough to say that, while there has been some apparent divergence, and perhaps some inconsistencies in the practical application of the rule to particular cases, there is no substantial conflict anywhere upon the proposition that a professional practice is a lawful subject of sale, and that equity will protect the purchaser against the competition of a seller who has contracted to surrender the good will of his business to the buyer. There is nothing inherently vicious in the rule, and we are content to abide by it.

In closing, it is proper to notice counsel's appeal to the court to uphold the high ethical standards of the medical profession by denying the plaintiff's prayer for relief. Touching this subject, they say:

"It cannot be the policy of the state to encourage or permit violations of the ethics of the profession, as agreed upon generally by the profession. It is surely the policy of the state to discourage—if not to forbid—practices which tend to lower the standards and traditions of the profession."

This proposition of counsel's has our complete and cordial acquiescence; and, so far as this case is concerned, there is no better or more appropriate way to emphasize our concurrence in the principle they contend for than to compel their client to uphold the standards and traditions of his profession by exhibiting common honesty in the performance of his contracts. The record shows, as we have seen, that the appellant voluntarily entered into the con-

tract to sell his business and to refrain from further practice in the county, and that, in consideration of that agreement, he demanded and received \$1,000. It further appears without dispute,—indeed, he admits of record,—that he has never ceased his practice in the county, and that, while he has removed to another town, he still returns to Dow City for the treatment of patients. For this open and flagrant violation of his contract he offers no explanation or excuse. nor does he return or offer to return the money paid him, but asks the court to permit him to escape with it, on the theory that his agreement was stamped with illegality to such a degree that plaintiff ought not to have any relief. There may be cases in which such a plea is sustainable, but this is not one of that happily infrequent kind.

The decree is clearly right, and it is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

TOWN OF HARTLEY, Appellee, v. FLOETE LUMBER COMPANY
et al., Appellants.

CONTRACTS: Validity—Sale by Councilman to City—Recovery for Value of Goods. Where the councilman of a city voted to purchase merchandise from a company in which he was a stockholder, director, and manager, the contract was contrary to public policy, under Section 668, Subdiv. 14, Code Supp., 1913; but *held*, there being no fraud or concealment in the sale, that the company could recover the actual value of the merchandise from the city.

Appeal from O'Brien District Court.—WILLIAM HUTCHINSON, Judge.

MARCH 20, 1919.

ACTION to cancel certain warrants issued by the plaintiff city to the defendant company. Decree as prayed. Opinion states the facts.—*Reversed and remanded*.

Heald & Cook and J. T. Conn, for appellants.

T. E. Diamond, for appellee.

GAYNOR, J.—The plaintiff brings this action in equity, praying the cancellation of certain warrants issued by it to the defendant company. Its theory is that the warrants are void, and it predicates this on substantially these facts:

That the defendant the Floete Lumber Company is, and, at the time of the matters complained of, was, a private corporation, with one of its branch offices and yards in the plaintiff town; that the other defendant, Grotewohl, is and was, at all times covered by the transactions herein complained of, a stockholder and member of the board of directors of the defendant company, and its local manager at the town of Hartley, and also a duly elected, qualified, and acting councilman of plaintiff city; that, while so a member of the city council, and sustaining the relationship hereinbefore indicated to the defendant company, defendant sold and delivered to the town of Hartley, through Grotewohl, certain goods, wares, and merchandise, and in payment therefor, issued the warrants in question.

It appears that Grotewohl, as a member of the city council, voted for the purchase of the material, for the allowance of the bills, when presented, and for the issuance of the warrants involved. At the time this action was commenced, these warrants were all in the hands of the defendant company, and unpaid.

Grotewohl's term of office expired on the 3d day of April, 1916, and a new council was elected. On the 7th day of April, 1916, plaintiff, through its new council, served notice on the defendants that the warrants would not be paid, and instructed the treasurer not to pay any of the warrants. It further appears in the stipulation of facts that the city, through its council, had full knowledge of the purchase when made, and the relationship of the parties, and the use

to which the things purchased were put, and had this knowledge at the time the bills were approved and allowed, and the warrants ordered. It further appears that the reasonable market value of the goods purchased and received by the plaintiff is represented by the warrants issued, and that some of the goods received have been used by the city, and cannot be returned, while other of the material is of such a character and so used that it is impossible to return it without dismantling or tearing down or destroying the building or structure into which it has been incorporated. It further appears that the property was a proper subject of purchase, and was bought and used for the benefit of its citizens.

As we said before, this action is brought to cancel the warrants issued, on the theory that they are void because of the relationship of Grotewohl to the two contracting parties, and because of his interest in the subject-matter of the contract.

The defendant company, in a cross-petition, alleges that the goods were sold at the fair market value, were received and used by the plaintiff, and are still retained by it, and were of value to the plaintiff. It prays that, if the court finds that the warrants are void because of the facts alleged, defendant have judgment for the actual value of the property received and retained and used by the plaintiff, without profit. It is conceded by the plaintiff that the profit to defendant did not exceed 20 per cent, and that, after deducting \$445.84 from the total amount of the bills as audited and approved by the council, and as represented by the warrants, the balance would represent the actual cost of the merchandise, without profit of any kind to the defendant. The court, however, found that the warrants were void, ordered them canceled, and enjoined the plaintiff from paying to the defendant any sum whatever for the material furnished; and from this decree, the defendant appeals.

Section 668 of the Code of 1897, Subdivision 14, provides:

"No member of any council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation."

We have had occasion to construe this statute in *Bay v. Davidson*, 133 Iowa 688, at page 690, and said that the purpose of the statute was to prevent councilmen, directly or indirectly, from making profit out of their relationship with the city; that the compensation provided for was the only compensation which councilmen were entitled to receive; and that the compensation cannot be increased through profits made, directly or indirectly, in the sale of goods or merchandise to the city. It was held that contracts made by a councilman, acting for the city, with himself, or with corporations in which he was pecuniarily interested, were against public policy, and not enforceable against the city, because of the temptation it placed before these officers to profit in double dealing. The thought running through the cases seems to be that one intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. Nothing can be added to what has been already said by this court on this question. Such contracts are voidable at common law. This court has refused to recognize them or enforce them. See *Bay v. Davidson*, supra; *James v. City of Hamburg*, 174 Iowa 301, 310, and cases therein cited. The court was right, therefore, in canceling the warrants and refusing to recognize or enforce the contract.

But the question still remains: Is this defendant company without remedy in a court of equity?

The contract, it is true, was made in violation of public policy, and the contract, as such, was not enforceable in law or equity; and, while executory, any attempt to enforce it would have been enjoined. It was a voidable contract, and, upon proper showing, the courts refused to recognize and enforce it. We have, however, this situation before us: The plaintiff city acted through its council—a body of men of its own choosing. The things involved in this suit were needed by the city. The city had a right to, and, because of its needs, it was its duty to purchase these things somewhere. The purchase was neither against the statute nor against public policy. The purchase was not wrongful in itself. It became unenforceable only because of the relationship of the parties to the transaction. The rule of public policy which prevents the enforcement of contracts made under the circumstances presented in this case, rests upon the thought that it is essential to the public good to keep all parties occupying a fiduciary character, to the strict performance of the duties they have assumed in that character; and when they depart from this, the court will not allow them to profit by their wrong. The temptation to violate this rule of public policy lies in the profit which may come to the individual from its violation. Remove all hope of profit, and you remove at once the temptation. It goes without saying that one who assumes that relationship to a city which the law imposes upon a councilman, rests under an obligation of absolute loyalty to the city whose interests he has assumed to serve, and the law will not tolerate his entering into any relationship by which his individual interests could possibly conflict with the interests of his constituents. They are entitled exclusively to the exercise of his best judgment in their behalf. As said in some cases, a councilman is not permitted to act both as employer and employee. He is intrusted with public functions for the public good. His duty is to protect and promote the inter-

ests of the city, and not his own. This rule has been rigidly enforced, because of the temptation placed upon a public officer to betray the trust for the advancement of his own interest. It is even greater than in private life,—though even there, one is not permitted to serve two masters,—because the risk of detection is less in the one case than in the other. As said in one case, a judge cannot be permitted to hear and decide his own case, or one in which he is personally interested. The judge might rise above the temptation, but because of the temptation, he is not permitted to act. No public officer can be permitted to reap any profit or personal advantage from his official acts. It is the profit that furnishes the bait. Remove the bait, and you take from it all the alluring features.

It might be argued that to allow the wrongdoer to recover the actual cost of the thing sold, would be to tempt him to try to profit in his own wrong, because, if he failed to make effectual the contract and reap the profit, he would at least be without substantial injury; that it would offer temptation to try to circumvent the law, without fear of substantial loss. But again, the temptation to wrong lies in the profit that comes from the wrong. Remove all hope of profit, and you remove all temptation to do the wrong out of which the profit might come.

There is no claim made in this case that there was any actual fraud practiced by either of the parties to the transaction out of which this controversy grows. Nothing was done in the dark, and there was no effort at concealment. The plaintiff city has received substantial benefits. We think the court should have allowed the defendants to recover the actual value of the property received and retained by the plaintiff, and that the court erred in enjoining the defendants from receiving anything for the goods furnished. We are not without authority on this question from our own court. It has support in the holding of this court in

Diver v. Keokuk Sav. Bank, 126 Iowa 691, 700, which is fully supported by the reasoning found in *Kagy v. Independent Dist.*, 117 Iowa 694. In the last-named case, it is said:

"There is nothing morally wrong or inequitable in saying to a school district that it must pay a fair consideration for benefits received, before it will be permitted to repudiate an executed contract by virtue of which it has obtained, and continues to hold, something of substantial value."

In the *Diver* case, *supra*, it was said:

"We may also concede that anyone interested might, during this time [that is, while the contract was executory], have challenged the contract in proper and timely proceedings for that purpose. But the question here presented is much broader than this. It is this: May a taxpayer, after the work has been performed, and accepted by the city—there being no actual fraud shown—successfully resist payment therefor because of a violation of Section 943 of the Code? That question was decided adversely to appellant in *Kagy v. Independent Dist.*, 117 Iowa 694."

There is, a decided conflict among the authorities upon the right of the plaintiff to recover under the facts here involved, but this court is committed to the doctrine herein announced, and we think the rule is equitable, and we have no disposition to depart from it.

For the reasons herein given, the judgment of the district court is reversed and remanded for decree in accordance with this opinion.—*Reversed and remanded.*

LADD, C. J., EVANS and STEVENS, JJ., concur.

FRANK V. BROSE, Appellee, v. CHICAGO GREAT WESTERN
RAILROAD COMPANY, Appellant.

RAILROADS: Crossing Accidents—Reliance on Precautions—Contributory Negligence. Where a person injured at a railway cross-

ing knew of the automatic signaling device at the crossing, and was induced by its failure to work to believe the crossing safe, the jury had a right to consider that fact in determining whether he exercised ordinary care in attempting to go upon the crossing.

RAILROADS: Crossing Accidents—Signals—Negligence—Negative

2 **Testimony.** Where plaintiff and his companion testified that they listened intently for signals, before going upon a railway crossing, and heard none, and the train crew were not examined as witnesses upon that subject, evidence held sufficient to go to the jury upon negligence in not giving signals.

Appeal from Cerro Gordo District Court.—J. J. CLARK,
Judge.

MARCH 21, 1919.

ACTION for damages to an automobile, caused by a collision thereof with one of defendant's trains. Defendant appeals from a judgment in favor of plaintiff for \$458.74.—*Affirmed.*

Blythe, Markley, Rule & Smith and Carr, Carr & Coz,
for appellant.

Senneff, Bliss, Witwer & Senneff, for appellee.

STEVENS, J.—I. The argument of counsel for appellant is confined almost entirely to the question of plaintiff's alleged contributory negligence. The material facts appearing in the record are, in substance, as follows:

On the night of November 10, 1916, while plaintiff and another person were proceeding east in a Dodge touring car on one of the public streets of Mason City, his car collided with some freight cars which were being pushed north on defendant's main track across said street. The train, according to the testimony of defendant's witnesses, consisted of thirteen cars and an engine, which was attached to the south end of the train, but headed north. There was a residence south of the street, and about 30 feet west of de

fendant's track, and another residence about 50 feet farther west. There were also some trees between the first house and the track. There were no street lights within a block east or west of the crossing. Plaintiff's automobile was equipped with headlights, which, he testified, enabled him to see for a distance of at least 200 feet in front thereof, the same spreading out across the greater part of the street. The night was cold and dark, and both plaintiff and the other occupant of the car testified that they looked south, when about 100 feet west of the crossing, and again when about 40 feet west thereof, but that they did not see the cars with which the automobile shortly collided. There was nothing but the trees between the house and track to obstruct plaintiff's view of the track at the last point of observation.

For a considerable time prior to the accident, defendant had maintained an automatic electric signal gong at the crossing. It was located immediately west of the track, on the north line of the street; but on the occasion in question, it was out of order, and did not ring as defendant's train approached the street. Plaintiff had frequently passed over the crossing in question, and knew of the automatic signaling device, but did not know that it was out of order. Both plaintiff and his companion observed, before attempting to cross the track, that the signal bell was not ringing. The testimony on behalf of plaintiff tended to show that the automobile approached the crossing at a speed of from 10 to 12 miles per hour, and that defendant's train was being operated at around 16 miles per hour. Plaintiff and the other occupant of the car testified that no lights were visible upon any part of the train; that the same could not be seen, on account of the darkness; and that, although they were listening intently, they did not hear the movement of the train. On the other hand, defendant's train crew testified that there was a brakeman with a lantern

on each of the two north cars, and that same were plainly visible to a person upon the street near the crossing. They also testified that the train was not moving to exceed six miles per hour. When a few feet from the track, the speed of the automobile was increased; but plaintiff testified that, when within about 12 feet thereof, the first car of defendant's train came into view upon the crossing, and that he quickly set the brake, and attempted to stop the automobile. One of the train crew testified that he saw plaintiff coming toward the crossing, and signaled the engineer that an automobile was approaching at a rapid rate of speed. Plaintiff also claimed that no whistle was blown or bell rung for the crossing.

It will be observed, from the foregoing statement of the evidence, that the jury could have found therefrom that plaintiff looked, when at least 100 feet west of the crossing, and again when within 40 feet thereof; that both occupants of the car listened intently, but did not hear the rattling of the train; that no lights were visible upon any part thereof; that, because of the darkness, they were unable to see it; and that they relied, to some extent, upon the failure of the automatic signaling device to give warning of the train's approach; that the car with which the automobile collided did not come into view until it was revealed by the headlights of plaintiff's automobile; and that he was then so close to the track that he was unable to stop his automobile in time to avoid the collision.

The duty of a traveler upon a street or highway, upon approaching a railway crossing, to look and listen for approaching trains, is, of course, conceded. Plaintiff knew of the automatic signaling device at the crossing, and was quite naturally induced, by its failure to work, to believe the crossing clear and free from danger. The jury had a right to take this fact into consideration, in deciding whether plaintiff exercised ordi-

1. RAILROADS :
crossing acci-
dents: reli-
ance on pre-
cautions: con-
tributory negli-
gence.

nary care in attempting to go upon the crossing. *Lockridge v. Minneapolis & St. L. R. Co.*, 161 Iowa 74; *Dusold v. Chicago G. W. R. Co.*, 162 Iowa 441.

While plaintiff's car was pretty thoroughly demolished, neither he nor his companion was thrown from the seat of the automobile or injured. This fact tends strongly to corroborate plaintiff's claim that he was driving his car at a moderate speed. The question of contributory negligence was clearly for the jury.

II. Among the grounds of negligence alleged in plaintiff's petition was defendant's failure to ring the engine bell at the crossing. The evidence offered to sustain this allegation consisted of the statement of plaintiff and his companion that, while they listened intently, before attempting to go upon the crossing, for warning signals, none were heard. In addition thereto, plaintiff testified that defendant did not customarily cause the engine bell to be rung for this crossing. This testimony was necessarily less emphatic than would have been a positive statement that the bell was not rung, but, nevertheless, is of some probative value. Both witnesses were in full possession of their sense of hearing, and listened for the very purpose of determining whether any warning signal announced the approach of a train. Ordinarily, one thus situated would hear the customary signals, if given. It is true, plaintiff expressed doubt whether the ringing of the bell could have been heard, under the circumstances; but this is not conclusive. The train crew were examined as witnesses on behalf of the defendant, but were not interrogated upon this point. They must have known whether the bell was, in fact, rung or not. Weight in other jurisdictions has been given to this fact. *Haverstick v. Pennsylvania R. Co.*, 171 Pa. 101 (32 Atl. 1128); *Chicago, R. I. & P. R. Co. v. Stepp*, 90 C. C. A. 431 (22 L. R. A. [N. S.] 350).

2. RAILROADS :
crossing acci-
dents : signals :
negligence : nega-
tive testi-
mony.

We are not, therefore, disposed to hold that the court committed error by submitting this question to the jury.

III. Exceptions were taken to other instructions, but they are not urged in argument upon this appeal. Since we find no error in the record, the judgment of the court below must be—*Affirmed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

BERTHA CARR, Administratrix, Appellant, v. INTER-URBAN RAILWAY COMPANY, Appellee and Cross-Appellant.

NEGLIGENCE: Last Clear Chance and Actual Knowledge. Actual knowledge of the negligence of an injured party is essential to the application of the doctrine of "last clear chance,"—not reasonable ability to discover such negligence.

Appeal from Polk District Court.—CHAS. A. DUDLEY and THOMAS J. GUTHRIE, Judges.

MARCH 21, 1919.

PLAINTIFF, who is the surviving widow of John T. Carr, who was killed about 6 o'clock A. M. on the morning of December 1, 1916, while walking north on East Thirty-third Street, near the intersection thereof with Cleveland Avenue in the city of Des Moines, brings this action, as administratrix of his estate. When about on Cleveland Avenue, deceased met a southbound street car, and stepped from between the east and west tracks of defendant onto the track. When somewhere near the north side of Cleveland Avenue, he was struck by a northbound interurban car, and fatally injured. A trial was had in the district court, resulting in a verdict for plaintiff. Upon motion of defendant, the verdict was set aside, and a new trial granted, on account of errors in two instructions. Both parties appeal. The

questions presented do not call for a detailed statement of the evidence. Plaintiff, having first completed her appeal, is denominated the appellant.—*Affirmed.*

Clark, Byers & Hutchinson and *R. P. Thompson*, for appellant.

W. H. McHenry and *A. B. Howland*, for appellee and cross-appellant.

STEVENS, J.—I. On account of the death of the trial judge before ruling upon defendant's motion for a new trial, same was passed upon and sustained by Honorable Thomas J. Guthrie, one of the judges of the Polk County district court. It was sustained upon the ground that prejudicial error was committed by the court in two of its instructions to the jury. Argument of counsel, however, covers numerous exceptions to these instructions taken at the time of the trial, but not referred to by the court in its ruling upon the motion.

Instruction No. 7, which the court, in passing upon the motion for new trial, held to be erroneous, related to the doctrine of the "last clear chance." In this instruction, the court charged that, if the motorman saw, or, by the exercise of reasonable diligence, could have seen decedent in time to have warned him of the approaching car, in time to have, by the exercise of reasonable care upon his part, so controlled his car as to prevent the accident, and he failed to do so, defendant was guilty of negligence, even though decedent was negligent in going upon the track.

Counsel for appellee contends that the evidence did not justify the giving of an instruction upon this point, and also that the instruction given does not correctly state the law. In view of the conclusion reached herein, and the possibility of a retrial, we refrain from discussing or expressing an opinion as to the sufficiency of the evidence to justify the giving of an instruction upon this point, and pro-

ceed to consider counsel's exceptions to the court's statement of the law. The "last clear chance" doctrine, as adopted in this state, has often been stated and defined by this court. In *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, the court said:

"The party who has the last opportunity of avoiding an accident is not excused by the negligence of anyone else. His negligence, and not that of the one first in fault, is the proximate cause of the injury.' Again, it has been stated in this way: 'Where both parties are negligent, the one that has the last clear opportunity to avoid the accident, notwithstanding negligence of the other, is solely responsible for it; his negligence being deemed the direct and proximate cause of it.' The rule is bottomed sometimes upon one proposition, and sometimes upon another, and sometimes upon both. The first is that, in such cases, defendant's negligence, instead of being concurrent, is the sole and proximate cause of the injury; and the other is that plaintiff's negligence is no defense to wanton or willful negligence. When bottomed solely upon the last proposition, to wit, wantonness or willfulness, it is apparent that something more than the want of ordinary care is necessary. The injury must either be willful, or, as said in some cases, be due to such gross negligence as that wantonness or willfulness may be inferred. When bottomed upon the former proposition,—that is to say, upon the doctrine that defendant's negligence, being last in point of time, is the proximate, and plaintiff's precedent negligence the remote, cause,—neither wantonness or willfulness nor their equivalent need be shown. But it must appear in such cases that plaintiff's and defendant's negligence are not concurrent in point of time. If concurrent in this sense, then there can be no recovery, save where the rule of comparative negligence obtains."

Again, in *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33, at 41:

"The doctrine of last fair chance presupposes negligence on the part of the party injured, and proceeds upon the theory that, notwithstanding this negligence, if the other party, being cognizant of that negligence and of the peril in which the party had placed himself, failed to take the necessary precautions to avoid injuring him, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care, and his failure to exercise it is, in such cases, the proximate cause of the injury. It is defendant's subsequent negligence, after discovering the peril, differing in every essential from the mere continuation of the original negligence, for which he is held liable." See also *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667; *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579; *Wolfe v. Chicago G. W. R. Co.*, 166 Iowa 506; *Doherty v. Des Moines City R. Co.*, 137 Iowa 358.

It will be observed, as stated above, that the instruction charged the jury that, if the motorman in fact saw deceased in a position of peril, or if, by the exercise of reasonable diligence, he could have seen him in a position of peril, in time to have avoided the injuries, and failed to do so, then, notwithstanding it also found that deceased was negligent, its verdict should be for plaintiff,—thus making ability to see the equivalent of seeing.

Mr. Justice Sherwin, speaking for the court, in *Bourrett v. Chicago & N. W. R. Co.*, supra, said:

"The doctrine of last chance is founded on actual knowledge of the plaintiff's negligence, and this court has consistently so held in all cases where the facts were similar to the facts presented here, and such holding has been uniform in nontrespas as well as in trespass cases."

And again, in *Wilflin v. Des Moines City R. Co.*, 176 Iowa 642:

"Of course, the motorman must have seen the person in peril on the track ahead in time to have avoided a collision."

See, also, *Wolfe v. Chicago G. W. R. Co.*, supra, and *Doherty v. Des Moines City R. Co.*, supra.

It will thus be seen that the doctrine of "last clear chance" presupposes that the engineer or motorman had actual knowledge of the injured person's peril, in time, by the exercise of ordinary care, to have avoided the accident. This is equally true whether the injuries complained of were received upon a steam railroad or street railway. No distinction exists in this respect.

Counsel for appellant cites numerous of our decisions which, he contends, sustain the instruction; but, upon careful analysis, they will be found not to do so. In *Welsh v. Tri-City R. Co.*, 148 Iowa 200, the first of the cases cited and relied upon by appellant upon this point, the instruction, although not set out in the opinion, apparently was similar to the instruction under consideration. It was sustained upon the theory that the evidence tended to show that the motorman in fact saw the plaintiff on the track in time to have prevented the accident.

In *Hutchinson, etc., Co. v. Des Moines City R. Co.*, 172 Iowa 527, the motorman testified that he saw the auto truck and driver before the accident, and, under the facts, the jury could have found, in time to have prevented the accident; while in *Davidson Bros. Co. v. Des Moines City R. Co.*, 170 Iowa 467, the court held that the instruction complained of did not submit the "last clear chance" rule to the jury, and therefore, this case is not in point.

In *Doherty v. Des Moines City R. Co.*, 137 Iowa 358, the writer of the opinion discussed, to some extent, the "last clear chance" doctrine, but held that the evidence did not call for its application.

Bridenstine v. Iowa City Elec. R. Co., 181 Iowa 1124,

is not in conflict with the conclusion reached herein. Numerous other cases cited need not be considered separately. Suffice it to say that none of them sustain the instruction in question.

Pointing out the distinction between the care required by the motorman in charge of a street car and the engineer upon a steam railroad, which is important in this connection, the court, in *Barry v. Burlington R. & L. Co.*, 119 Iowa 62, said:

"The distinction between the care required in connection with the running of a railway train, operated on a right of way, as to which the railroad company enjoys the exclusive right of possession, and the care which should be exercised in the running of a street car, operated in the public streets of a city, is manifest. Those operating a street car, under such circumstances, are bound to do so with regard to the safety of persons rightfully upon the public streets; for the street car track, notwithstanding its additional use, remains a part of the street."

And again, in *Welsh v. Tri-City R. Co.*, *supra*:

"It is well settled, however, that the duty of the motorman on a street car to be on the lookout for persons within or approaching the zone of danger is different from that of an engineer in charge of a railway engine operated along a right of way, where there is no reason to anticipate the approach of persons to the track."

See, also, *Doherty v. Des Moines City R. Co.*, *supra*; *Doran v. Cedar Rapids & M. C. R. Co.*, 117 Iowa 442; *Watson v. Boone Elec. Co.*, 163 Iowa 316, 317; *Wilflin v. Des Moines City R. Co.*, *supra*.

Based upon the duty of the motorman to keep a constant lookout ahead, and to each side in front of his car, for vehicles or pedestrians upon or about to pass upon the track, we have repeatedly held, as was said in *McCormick v. Ottumwa R. & L. Co.*, *supra*, that, "as bearing upon the ques-

tion as to whether or not he [the motorman] did see, his duty to be on the lookout for persons who may rightfully be upon the track is evidence of the fact that he did, in fact, see the party injured;" and in *Barry v. Burlington R. & L. Co.*, supra, the court said:

"And in this case, the finding of the jury that the motorman, who was shown to have been on the front platform of the car, from which he could easily see the surface of the street immediately in front, as he was advancing,—and the fact that it was his duty, not only under the rules of the company, which were admitted in evidence, but also under the general requirement of the exercise of care in operating the car,—did see the deceased in time to have avoided the fatal injury to him, would have had support in the evidence."

And, again, in *Wilflin v. Des Moines City R. Co.*, the court re-affirmed its prior holding on this question, as follows:

"Of course, the motorman must have seen the person in peril on the track ahead in time to have avoided the collision, according to the majority in *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579; but on the duty to keep a lookout and a clear field of vision may be based a finding that he did see, in a suit against a street railway."

The degree of care required of pedestrians or drivers of vehicles about to go upon a street railway track is well stated in the following cases: *Barry v. Burlington R. & L. Co.*, supra; *Perjue v. Citizens' Elec. L. & G. Co.*, 131 Iowa 710; *Engvall v. Des Moines City R. Co.*, 145 Iowa 560, 561; *Welsh v. Tri-City R. Co.*, supra; *Watson v. Boone Elec. Co.*, supra; *Wilflin v. Des Moines City R. Co.*, supra.

Amplification of the rules stated in the foregoing cases could amount to little more than a restatement thereof. It is the duty of the motorman to keep constant lookout for pedestrians, or the drivers of vehicles, whose right to

the use of the street is equal to that of the street railway, and if he sees a person in a position of peril upon the track in time to do so, he must stop the car, or use such other means as are available to him to avoid injuring such person; and if it appears from the evidence that he had a clear, unobstructed view of the track, the jury may infer, from his duty to keep a lookout ahead, that he in fact saw the injured person in a position of peril. This inference may, of course, be rebutted by evidence to the contrary.

It follows that the instruction in question was erroneous in the respect indicated, and defendant's motion for a new trial was, therefore, properly sustained.

II. The other instruction relating to diverting circumstances, found erroneous by the court could not have been otherwise than confusing to the jury. Its meaning is not clear. In view of a possible retrial of the case, a discussion of the law of diverting circumstances at this time could hardly be profitable. The evidence may not be the same upon a second trial. As the ruling of the court sustaining defendant's motion for a new trial is affirmed, it is unnecessary to consider defendant's appeal. For the reasons indicated, the judgment of the court below is—*Affirmed.*

LADD, C. J., EVANS and GAYNOR, JJ., concur.

FIRST NATIONAL BANK OF SHENANDOAH, Appellee, v.
FRANCIS DRAKE et al., Appellants.

GUARANTY: Discharge of Guarantor—Secondary Liability. Under
1 Section 3060-a192, Code Supplement, 1913, the guarantor on a note is only secondarily liable, and therefore, under Section 3060-a120, Code Supplement, 1913, he is discharged by the discharge of the principal, or prior party.

GUARANTY: Limitation of Actions—Nonresident Guarantor Dis-
2 **charged by Bar of Statute Against Maker of Note.** A cause of action which is barred by the statute of limitations as against the maker of a note is, by reason thereof, barred against the guarantor on the same note, although the guarantor is a non-resident of the state, and otherwise there would be no such bar as to him.

Appeal from Page District Court.—THOMAS ARTHUR,
Judge.

MARCH 21, 1919.

ACTION upon a guaranty of a payment of a promissory note. Plea: The statute of limitations has run against the maker of the note, and the guarantor is entitled to invoke the same statute in his own behalf. Judgment and decree for the plaintiff in the court below. Defendant appeals.—*Reversed.*

Denver L. Wilson and Thomas W. Keenan, for appellants.

Ferguson, Barnes & Ferguson, for appellee.

GAYNOR, J.—In this action, plaintiff seeks judgment against defendant Francis Drake, on his guaranty of payment of a certain note, and asks that the conveyance of certain real estate claimed to have been fraudulently conveyed to the defendant Eliza Drake be set aside as fraudulent.

It appears that, on or about September 23, 1905, one J. B. Sutton executed his promissory note to the Read-Gwynn Bank of Imogene, due in six months from date, and that this note was duly transferred to plaintiff. At the time the note was executed, and before it was delivered, Francis Drake, with others, guaranteed its payment, in writing, on the back thereof, in the following words:

“For value received we hereby guarantee the payment of the within note at maturity, waiving demand, notice of nonpayment and protest.”

The action against Francis Drake is upon this guaranty. Before the commencement of this action, the note was barred by the statute of limitations as to Sutton. Before it became barred, Francis Drake moved to California, and has resided there ever since. The action, therefore, is not barred, as to him, under the statute. It is claimed, however, that, inasmuch as the action on the note was barred at the time this action was commenced, as to J. B. Sutton (the maker) and his estate,—for Sutton died in 1912,—it is barred as to him. No action or proceeding of any kind was ever had against the principal, Sutton, or his estate. It is apparent that, if the defendant's contention is correct, and the fact that the statute has run against Sutton bars the action as to this defendant, the controversy is at an end. There is no claim that Drake was other than guarantor of the payment of the note. There is no claim that any of the consideration passed to him. He is sought to be held upon his guaranty only. Sutton was primarily liable upon the note. Drake's guaranty was of the payment. He assumed, therefore, a secondary liability. All right to enforce payment against Sutton has been lost by lapse of time, and the plaintiff is without remedy against Sutton or his estate. Plaintiff pleads no excuse for not enforcing his claim against Sutton or his estate. Sutton died some time in 1912, and at the time of his death, was a resident of this state.

Section 3060-a192, Code Supplement, 1913, provides:

"The person 'primarily' liable on an instrument is the person who *by the terms of the instrument* is absolutely required to pay the same. All other parties are 'secondarily' liable."

1. GUARANTY:
discharge of
guarantor: sec.
ondary liability.

In *Rouse v. Wooten*, 140 N. C. 557, 558, the Supreme Court, construing this section, held that a surety comes within the definition of a person whose liability is primary; for he is, by the terms of the

instrument, absolutely required to pay the same. See, also, *Coleman v. Fuller*, 105 N. C. 328.

A surety's promise is to pay the debt. A guarantor's undertaking is to pay the debt if the debtor cannot. A guarantor is never the maker of the note. The undertaking of a guarantor is collateral. In the case of a surety, there is a direct promise to perform the original contract; while a guarantor's promise is only to perform the promise of another in case he cannot perform.

It is true, in this case, that the guaranty is absolute, but it is the guaranty of the performance of a contract made by another. It is a guaranty that the other will pay what he has contracted to pay in the original obligation. It is true that the defendant waived demand, notice, and protest, yet he stood as one pledging his credit to secure the obligation of another. His promise was, therefore, collateral to the promise of the other. The original promise of the maker was to pay. The promise of the guarantor was that the maker would pay. He made no direct promise to pay. The simple legal import of his promise was to protect the promise of another; to make good the promise of the other. His promise, therefore, though, in a sense, original and absolute, was collateral, and his liability secondary. All right to enforce the agreement of the original promisor has been lost by lapse of time. Section 3060-a120, Code Supplement, 1913, provides that a person secondarily liable on the instrument is discharged by the discharge of a prior party. See 2 Randolph on Commercial Paper (2d Ed.), Chapter 26, Section 849, in which it is said:

"A guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is liable in the first instance. A guarantor differs from a surety in this: that a surety is liable absolutely as principal upon default."

See *Ayres v. Findley*, 1 Pa. St. 501.

"But he [guarantor] undertakes to pay the note if he is called upon to do so within a reasonable time after its maturity and dishonor." *Parkman v. Brewster*, 15 Gray (Mass.) 271.

In *Moore v. Holt*, 10 Gratt. (Va.) 284, it is said:

"A guaranty is a collateral engagement or undertaking to be responsible for the debt of another upon his failure to perform his engagement. The surety's promise is to pay a debt which becomes his own debt, when the principal fails to pay it. * * * But the guarantor's debt is always to pay the debt of another." 2 Parson on Notes & Bills, 118.

The author says, also, that the surety's undertaking is to pay if the debtor cannot.

A surety is usually bound with his principal, in the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning. Usually, he will not be protected either by a mere indulgence of the principal or by want of notice of default of the principal, no matter how much he may be injured thereby.

In *Kearns v. Montgomery*, 4 W. Va. 29, 40, it is said:

"The contract of a guarantor is collateral and secondary. It differs in that respect generally from the contract of a surety which is direct; and in general, the guarantor contracts to pay, if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default."

A guaranty is a contract by one person to another for the fulfillment of a promise of a third person. *Andrews & Co. v. Tedford*, 37 Iowa 314. A guarantor is, in a sense, a surety, and may avail himself of any defense, to the same extent as the principal. *Conger & Michael v. Babbet*, 67 Iowa 13. A guarantor is one who becomes bound for a prior or collateral contract upon which the principal alone

is bound. A surety is one who joins with his principal in the execution of a contract, and becomes primarily liable thereon. A guarantor is not primarily liable upon his principal's contract, and only becomes liable upon default of the latter. *Singer Mfg. Co. v. Littler*, 56 Iowa 601.

We have said this much because we think this case is controlled and ruled by what was said by this court in *Auchampaugh v. Schmidt*, 70 Iowa 642, in which it was held that a claim which is barred by the

2. GUARANTY: Limitation of actions: non-resident guarantor discharged by bar of statute against maker of note. statute of limitations, as against the principal debtor, is, by reason thereof, barred also as against the surety. In that case, like the case at bar, the surety was a non-resident, and as to him, under the statute, the suit was not barred. The maker of the note, however, was a resident of this state, and as to him an action was barred. The surety pleaded the bar against the maker as available to himself as surety, and his contention was sustained. This case has stood unchallenged in this court over 30 years. Some cases, however, hold to a different doctrine. See *Willis & Bro. v. Chowning*, 90 Tex. 617 (40 S. W. 395, 59 Am. St. 842, and notes to the case as reported in 59 Am. St.). See, also, 12 Ruling Case Law, under the head of "Guaranty," Sections 52 and 55.

We see no reason, however, for departing, at this time, from the holding in the *Auchampaugh* case, *supra*. Nor is there any sound reason why the rule as laid down in this case does not apply to a guarantor. He, like the surety, may avail himself of any defenses that were open to his principal. By the laches of the plaintiff, the maker and his estate have been relieved of the obligation of the original contract. As said in the *Auchampaugh* case, the original maker is relieved from setting up any meritorious defense which he may have had, and his estate is permitted to rely upon the technical defense of the statute alone. His estate

was, therefore, no longer under obligation to preserve the evidence of the meritorious defense, if any; so the court will not inquire whether he had a meritorious defense. The statute is a statute of repose. It follows, from the logic of that case, that this guarantor, who had a right to set up any defense which the original maker of the note might have urged against the note, is also not required to preserve the evidence of that defense after the principal was not bound to do so.

All the reasons that support the *Auchampaugh* case can be urged, with even greater reason, in favor of the guarantor. Following the rule in the *Auchampaugh* case, we think the court was wrong in entering judgment against this defendant. His plea should have been sustained and the cause dismissed. As plaintiff had no enforceable claim against this defendant, it is immaterial whether the transfer of the real estate was made to the other defendant without consideration or not. The cause is reversed, with direction to sustain defendant's plea of the statute of limitations, and to dismiss the cause as to both defendants.—*Reversed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

E. J. HEISEL, Appellee, v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY et al., Appellants.

CARRIERS: Carriage of Live Stock—Delay by Initial Carrier. In

- 1 an action by shipper for damage to shipment of horses, due to delay, against the initial and connecting carriers, where the negligence of the initial carrier contributed to the delay, although the greater part of delay was on the line of the connecting carrier, it could not be held, as a matter of law, that there was no liability on the part of the initial carrier.

CARRIERS: Carriage of Live Stock—Twenty-Eight Hour Law—

- 2 Evidence. Where an initial carrier had in its possession a shipment of horses less than 28 hours, it was error to submit to the

jury, as against it, the issue of negligence in not unloading the shipment as required under the 28-hour law.

CARRIERS: Carriage of Live Stock—Shipping Contract—With Reasonable Dispatch—Evidence. Where the shipping contract provided that the carrier was not required to transport shipment of horses on any particular train, or for any particular market, or otherwise than with *reasonable dispatch*, the statement of the carrier's agent as to the time when the shipment would reach its destination, not offered or admitted as tending to show any *other contract*, was competent and material, as bearing upon the question whether the shipment had been carried *with reasonable dispatch*, and was not inadmissible as tending to show a promise of special facilities, or as varying the terms of a written contract.

TRIAL: Instructions—Damages to Shipment of Horses—Province of Jury. An instruction, in action for damages to shipment of horses, as to damages, *based upon the fair market value*, held proper, and not as making the evidence introduced conclusive on the jury.

APPEAL AND ERROR: Exclusion of Question—Failure to Show What Answer Would Have Been. Where the records fail to show what the answer to a disallowed question would have been, no error is presented on appeal.

CARRIERS: Carriage of Live Stock—Twenty-Eight Hour Law—Duty Not Dependent on Demand of Caretaker. The duty of the carrier to unload a shipment of live stock under the 28-hour law is not in any way affected by the fact that the caretaker with the horses fails to demand that they be unloaded.

CARRIERS: Carriage of Live Stock—Knowledge of Time in Carriage over Other Line—Carrying with Due Dispatch. Where the connecting carrier, to whom a shipment of horses was transferred by an initial carrier, knew, at the time of their delivery to it, that the shipment had been in the course of carriage for 24 hours, it should have realized that reasonable care for the carriage over the remainder of the route required that the car be picked up and forwarded with all due dispatch.

CARRIERS: Carriage of Live Stock—Delay in Shipment—Sufficiency of Evidence. Evidence reviewed, and held sufficient to sustain finding that delay of connecting carrier was proximate cause of injury to horses, in action for damages due to delay in shipment of horses.

Appeal from Mahaska District Court.—J. F. TALBOTT,
Judge.

MARCH 21, 1919.

ACTION at law to recover damages on account of alleged negligence in the transportation of freight. Judgment for plaintiff, and defendants appeal.—*Reversed in part; affirmed in part.*

F. W. Sargent and Burrell & Devitt, for appellants.

McCoy & McCoy and S. V. Reynolds, for appellee.

WEAVER, J.—The plaintiff is a dealer in horses, at Fremont, Mahaska County, Iowa, a station on the line of the Minneapolis & St. Louis Railroad Company, a common carrier. The Chicago, Rock Island & Pacific is also a common carrier, on whose line in Kossuth County is the station of Titonka. At the time now in question, the property and business of the last-named company were in the charge and control of a receiver, Jacob M. Dickinson. For convenient reference in this opinion, the last above-named carrier will be spoken of as the "Rock Island Company," and the other, as the "M. & St. L." At 7:00 o'clock A. M. of October 22, 1915, plaintiff delivered to the Rock Island Company at Titonka six stallions, to be transported to Fremont. The route contemplated and followed was over the Rock Island from Titonka to a connection with the M. & St. L. at Abbott Junction, and thence over the latter road to Fremont, a distance of 189 miles. The car arrived at Fremont at 3:20 P. M., of October 24, 1915, and the horses were delivered to plaintiff at 5 P. M. of that day, making a period of 58 hours between the beginning of the journey and the delivery at the destination, during which time the carrier did not unload the horses for rest, water, or feeding.

On delivery of the animals at Fremont, and the pay-

ment of charges, the agent of the M. and St. L. at Fremont receipted the freight bill in the following form:

“Received payment for the company191....
Total \$40.55. Badly delayed in transit.

“J. A. Page, Agent.

“Per J. A. P., Cashier.”

It appears without substantial dispute that, when received at Fremont, the horses all appeared stiff and worn; that one was then sick, and died within a day or two; and that another developed pneumonia, and was under treatment for a considerable period. Thereafter, plaintiff gave to each of the defendants written notice of his demand for damages which he alleged he had sustained by reason of the unreasonable delay in the transportation of his horses and the failure of the said carrier to unload the horses, as provided by law. After some ineffectual effort at an adjustment of the claim, the plaintiff brought his action at law, March 17, 1916.

In his petition, he sets forth the fact of the shipment and alleges that the usual time required for the transportation did not exceed 15 hours; that, in disregard of the carrier's duty in this respect, the trip was not completed for a period of nearly 60 hours; and that in violation of their statutory obligations not to keep the horses confined in the car more than 28 hours at a time without unloading for rest, defendants did not unload them at any time during said transportation; and that, as a result of such negligence and violation of law, plaintiff sustained damages to the amount of \$1,500, for which he demands a recovery.

The defendants deny the allegations of the petition, set up the written contract for the shipment, and allege their own compliance therewith in all respects. They further plead that a caretaker employed by the plaintiff accompanied the shipment, and that, if the horses were damaged in

transit, it was due to his fault, and not to that of the defendants.

There was a trial to a jury, and a verdict returned for the plaintiff for \$1,350.

As the liability of the several defendants upon the claim asserted by the plaintiff is not necessarily identical or co-extensive, we shall consider the issues separately.

I. There is some question raised as to the effect of the receivership upon the liability of the Rock Island Company; but, in view of our conclusion hereinafter stated, we think it unnecessary to pass upon that question. If this company (or its receiver) is to be held liable, it must be because of some failure of duty which is owed to the plaintiff, and not because of any act or omission on the part of the M. & St. L. after the car was delivered into its custody. In other words, to recover from the Rock Island, it must be because of its own independent negligence, or because from its negligence, in combination with the negligence of its codefendant, the alleged injury to the horses was received. It will be observed from the foregoing statement of the issues that plaintiff bases his claim to recovery on two grounds: (1) That there was unreasonable delay in the transportation; and (2) that the horses were confined in the car more than 28 hours, without being unloaded for rest, as provided by statute.

The trial court submitted both issues to the jury, as against both defendants. The verdict was general in form against both. The Rock Island Company insists that the evidence is, as a matter of law, insufficient to charge it with responsibility for the delay in the transportation or the retention of the horses in the car for more than 28 hours.

So far as relates to the delay above, it is accepted without dispute that the train from Titonka was at least two hours behind its scheduled time in arriving at Abbott Junction, where the car was delivered to the M. & St. L. It was

due at that point at 7:05 A. M., in time for the car to have been taken up by a freight train due to pass the junction south on the M. & St. L. at 7:40 A. M., and to reach Marshalltown at 10:45 A. M., in time for a connection there which would land the shipment at Fremont during the afternoon of the same day.

That there was an unreasonable delay in the transportation from Titonka to Fremont is scarcely open to doubt, and there was evidence from which the jury could

properly find that the failure of the Rock Island to deliver the shipment to the M. & St. L. on time contributed thereto. It follows, therefore, that the court could not properly hold, as a matter of law, that the Rock Island incurred no liability for the injury resulting from the delay, although the greater part of such delay was suffered on the line of the other defendant.

But when we take up the Rock Island's further objection, that the court erred in submitting to the jury the question of that company's liability for the confinement of the horses in the car for more than 28 hours,

without unloading them for rest, the appellee's case is much less clear. As we have seen, the car was taken up by this company at Titonka at 7:00 A. M. of October 22d.

and was due at Abbott Junction at 7:05 A. M. of October 23d, an interval of but 24 hours and 5 minutes. It was, in fact, placed upon the M. & St. L.'s transfer track at 9:10 A. M., making the entire time during which the shipment was in the hands of the Rock Island, 26 hours and 10 minutes. About an hour after it was placed on the transfer, an M. & St. L. train, arriving from the north, hitched onto the car in question, moved it about, but finally went on, leaving it at the junction. From all this, it seems certain that the entire period during which the car of horses was actually

1. CARRIERS: carriage of live stock: delay by initial carrier.

2. CARRIERS: carriage of live stock: twenty-eight hour law: evidence.

or constructively in the possession of the Rock Island did not exceed 28 hours. It must be said, therefore, that there is no evidence of a violation by this company of the statute prescribing that limit to the carriage of live stock without unloading; and this issue, as against it, should not have been submitted to the jury.

II. The shipping contract provides that the carrier does not agree to transport the shipment on any particular train, or in time for any particular market, or otherwise than with reasonable dispatch. On the trial below, the plaintiff was permitted to show, over the defendant's objections, that, in applying to the station agent at Titonka, to arrange for the shipment of the horses, he inquired of the agent of the time when the horses would arrive at Fremont, and the agent informed him that, if shipped by way of Abbott Crossing, they would reach their destination on the morning of October 23d. Error is assigned upon admission of this evidence, as being in violation of the law which prohibits the furnishing of extra or special facilities to one shipper, which are not extended to shippers usually; also as tending to vary the terms of the written contract, which provides, as above stated, that the carrier did not undertake to transport the shipment by any particular train or for any particular market.

The objection is not well taken. The evidence was not offered or admitted as tending to show any other contract than the one embodied in the writing. While the carrier did not undertake to carry this shipment by any particular or designated train, or in time for any particular market, it did undertake to transport it with "reasonable dispatch." Indeed, had the writing not expressed it, that obligation would still be implied, as a matter of law. Failure, if any, to observe such obligations was negligence, and testimony of statements and representations of the carrier to the

3. CARRIERS: carriage of live stock: shipping contract: with reasonable dispatch: evidence.

shipper as to the time required for the performance of the duty it assumed, was competent and material evidence on the issue of negligence. 10 Corpus Juris, Section 434, p. 302; *Missouri, K. & T. R. Co. v. Stanfield*, 40 Tex. Civ. App. 385 (90 S. W. 517); *Sloop v. Wabash R. Co.*, 117 Mo. App. 204 (84 S. W. 111).

It also has some bearing on the situation in this particular case that the shipping contract was not reduced to writing or signed and delivered until after the shipment had been delivered, and was in its course of transit and at the town of Garner. The testimony objected to was not obnoxious to the rule against parol evidence to change or add to the terms of a written contract, nor does it in the least tend to show any undertaking or promise to extend to plaintiff any special favor, facility, or advantage not accorded to the public, or shippers in general.

III. Error is assigned upon the giving of Paragraph 19 of the court's charge to the jury, reading as follows:

"If you find for the plaintiff, and that he is entitled to recover for the loss of the stallion that died, you will allow him, as damages therefor, the reasonable, fair market value of said stallion, as shown by the evidence; and if you find that he is entitled to recover for the injury to the other stallions, you will allow him as damages the differences between the reasonable, fair value of said stallions in the condition they were in immediately after transportation, as shown by evidence, and the reasonable, fair value of said stallions as it would have been had they been transported and delivered to plaintiff without negligence on the part of the defendants in transportation, as shown by the evidence."

4. TRIAL: instructions: damages to shipment of horses: province of jury.

The exception taken to this instruction is that it "makes the evidence of value conclusive on the jury," and is, therefore, inconsistent with our holding in *Fowle v. Par-*

sons, 160 Iowa 454, and others of that class, where it is said, in substance, that testimony as to values and expert testimony generally upon such subjects is not necessarily conclusive, but that jurors, in disposing of the question, may exercise their judgments as reasonable men, in the light of common knowledge and the common experiences of mankind.

The objection indicates a lack of appreciation of the rule so invoked, or a desire that we shall extend it far beyond what any authority has yet held. No precedent cited gives any support to the idea that, without any evidence on the subject, the jury may proceed to assess values or damages, guided only by the inner light of its own judgment; but rather, the question of values being, in the last analysis, a question of opinion and judgment only, the jurors are not required to accept the estimate of any one or more witnesses as conclusive, but, taking into consideration such testimony, and all of it, and giving it that weight and influence, much or little, to which they believe it fairly entitled, under all the proved facts and circumstances, they may therefrom,—that is, from the evidence in the case,—reach that conclusion which best satisfies their own judgments, whether it does or does not coincide with the views expressed by any particular witness. In every case, a proper verdict upon any disputed question of fact is one which depends upon the evidence for its justification. The instruction here challenged is in strict accord with this view, and the objection thereto cannot be sustained.

Had the appellant desired the court to go further, and give more particular attention to the rule applied in the *Fowle* case, *supra*, and in *Moore v. Chicago, R. I. & P. R. Co.*, 151 Iowa 353, 360, the court might very properly have granted the request; but the verdict as it stands shows no error.

The instruction as given does not, as counsel argues,

deprive the jury of power to pass on the weight of such opinion evidence, nor does it, in substance or effect, tell the jury that the evidence of value was conclusive.

IV. Upon his cross-examination, the plaintiff was asked what he paid for the stallions at Titonka, and upon plaintiff's objection, the evidence was excluded. There

5. APPEAL AND ERROR: exclusion of question: failure to show what answer would have been.

is nothing in the record to indicate what the witness would have answered, had he been permitted to speak, nor did appellants show or offer to show what they expected to develop or disclose by the evidence in this respect. While the court might very well have overruled the objection and allowed the witness to answer, it is thoroughly well settled that a record such as here made shows no reversible error. *Arnold v. Livingston*, 155 Iowa 601, 606; *Porter v. Moles*, 151 Iowa 279, 281; *Gittings v. Duncan*, 164 Iowa 373; *Woods Co. v. Chicago, R. I. & P. R. Co.*, 161 Iowa 639, 641.

V. It appears affirmatively that neither defendant had any facility or convenience for unloading and resting stock at Abbott Crossing. There is no showing that, after taking the car into its possession, the M. & St. L., by its agents or trainmen, put the car anywhere into position to be unloaded until it finally reached Fremont, or that they or any of them at any time offered or proposed to the caretaker so to do. The plaintiff himself was not with the shipment, and there is no evidence that he requested or directed the carriers to ignore the provisions of the statute, or that he authorized the caretaker so to do, or that the caretaker did, in fact, request or direct such course of action by the carrier. The most that is urged in argument is that the caretaker did not demand that the horses be unloaded and rested, and because of this failure so to do, the plaintiff cannot

6. CARRIERS: carriage of live stock: twenty-eight hour law: duty not dependent on demand of caretaker.

complain of the negligence of the carriers. The duty of the carrier to obey the statute was not at all dependent on a demand by the plaintiff's servant. Plaintiff had the right, in delivering the shipment to the carrier, to assume that the carrier would obey the law. Even an agreement between the caretaker and the carrier to disobey the law would not affect the plaintiff's rights, unless it should appear that the caretaker was acting by his authority; the carrier cannot be allowed to escape liability for its disobedience of a mandatory law because of a failure to protest by the servant of one who suffers injury therefrom. Furthermore, the court did instruct the jury that the defendant was not bound to unload the horses if they were carried in a car that afforded them proper space and opportunity to rest.

VI. But, passing the question of negligence in failing to unload the horses *en route*, the negligence of the M. & St. L. in failure to forward the shipment with reasonable diligence and promptness is so clearly dem-

7. CARRIERS: carriage of live stock: knowledge of time in carriage over other line: carrying with due dispatch.

onstrated that other issues become of secondary importance. That there was such a failure was distinctly recognized by the carrier's own notation on its freight bill "Badly delayed in transit." Abbott Cross-

sing and Fremont are, as we have said, both on the line of the M. & St. L., and but 113 miles apart; and from the time the car was delivered to this company, on the morning of October 23d, to the delivery of the horses to the plaintiff, late in the afternoon of October 24th, covers a period of some 32 hours. There is evidence from which the jury could find that, while the car was left standing on the defendant's side track at Abbott Junction, two freight trains going south passed it by, and it was not until the third train picked it up, after two o'clock P. M., that it was started on its way; and even then, it was about 25 hours before it arrived at Fremont, and 27 hours before the

horses were delivered to the plaintiff. That a prompter transportation and earlier delivery were easily practicable, without any departure from the regular train schedule, is shown by the specific admission of record, which reads as follows:

"It is conceded by the parties that, on October 22, 23, and 24, 1915, the M. & St. L. freight train No. 96, which arrives at Abbott Crossing between 11:30 and 11:55 A. M., arriving in Marshalltown, Iowa, at 3:00 P. M., arrives in Oskaloosa at 7:05 P. M., leaves Oskaloosa at 8:30 P. M., arriving in Fremont at 9:10 P. M., the same day."

Transportation even upon this schedule should have avoided at least 18 hours of the delay. In considering what reasonable diligence required at the appellant's hands, the fact that these horses had been 24 hours or more in course of transportation when they were delivered to the M. & St. L. at the junction is not to be overlooked. Not that the M. & St. L. would be chargeable with negligence because of any delay on the part of the Rock Island Company; but the former company, knowing, as it did, that the horses had been in the course of carriage for an entire day of 24 hours or more, must also have realized, or should have realized, that, to some extent, the animals were already travel worn, and that reasonable care for their safe carriage over the remainder of the route required that the car be picked up and forwarded to its destination with all due dispatch. In saying that the M. & St. L. received the horses, knowing that they had already been carried from Titonka, we do not indulge in any mere presumption; for on the freight bill issued by the defendant, on which is noted, "Badly delayed in transit," there is a memorandum showing the day and hour when the car was loaded at Titonka, as well as the day and the hour when it was transferred at the junction.

That there was negligent delay on the part of the M. &

St. L. is too clear to admit of serious debate, and there is ample support for the jury's finding that such delay was the proximate cause of the injury to the

8. CARRIERS: carriage of live horses of which the plaintiff complains.

stock: delay in shipment: sufficiency of evidence.

Other objections argued by counsel, as far as they have any foundation on the subject, are controlled by the conclusion we have

already announced.

As against the defendant the Minneapolis & Saint Louis Railroad Company, we find there was no prejudicial error, and the judgment from which it appeals must be affirmed.

The judgment of the district court against the Rock Island Company and Dickinson, Receiver, will be reversed, and costs of such appeal will be taxed to the appellee. As against the Minneapolis & Saint Louis Railroad Company, the judgment is affirmed, and costs will be taxed to appellant.—*Reversed in part; affirmed in part.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

G. A. WATERMAN, Appellee, v. FRED E. WOOD, Appellant.

VENDOR AND PURCHASER: Presumptions—Possession—Evidence

1 —**Burden of Proof.** In the absence of other showing, the right to possession is in the holder of the legal title, and the burden of showing a superior right thereto is upon the party asserting it.

VENDOR AND PURCHASER: Possession—No Right until Purchaser Acquires Title.

2 A mere contract to sell and convey land at a future date confers no right of possession until the purchaser has acquired title in himself.

VENDOR AND PURCHASER: Possession—Consent of Vendor to

3 **Possession before Passing of Title.** While, prior to the passing of title under contract not providing for possession, purchaser could not, without the consent of the vendor, acquire the right of possession, yet if, after making the initial payment, and before

the delivery of deed, the vendor consents to the purchaser's entering into possession, the purchaser could rightfully hold such possession, pending the delivery of the deed or final adjudication of his rights.

PRINCIPAL AND AGENT: Powers of Agent—No Ratification Without Knowledge. To bind the owner of property by acts of agent in letting purchaser into possession, after an initial payment, but before delivery of deed, it must appear that the agent had authority from the owner; and, in the absence of knowledge on the part of the owner that the agent had so assumed to act in his behalf, there could be no ratification.

FORCIBLE ENTRY AND DETAINER: Right of Action—Against One Claiming Possession as Purchaser. The action of forcible entry and detainer will lie against one claiming possession, if he is unlawfully in possession.

FORCIBLE ENTRY AND DETAINER: Right of Action—Tenant at Will. A person who takes wrongful possession of property may become a tenant at will by being permitted to remain there 30 days or more, making it necessary to terminate his tenancy by statutory notice; but, his tenancy being so terminated, he is liable to eviction by summary proceedings.

APPEAL AND ERROR: Briefs—Improper Matter—Counsel Criticized. Conduct of counsel, in presenting immaterial matter, and in making vicious attack upon trial judge, in his brief, censured and criticised.

Appeal from Plymouth District Court.—WILLIAM HUTCHINSON, Judge.

MARCH 21, 1919.

ACTION to recover possession of a house and lot in the city of Le Mars. There was a trial to the court, a judgment for the plaintiff as prayed, and defendant appeals.—*Affirmed.*

T. M. Zink, for appellant.

Nelson Miller, for appellee.

WEAVER, J.—To a considerable extent, the facts are

not in dispute. George E. Richardson was a real estate agent in Le Mars, and had in his employment one A. L. Bowers. The plaintiff, Waterman, owned a house and lot in Le Mars, but, at the inception of the deal now in controversy, he was living in another state. The defendant, Wood, was a resident of Le Mars, and desired to purchase plaintiff's property, above mentioned. There was some talk or negotiation between the defendant and Bowers about the purchase of the property; but whether Bowers and his employer, Richardson, or either of them, was, at that time, the authorized agent of the plaintiff is a matter on which witnesses are not entirely agreed. Bowers testifies that he was first approached by defendant, who wished to know if he (Bowers) could get the property for him, and said he would pay \$1,500 for it, but would not pay any commission. Being then asked if he would object to Richardson and Bowers' getting a commission from Waterman, he answered in the negative. Thereupon, Richardson took up the matter with plaintiff by letter, and sought to arrange with him for a sale to Wood upon the terms of his offer. Plaintiff finally agreed to allow the sale to be made, but at first refused to pay a commission. Later, he consented to pay a commission of \$50. On receipt of defendant's letter to the foregoing effect, Bowers received from the defendant a first payment of \$100, and delivered to him a receipt as follows:

"Le Mars, Iowa, Feb. 22, 1916.

"Received of Fred Wood certificate of deposit for One Hundred Dollars endorsed as first payment on the purchase of the G. A. Waterman property, being the north sixty-five feet of Lots Seven and Eight in Block Two of South Side Addition to Le Mars, Iowa; the consideration being fifteen hundred dollars; balance of which is to be paid upon delivery of deed and abstract showing perfect title.

"Geo. E. Richardson, by A. L. Bowers."

On notice of this arrangement, plaintiff and wife made out a warranty deed of the property to defendant, dated March 6, 1916, and forwarded it to a bank at Le Mars, to be delivered on payment of the stipulated price. This deed excepted from its warranty any "liens which are or might be assessed against this property for paving or sewer." It further appears that, about the time the agreement was made between defendant and Bowers, the city council had begun proceedings for the pavement of the street in front of this property; but apparently, neither plaintiff nor defendant then knew or understood that the property had become subject to a lien for the special assessment to be levied for that purpose, though Bowers testified (and defendant denies) that the subject was mentioned, and it was orally agreed that the defendant should assume its payment. When the defendant went to the bank to make payment for the property, and found that the abstract of title tendered with the deed showed a lien for such special assessment, he demanded its removal or payment, as a condition precedent to his acceptance of the deed. He then deposited the full amount with the bank, with the receipt which had been given him by Bowers, instructing the bank to pay it over when the conditions named in the receipt were complied with. The dispute thus arising was continued by correspondence and by some ineffectual attempts at a compromise, covering a period of several months, until, at some stage of the controversy, before this suit was begun, plaintiff withdrew his deed from the bank, and refused to proceed further with the deal. The money deposited by the defendant still remains in the bank.

We now turn to facts more immediately connected with the possession of the property. When these negotiations were begun, the house and lot were occupied by a tenant of the plaintiff's, one Jones. On March 1, 1916, after the initial payment of \$100 by the defendant, but before plain-

tiff had deposited the deed in the bank, defendant, who was then occupying other leased premises, arranged with Jones to permit him to go into possession of the Waterman house and lot, and for Jones to occupy the place which defendant vacated. By what authority defendant thus assumed possession of the property before he acquired title thereto, the record is quite obscure. As a witness, defendant says:

"I moved into this property March 1, 1916. I had to give possession of the house I was in, March 1, 1916, and Mr. Jones could rent it; so I went to Mr. Bowers and asked him if he couldn't make some arrangement so as to trade houses with Jones, as Jones wanted to move into the house I was in; and Mr. Bowers made the arrangement. Mr. Bowers was not working for me, and I did not employ him to do any work for me in this matter."

On the other hand, Bowers says:

"Mr. Wood talked with me about moving into the property, and asked if I could give him possession, and I told him I could not. He asked me if I would see the tenant, Jones, and see what he would say about moving out, and I told him I would, and did. I cannot say how Wood came to move into the property, as that is all I had to do with it."

There is no evidence whatever that either Bowers or Richardson had been given any power or authority to transfer the possession to defendant before the transfer of title. On the contrary, the correspondence which followed between plaintiff and Richardson shows that plaintiff declared that defendant had entered into occupancy of the premises without authority or right, and insisted that Richardson proceed to dispossess him, if he failed to pay the purchase price and take the deed tendered to him. On March 8, 1917, plaintiff served defendant with a 30-day notice to vacate the premises, and on April 10, 1917, defendant being still in possession, plaintiff served him with a further written notice to quit the same within three days. Defendant

having refused to comply with said notice, plaintiff brought action against him in forcible entry and detainer before a justice of the peace, by filing a petition with the justice, setting forth his claim of title and defendant's alleged wrongful possession, and demanding his ouster therefrom. The defendant answered, alleging that he himself was "the absolute owner in fee simple" of the described property, and stating his version of the facts. Plaintiff then replied, denying the answer; and the justice of the peace, finding that an issue of title had been raised, certified the case to the district court for trial.

The foregoing statement embodies all the facts and testimony which are material to a determination of the appeal.

I. With these facts in mind, little discussion is needed upon the law governing the rights of the parties, so far as they are involved in the issues presented. The question to be decided is the right to the possession of the house and lot. The question of title is important only so far as it bears upon the right of possession. While

1. **VENDOR AND
PURCHASER:**
presumptions:
possession: evi-
dence: burden
of proof.

defendant pleads in his answer that he is the absolute owner of the fee of the property in dispute, it is conclusively shown that plaintiff still holds the legal title; and, if defendant is entitled to the possession, it must be because the possession he defends was acquired with plaintiff's consent, or by some contract therefor with him. In the absence of other showing, the right to the possession of land is in the holder of the legal title, and the burden of showing a superior right thereto is upon the party who asserts

2. **VENDOR AND
PURCHASER:**
possession: no
right until pur-
chaser acquires
title.

it. A mere contract or agreement, written or oral, to sell and convey at a future date, confers no right of possession upon the purchaser until the conveyance is complete: that is, until the purchaser has acquired title in himself. It

is, of course, competent for the parties to agree upon a delivery of possession before consummation of the deal by delivery of deed. Defendant in this case bottoms his

3. **VENDOR AND**

PURCHASER:

possession:

consent of ven-

dor to possession

before passing

of title.

claim to be a purchaser upon the written contract or receipt signed by Bowers in the name of Richardson. He insists that this paper embodies all the conditions of his purchase, and that nothing was omitted therefrom by oversight or mistake. As-

suming this to be correct, for the purposes of this case, it contains no provision or hint or suggestion that either party contemplated a delivery of possession until the purchase price was paid and title passed. Recognizing this situation, appellant claims and argues that, after the written receipt was delivered, and before appellee, who was then in a distant state, had made and forwarded the deed to the bank at Le Mars, plaintiff, by the act of Bowers or Richardson as his agent, did consent to his entering into the possession, and, such entry being lawful, and his tender of payment of the purchase price being sufficient, his possession cannot be made unlawful by plaintiff's refusal to deliver the deed according to the contract. If the record could fairly be said to establish these alleged facts, the defense would be perfect, and defendant could rightfully hold the possession so acquired, pending the delivery of the deed or the final adjudication of his right to such conveyance. But such is not the showing, and we find there is an entire failure of proof in support of this affirmative defense. There is no evidence that either Richardson or Bowers was the plaintiff's agent, having any authority with reference to this property, prior to the inception of the correspondence between Richardson and plaintiff concerning a sale to defendant. That correspondence would, however, sustain a finding that Richardson did then become plaintiff's agent for the sale of the property to defendant for the sum of \$1,500,

and it was in pursuance of this authority that Richardson, by Bowers, made the contract to sell and convey, as indicated in the receipt which we have already quoted in full. There is nothing in all the correspondence between plaintiff and Richardson, or plaintiff and the bank, which tends in the slightest degree to show authority in either Richardson or Bowers to control the possession of the property, pending the consummation of the deal, or to permit plaintiff to assume the possession before he acquired the title. On the contrary, the whole drift and import of plaintiff's letters strengthens and supports his assertion that he never gave such authority to anyone, it being his constant contention that defendant's possession was wrongful. If, finding him in possession, plaintiff refrained from beginning proceedings for his eviction, pending a possible settlement or adjustment of the dispute over the liability for the paving tax, and delay for more than 30 days might operate, under our statute, to convert the tenant's holding into a tenancy at will, still it could not make the original entry otherwise than wrongful, or destroy plaintiff's right, on failure of negotiations for a settlement, to terminate the tenancy at will by proper notice. Defendant's sole reliance for his right to take possession is upon the evidence that he asked Bowers to see the tenant, Jones, and arrange with him for the change, and that Bowers did so. All this may be admitted, but it proves nothing. To bind plaintiff by Bowers'

4. PRINCIPAL AND
AGENT: powers
of agent: no
ratification with-
out knowledge.

act, it must appear, expressly or by fair inference, that Bowers had authority therefor from plaintiff. For this conclusion there is no support in the record, and counsel's claim that there is evidence of a ratification by the plaintiff is equally unfounded. There is no evidence whatever that plaintiff knew or was ever informed that Bowers had assumed to so act in his behalf, and in the absence of such knowledge or notice, there could be no rat-

ification. It follows from what we have said that the trial court reached the right conclusion, and that its judgment should be affirmed.

II. The plaintiff filed a pleading in the district court, asking that the contract or receipt to which we have referred be reformed, to show that defendant assumed the payment of the paving tax; and the court in its decree found for the plaintiff on that issue, and ordered that the writing be so reformed. We are disposed to the view that, without regard to such reformation, plaintiff was entitled to the possession of the property, and for that reason, we have not discussed the merits of the dispute over the terms of the agreement in this respect. In our judgment, however, the evidence tends to show that, when the agreement was made, the fact that paving was contemplated was known and was discussed by the parties; but neither of them knew or supposed that proceedings had reached the point where the tax for such improvement had become a lien, and the deal was made on the supposition by both parties that the burden of such charge, when finally assessed, would fall upon the purchaser. It was only when the abstract of title tendered by plaintiff disclosed a lien already existing that defendant raised the objection that, under the agreement to give him a "perfect title," this lien should be removed by plaintiff. In other words, we find that the agreement was made upon the assumption that this tax was not a lien, and that the prospective burden of it would be borne by the defendant, and such being the case, the defendant suffers no wrong or prejudice by the reformation ordered by the trial court.

III. It is the theory of the appellant that, as he is claiming to hold possession as a purchaser, the action of forcible entry and detainer will not lie. The objection is

- without merit. A contract for the purchase of land, as we have seen, does not necessarily confer right of possession before conveyance; and, if a purchaser under a contract which does not provide for possession wrongfully assumes it, his contract does not make him immune against the remedies which would be appropriate against any other intruder. Again, as we have suggested in a preceding paragraph, one who takes wrongful possession may become a tenant at will, by reason of being permitted to remain therein 30 days or more, making it necessary for the owner to terminate such tenancy by the statutory notice. But, his tenancy being so terminated, his holding again becomes wrongful, and he is liable to eviction by summary proceedings. None of the authorities cited by appellant announce any rule or principle inconsistent with those which we have here applied.
5. **FORCIBLE ENTRY AND DETAINER:** right of action: against one claiming possession as purchaser.
6. **FORCIBLE ENTRY AND DETAINER:** right of action: tenant at will.

IV. During the trial below, there was an unfortunate clash between the court and counsel for defendant, with reference to the admissibility of certain evidence and the persistence of counsel in making a record of certain objections which the court seemed to think had already been sufficiently noted. The interchange of heated remarks culminated in an order temporarily excluding counsel from the court room. Later, counsel returned; and, the court having announced its finding for the plaintiff, counsel then complained that he had not been given proper opportunity to argue the case, and thereupon, the record of what occurred proceeds as follows:

7. **APPEAL AND ERROR:** briefs: improper matter: counsel criticised.

"The Court: Well, the case is decided. Mr. Zink: I don't know why this court has nothing to do but fight me. I have tried to treat you decently and fairly. I have not said a word in the trial of this case to which any court

could take any exception. You have ranted at me— The Court: That is all, Mr. Zink, that is all. The court will not listen to your lecture at this time. Mr. Zink: Well, you will listen at some other time,—you will have to listen. The Court: We are ready for the next case.”

The darkly hinted-at “some other time,” contained in the foregoing remark, seems to have had reference to the opportunity which an appeal to this court might afford to even up the account between counsel and court; for the brief of the former is liberally besprinkled with terms of gross disrespect to the trial court. The brief repeatedly refers to the trial court as “Hutchinson;” describes the court’s findings of fact as “absurd and untruthful;” quotes the court’s language, characterizing it as “ape-like reasoning;” and says that “shallower logic could not blow from an empty skull;” and declares that counsel “entertains such supreme contempt for Hutchinson it is awkward to credit him with such merit as he is entitled to.”

The record showing the occurrence in the trial below, to which we have referred, has been preserved and brought to this court by the appellant himself, and counsel’s vicious attacks upon the trial judge have been given frequent and prominent place in his brief; and, while they are wholly irrelevant to the merits of the case, we must assume that appellant desires us to give them some attention.

Courts are not immune against error, nor have we yet discovered any such saving quality in members of the profession, a part of whose inalienable privileges is the right to preserve and argue exceptions to adverse rulings. As a rule, members of the bar are self-respecting, fearless, and independent men, who know their rights and the rights of their clients, and how to protect themselves and their clients against the effect of erroneous adverse rulings, without indulging in gross disrespect to the court or scurrilous

abuse of the man who happens to occupy the bench; but unhappily, as this case demonstrates, there are exceptions. It is perhaps too much to expect of human nature that every vigorously contested case shall be tried without an occasional display of irritation on part of either court or counsel; but it is to the credit of the profession that few cherish resentments thus aroused, and fewer still so far forget what is due to their own dignity and standing (to say nothing of what is due to the court) as to proceed deliberately, when "the blood has had time to cool and reason to resume its sway," to place upon the permanent records of the court of which they are officers, the evidence of their malignant ill will. For such an act, there can be no justification, and we greatly regret that counsel should permit himself to assume such an attitude. As a sane man, and lawyer of long experience, he knows that, in passing upon the merits of his client's appeal, this court cannot permit much less give the effect of argument, to his coarse vilification of the trial judge, whose fault, if any, in so far as disclosed by this record, was his failure to resort to more drastic measures.

The appellee has refrained from any attempt to compete with opposing counsel in bandying words of abuse, and has entirely ignored that feature of appellant's brief. We also should pass it without notice, were it not that our silence might be taken as a precedent encouraging repetition of such offenses, against all the rules of propriety which are supposed to govern the conduct of reputable members of the bar in their relations to the courts in which they are allowed to practice. Such conduct cannot and will not be tolerated.

The merits of the case are clearly with the plaintiff, and the judgment below is, therefore, affirmed, with costs.—*Affirmed.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

CALVIN WILLIAMSON, Appellant, v. SUE ADELAIDE WILLIAMSON, Appellee.

DIVORCE: Alimony Made Subject to Invalid Mortgage. The court, in awarding a homestead to a wife as alimony, may make such homestead subject to a mortgage in favor of the creditor of the husband, even though such mortgage was invalid because not signed by the wife, and especially may the wife not question the foreclosure of such mortgage when she has never questioned the decree which awarded her the property.

Appeal from Scott District Court.—F. D. LETTS, Judge.

MARCH 21, 1919.

ACTION to foreclose a mortgage. Opinion states the facts. Decree dismissing plaintiff's petition in the court below. Plaintiff appeals.—*Reversed and remanded.*

Isaac Petersberger, for appellant.

Betty & Betty, and *J. A. Hanley*, for appellee.

GAYNOR, J.—This action is brought to foreclose a certain real estate mortgage executed and delivered by one Ralph Williamson to the plaintiff on the 24th day of July, 1916, given to secure two promissory notes, which then represented a valid indebtedness due from the said Ralph to the plaintiff (his father). Ralph was, at the time, a married man, and the property covered by the mortgage was his homestead. His wife did not join in the mortgage. She is the defendant herein, and claims that the mortgage is void for that reason.

It appears that Ralph and this defendant were married October 3, 1906, and soon after their marriage, entered into possession of this property, and occupied the same as a homestead,—that is, lived in it as a home,—until some time in August, 1914, when she left, and went to Texas.

She remained in Texas until some time in July, 1916, and then returned, and took up her home with her parents. About the time she returned, or just prior to the time she returned from Texas, divorce proceedings were commenced against her by her husband. She appeared, and filed a cross-petition. On the 17th day of March, 1917, a divorce was granted to her on her cross-petition. In this suit, she claimed and was awarded this homestead as alimony. The decree, however, recited that the defendant (the wife) had no money or property; that plaintiff (the husband) had title to the real estate now in controversy; that the real estate is subject to the mortgage now in controversy; that the indebtedness secured by the mortgage is a valid, subsisting indebtedness due from the husband to his father (the plaintiff herein). It was, therefore, ordered and adjudged that the real estate (meaning the homestead) be awarded to the wife, and that the husband execute to her a good and sufficient quitclaim deed therefor, subject to the mortgage, and then said:

"Provided, however, that the mortgage in favor of Calvin Williamson be confirmed and charged as a valid and subsisting lien against said real estate. Providing further, that the defendant take said real estate subject to the liens of the mortgages held by said Calvin Williamson."

At the time the decree was entered, neither husband nor wife was in the physical possession of this property. They were not occupying it as a home. It had been rented to and was in the possession of tenants, who occupied under a lease from the husband.

On the 2d day of April, 1917, in pursuance of the decree hereinbefore referred to, Ralph Williamson, the husband, executed and delivered to his wife a quitclaim deed to the premises in controversy, duly signed and acknowledged, conveying all his right in the property to her, subject to the mortgage of Calvin Williamson (plaintiff here-

in), and other charges, as per decree dated March 17, 1917, in the case of Ralph Williamson v. Sue Williamson. This deed was accepted by the wife; and, although she never took physical possession of the property or occupied it as a home, she caused the tenants in possession attorn to her, and thereafter, she collected the rentals.

In his petition, plaintiff pleads the notes and mortgage executed as aforesaid, and this decree, and asks that the mortgage be declared a lien upon the property in controversy, superior to any claim of this defendant, and that a special execution issue for the sale of the property.

This case involves the effect of this decree upon the rights of this defendant. It is true that our statute provides (Section 2974 of the Code, 1897):

"No conveyance or incumbrance of the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument."

The only right this defendant (the wife) had in that property at the time was the right of possession,—the homestead right. It appears that neither had any property except this homestead, at the time the divorce proceedings were instituted, and that, in her petition, she claimed a right to alimony out of this property. The subject-matter and the parties were both, before the court. The husband's right in the property was that of fee owner. The wife's right in the property was the inchoate right of dower. Both had the homestead right. These rights were all before the court, at the time it undertook to make a disposition of the property in its decree, and it did make a disposition of it. This was in the nature of community property, and the equities and rights of the parties in this property were before the court for consideration and adjustment. The property equities of the parties were before the court for adjustment. The court had before it a full view of the parties and their circumstances, the prop-

erty each owned, and the interest each had in the property of the other. There was one child born to these parties, and the custody of this child was given to this defendant. The court undertook to decree only so much to the plaintiff, as alimony, as, upon a fair consideration of all the equities, seemed to the court to be just and right. She got no more and can hold no more than was given her by the decree. Upon the granting of the decree of divorce, all right that either had in the property of the other is taken away, except as we find it preserved in the decree. All the rights in this property came, as it were, into the court's hopper, to be ground out and distributed between the parties, and whatever in the grinding came to each, measured his right in the property thereafter. It was conceded, or not disputed, that the husband was indebted to his father in the amount represented by the notes and mortgage in controversy. Had there been no mortgage, the court, finding the husband without property except the homestead, might well grant to the wife the homestead upon condition that she pay a certain stipulated sum to the husband out of the thing granted, or to one of his creditors, and make it a lien on the thing granted. Through the grinding there came from the hopper to her only that which was left, after discharging these burdens. She took it under the decree. She took it with the burdens placed upon it by the decree. She holds it under a deed granting to her the thing, subject to the burdens. No appeal was ever taken from the decree. It stands as a verity. She accepted the property under the decree, with the burdens placed upon it by the decree, and she holds it now with the burdens which the decree placed upon it. The property belonged to her husband. The debt which the decree establishes as a lien upon the property, was her husband's debt. This debt was made, by the express terms of the decree, a lien upon this property. The court had jurisdiction of the defendant in this suit, and of

the subject-matter of the action and of the property affected by the lien. Whether the mortgage was void or not for the reason asserted by the defendant, the court recognized it as a valid mortgage; at least recognized the debt as a binding debt upon the husband, who was the owner of the property. It adjudged it to be a lien. It established it as a lien. It put it as a burden on the property, and gave to her the property, subject to the burden. She accepted it subject to the burden. Whether the decree in that case was right or wrong, it must be held valid in this suit. To allow her now to assert her homestead right is to allow her to assert a right inconsistent with the decree under which she holds the property. As bearing upon this question, though not directly deciding it, see *Hemenway v. Wood*, 53 Iowa 21; *Daniels v. Morris*, 54 Iowa 369; *Byers v. Byers*, 21 Iowa 268; *Werner v. Werner*, 59 Kans. 399 (68 Am. St. 372); *Rosholt v. Mehus*, 3 N. D. 513 (23 L. R. A. 239); *Luttschwager v. Fank*, 151 Iowa 55.

On the whole record, we think the court erred in dismissing plaintiff's petition, and the cause is reversed and remanded for a decree in accordance herewith.—*Reversed and remanded.*

LADD, C. J., EVANS and STEVENS, JJ., concur.

IN RE ESTATE OF THOMAS G. ORWIG.

DEEDS: Consideration—Presumption. It cannot be said that a deed
1 was without full consideration, when, in addition to the presumption of consideration, the deed recites a valuable consideration, and there is no evidence conflicting therewith.

DEEDS: Construction—Definite Description of Land—Explanatory
2 **Descriptions—Effect.** *Definite* descriptions in a deed of the property conveyed will prevail over added clauses which are simply attempts to explain that which the definite description has al-

ready made plain. So held where the deed first described the land by its platted *lot number*, and then added, "*commonly known as No. 1210 Pleasant St.*," it being held that the entire lot was conveyed, and not that part only which constituted No. 1210 Pleasant St.

EVANS and PRESTON, JJ., dissent.

DEEDS: Construction—Ipso Facto Assignment of Outstanding Con-
3 **tract.** A general, unrestricted warranty deed, on full and valuable consideration, *ipso facto* carries to the grantee the *ownership* of, and *obligation to perform*, an outstanding contract of the grantor wherein such grantor had agreed to convey a portion of said property to a third person upon the payment by said third party of a stipulated sum, said grantee having notice of such contract when he accepted his deed.

EVANS and PRESTON, JJ., dissent.

PRINCIPLE APPLIED: A father owned an undivided two thirds of a lot, and his daughter, the remaining one third. The father, a widower, contracted to convey a portion of the lot to one Stanton, after the said Stanton had paid a named sum by monthly installments. Stanton went into possession, and commenced to make his payments. Before the payments had been completed, the father died; but, just prior to his death, he, on a full and valuable consideration, and by a general, unrestricted warranty deed, conveyed his entire two-thirds interest in the lot to his sister. This sister had full notice of the outstanding contract with Stanton, but no reference was made to said contract in said deed. This sister ultimately obtained the one-third interest in the lot owned by the said daughter. After the death of the father, his administrator claimed that the Stanton contract was a part of the personal estate left by the father. The sister claimed that the warranty deed to her *ipso facto* carried to her the ownership of said contract.

Held, the sister's contention was correct.

EXECUTORS AND ADMINISTRATORS: Collection and Manage-
4 **ment of Estate—Instructions by Court.** Probate courts have authority to determine whether an administrator, etc., has any interest, legal or equitable, in property, and to direct its said officer accordingly.

Appeal from Polk District Court.—LAWRENCE DEGRAFF,
Judge.

MAY 20, 1918.

REHEARING DENIED MARCH 24, 1919.

THE opinion states the case. Rebecca H. Orwig appeals.—*Reversed.*

Thos. J. Guthrie, W. P. Bair, Joseph I. Brody, and Roy E. Curray, for appellant.

A. F. Brown, E. D. Marshall, and McLaughlin, Shankland & Lappen, for appellees.

LADD, J.—Thomas G. and Mary Orwig acquired title to Lot 1 of Hubbell's Subdivision of the northwest quarter of Lot No. 6 of Rose's Addition to the city of Des Moines, under a deed made to them prior to January 1, 1907. In March, 1907, Mary Orwig died, leaving as her only heirs, her husband, Thomas G., and her daughter, Mabel Sweet. By operation of law, therefore, Thomas G. became owner of two thirds of the lot, and Mabel Sweet of one third thereof. On the 1st day of June of the same year, Thomas G. Orwig entered into a contract with George and Mary Stanton to convey the south 42 feet of said Lot 1, upon the payment of the purchase price of \$1,200, in installments of \$12.50 each, on the first day of each and every month, beginning June 1, 1907. On May 24, 1911, Thomas G. Orwig, being then a single man, executed to Rebecca H. Orwig a warranty deed, reciting "a consideration of labor performed by the grantee herein and for other good and valuable consideration," and describing the property conveyed as "Lot 1 of Hubbell's Addition of the N. W. quarter of Lot 6 of Rose's Addition to Fort Des Moines, commonly known as Number 1210 Pleasant Street." Subsequent to the recording of this deed, suit was instituted by Mabel Sweet against Rebecca H. Orwig, and, on hearing, decree was entered, deciding that the deed was valid, and given for a good con-

sideration. Thereafter, and on February 26, 1913, Mabel Sweet executed a deed conveying to Rebecca H. Orwig the grantor's undivided one third of said Lot 1. The Stantons had gone into possession, at the time of the contract between them and Thomas G. Orwig, and had so continued since; and, though having paid nearly \$500 on the contract, suspended payment for a time, and later tendered payment of installments to the administrator of Thomas G. Orwig. The administrator reported these facts to the court, and that four claims filed against the estate of Orwig were unpaid, and prayed for instructions as to whether the contract with the Stantons was an asset of the estate, and should be collected as such, or whether it belonged to Rebecca H. Orwig. The latter pleaded the warranty deed from Orwig and the quitclaim deed from Mabel Sweet, and that, under the former, she (Miss Orwig) acquired the interest of decedent in the contract with the Stantons, and she prayed that the administrator be instructed to turn over to her the said contract and the moneys collected thereon. The sole issue, then, is whether the contract with the Stantons passed to Rebecca H. Orwig by virtue of the warranty deed from Thomas G. Orwig.

I. The deed from decedent to Miss Orwig recites a valuable consideration; and that there was such is not questioned by any pleading. Moreover, a valuable consideration is to be presumed. Though the grantee, in testifying, spoke of decedent's promise, often repeated, to give her the property, and of his having given her the deed, it appeared that she had worked in grantor's office from March, 1907, until September, 1911, and had kept house for him during this period, and until his death. This evidence is not necessarily inconsistent with the "consideration of labor performed by the grantee herein," recited in the deed. In these circum-

1. **DEEDS: consid-
eration: pre-
sumption.**

stances, it cannot well be ruled that the deed was without full consideration.

II. Appellees contend that the deed conveyed only that portion of the lot not occupied by the Stantons, i. e., Lot No. 1210. The description contained is not subject to this construction:

“Lot 1 of Hubbell’s Subdivision of the N. W. quarter of Lot 6 of Rose’s Addition to Fort Des Moines, commonly known as Number 1210 Pleasant St. Excepting an undivided two-sixths (2/6) thereof, which belongs to Mabel S. Sweet, and reserving to myself an estate in said real property for the rest of my natural life. And I hereby covenant with the said Rebecca H. Orwig that I hold said premises by good and perfect title; that I have good right and lawful authority to sell the same and that they are free and clear from all incumbrances whatsoever, excepting one mortgage of \$500 to the Iowa Loan & Trust Company, dated March 15, 1907, and a second mortgage to the Iowa Loan & Trust Company for \$300, dated October 5, 1910. And I covenant to warrant and defend the said premises against the lawful claim of all persons whomsoever.

2. DEEDS: construction: definite description of land: explanatory descriptions: effect.

“Signed this 24th day of May, 1911.”

It will be noted that the description of the lot is complete without the added words, “*commonly known as Number 1210 Pleasant St.*” The italics are ours. This clause must be rejected, for that the preceding description of the property granted is clear and unambiguous, and the clause in italics does not limit or restrict such description. The rule prevailing in this state is well stated by Cole, J., in *Barney v. Miller*, 18 Iowa 460:

“Where a deed of conveyance contains a general description of the property conveyed, which is definite and certain in itself, and is followed by a particular descrip-

tion also, such particular description will not limit or restrict the grant which is clear and unambiguous by the general description. * * * This is a rule of construction, and is, of course, limited to the cases which are within it. Where the general description is indefinite and uncertain, and reference to the particular description must be had, in order to ascertain with certainty the subject of the grant, in such cases, the rule does not apply. But, then, the whole language will be taken together, and though it may be ambiguous, or even contradictory, if, upon the whole instrument, there is sufficient to manifest the intention of the parties with reasonable certainty, that will suffice."

See, also, as laying down the same rule, *Marshall v. McLean*, 3 G. Greene 363, and *Cummings v. Browne*, 61 Iowa 385. The italicised words are merely by way of explanation or reference, and as such, do not impair or destroy the specific grant preceding. The authorities are uniform in so declaring.

In *Hobbs v. Payson*, 85 Me. 498 (27 Atl. 519), the description was of "all my right, title, and interest in and to all real estate situated in Hope, Warren and Union [Counties]," to which was added, "meaning to convey all my right, title, and interest in the real estate formerly occupied by me," and the latter clause was held not to limit the grant to such estate only, the court saying:

"It rather makes sure that such lands were to be included with those of which the grantor had the visible occupation. They are words of inclusion, and not of exclusion. Words of reference or of explanation never destroy a specific grant. * * * They are useful where the description is imperfect, and where it is aided rather than controlled by them."

In *Barksdale v. Barksdale*, 92 Miss. 166 (45 So. 615), the grant was of "all the land bequeathed to me by the will of my uncle, Hickerson H. Barksdale. All of said lands are

lying and being situated in said Grenada County, known as the Minter Place, and state of Mississippi." The grantor had acquired a tract of land in that county other than "Minter Place," under a will; and, in deciding that it passed under the deed, notwithstanding the expression, "known as the Minter Place," the court said, in part:

"It is perfectly plain that 'all said lauds' are in Grenada County, Mississippi. The general rule that, 'where a general description is followed by a particular description, the particular description controls, and the other will be rejected,' is, of course, thoroughly sound; but in every such case, the particular description must be, not a redescription merely, but a second limiting description, a second granting clause. Where the alleged second description in no way limits or cuts down the area of the general granting clause, perfect in itself, then such alleged second description is nothing more nor less than a redescription, a mere reiteration, an effort to give to the land embraced in the general grant some other name by which it may be known in a community, without any purpose in mind to cut down from the extent and area of the perfectly correct general grant. What have we here that is relied on to cut down this good, this perfect, description in the general grant? Nothing save the mere participial phrase, carelessly thrown in, 'known as the Minter Place.' It would be sacrificing substance to form, it would be an utter disregard of the plain intent of the grantor, to say that, after he had plainly declared his purpose to convey all the lands in Grenada County, state of Mississippi, devised to him by his uncle, he had cut down a perfect grant by the careless use of the mere participial phrase, 'known as the Minter Place.' The general principle to which we have above referred had no application to the language of this deed. This is a mere reiteration or attempted redescription of what had already been perfectly conveyed. It does not carve out of the original

grant, or except from the original grant, by a particular description of any kind, any part or parcel of that original grant."

In *Friedman v. Nelson*, 53 Cal. 589, the description was:

"All that beach and water property lying between Folsom Street on the north, Ship's Channel on the east, the city limits on the south, and Price Street on the west, and known on the said map as Blocks Nos. one (1) to thirty-two (32) inclusive."

The land first described was held to have passed, rather than the 32 blocks mentioned. See, also, *Lord v. Wentworth*, 68 N. H. 610 (36 Atl. 17); *Rutherford v. Tracy*, 48 Mo. 325 (8 Am. R. 104).

The description in the deed, being clear and unambiguous, was not limited or restricted by italicised words, and the entire lot passed under the deed, and there was no occasion to resort to extrinsic evidence.

III. Did the warranty deed carry the grantor's rights under the contract with the Stantons?

Upon the execution of the contract of sale to the latter, an equitable interest in the land passed to the purchasers, and, for the purposes of descent and taxation, the interest of

decendent must have been treated as personal property. But the vendor retained the fee, and was entitled to retain the same until the contract of purchase should be performed.

It might have been forfeited by the vendor for nonpayment, and thereby the purchaser's interest barred in a summary manner. Thus the vendor's interest in the land is much larger than that of a mere mortgagee, and savors so strongly of ownership that a conveyance of the fee upon a valuable consideration is held to carry with it the right to enforce the terms of the contract in connection with the obligation to perform its terms. This

3. DEEDS: construction: *pro facto* assignment of outstanding contract.

appears from *Ten Eick v. Simpson*, 1 Sandf. Ch. (N. Y.) 244. There, William Simpson contracted to convey the land, upon the payment of the purchase price, to Gamsey Hickox. William subsequently conveyed the land to John Simpson. Thereafter, Hickox assigned the contract to Ten Eick. The latter paid the purchase price to William by executing to him a note, and thereafter demanded a conveyance from John, one of whose defenses was that Ten Eick had never tendered the purchase price to him. It appeared that John had paid William fully for the land. The court, in deciding that John was entitled to the purchase price, observed that the assignee of the contract of sale—

“Was entitled to the conveyance from John; and why? Because William had sold and conveyed the land to John, charged with Hickox’s equitable right. By that same conveyance, William admits that he received the price of all the land included in it. He thus ceased to have any interest in the subject-matter, save his personal liability on the contract, and in that he became the surety for John. John therefore had the estate, and he had paid for it. Hickox had an equitable claim for a deed of this small parcel, on paying the stipulated price to William and his assigns. John had become ‘his assigns,’ by the deed of the estate. And when the time arrived for Hickox to pay the price of his purchase, he was bound to pay it to John, as well by the mere letter of his contract as because he looked to John for a fulfillment of its obligation. The same duty rested upon the complainant, because he became the assignee of Hickox’s liabilities, as well as his rights, in the subject-matter; and he also had actual notice of the conveyance by William to John. The complainant applied to John as ‘the assigns’ of William, for a conveyance. The same act which enabled him to make that application entitled John to the purchase money. The complainant cannot say that John was ‘the assigns’ for one purpose and not for the other. After the

contract was executed, William became, in equity, the trustee of the land for Hickox, having a lien thereon for the purchase money. On his conveying the land to John, with notice of the trust, John became such trustee in equity in his stead, and the lien for the purchase money passed to him, along with the burden of the trust."

In *Taylor v. Stibbert*, 2 Ves. Jr., 437, 439, the vendee of the land with notice was held bound in all respects as the vendor had been, the chancellor (Lord Loughborough) saying:

"The rule that affects the purchaser is just as plain as that which would entitle the plaintiff to specific performance against Wood [the original vendor]; if he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree."

These decisions have been quite generally followed, and the rule established by the weight of authority is that a general warranty deed, without limitation, reservation, or exception, and in full consideration, presumed or proven, conveys all the grantor's title to and interest in the realty described therein, including the right of retention of such title and interest, in order to perform a contract of sale to a third party upon the payment of the purchase price of which the vendee is charged with notice, and operates as a transfer of the right to the unpaid purchase money then owed on said contract to the grantor. *Witt v. Boothe*, 98 Kan. 554 (158 Pac. 851); *Mutual Aid B. & L. Co. v. Gashe*, 56 Ohio St. 273 (46 N. E. 985); *Meyers v. Markham*, 90 Minn. 230 (96 N. W. 335); *Southern B. & L. Assn. v. Page*, 46 W. Va. 302 (33 S. E. 336); 39 Cyc. 1604. See *Dickey v. Lyon*, 19 Iowa 544, and *In re Estate of Miller*, 142 Iowa 663.

If the contract of sale previously had been assigned by the vendor to another, or promissory notes evidencing the purchase price had been negotiated, and consideration

in whole or in part withheld in lieu of the price, a different proposition would be presented. *Georgia State B. & L. Assn. v. Faison*, 114 Ga. 655 (40 S. E. 760); *Conner v. Banks*, 18 Ala. 42. But no such question is involved here. Decedent retained the contract of sale until his death, and nothing in the deed by him to his sister or in the record before us evidences any purpose that vendor's interest in said contract and right to the remainder of the purchase money should not pass under said deed.

It may be that a naked warranty deed, without more, will not carry to the grantee the purchase price promised for the land as against existing creditors of the grantor, but the purchase price is transferred by deed on valuable consideration if the deed of the grantee is due upon the payment of the price promised his grantor. If this be not so, then, if the purchase price is substantially equal to the value of the land, the grantee by deed gets nothing by the deed save an obligation to convey to the buyer, and if it be the contract that a warranty deed be made on payment of the price, the grantee from the maker of the contract gets none of the purchase price, but may be decreed to convey to the payer of said price with the covenants of warranty. It does not meet this argument to relegate such grantee to suit on the covenants of warranty in his deed, for the grantor may have been insolvent. The grantee should not be bound to assume the burden of carrying out the contract made by his grantor, except on receiving the consideration for that contract, in the absence of anything to indicate that such was the intention of the parties.

The consideration, such as it was, manifestly was thought by the grantor sufficient; and, in the absence of anything tending to show otherwise, he cannot be held to have intended to withhold from the operation of the deed the transfer of the contract, while burdening the grantee with the obligation to comply with its terms. In our opin-

ion, the conveyance with warranties carried with it the obligation to convey that portion of the lot contracted to the Stantons, upon payment to said grantee of the balance owing by said Stantons on the purchase price, and also the right to said purchase money. In other words, the conveyance operated as an assignment to the grantee of the contract between the grantor, Orwig, and the Stantons. We have discovered but one case to the contrary, *O'Brien v. Evans*, 107 Mich. 623 (65 N. W. 571); and in that case, the decisions heretofore cited seem to have escaped the attention of the court. Though the proceeding was in probate court, we know of no reason for deny-

4. EXECUTORS AND ADMINISTRATORS: collection and management of estate: instructions by court. ing such court the authority to direct an executor or administrator as to his interest in property, whether this be legal or equitable. Surely, the court, as it took cogni-

zance of the issues involved, was clothed with authority to decide, as is now well settled. *In re Receivership of Magner*, 173 Iowa 299; *Tucker v. Stewart*, 121 Iowa 714.

We reach the conclusion that Rebecca H. Orwig, grantee of the decedent, rather than the administrator of his estate, is entitled to the contract, and to all moneys paid thereon since decedent's death.—*Reversed*.

WEAVER, GAYNOR, SALINGER, and STEVENS, JJ., concur.

EVANS, J. (dissenting). I cannot concur in the majority opinion. This is a controversy over the proceeds of a certain land sale contract and a promissory note given by the debtor therefor, the contract and note being in the hands of the administrator. Rebecca Orwig, a sister of the decedent's, claims to be the owner thereof, under a certain warranty deed executed to her as grantee, by the decedent as grantor, a few days before his death. The description in the warranty deed includes other land, and is sufficiently broad to have conveyed to her the land included in the previous contract of sale, if the grantor had been the owner

thereof. The decedent was Thomas G. Orwig, who died June 23, 1911. The warranty deed was executed May 24, 1911. The description in the deed was as follows:

"Lot 1 of Hubbell's Subdivision of the N. W. quarter of Lot 6 of Rose's Addition to Fort Des Moines, commonly known as Number 1210 Pleasant Street."

At the time of the execution of such deed, the grantor was the owner of Lot 1, except the south 42 feet thereof. Prior to 1907, he had been the owner, also, of such south 42 feet. On such date, he sold this south 42 feet, together with the improvements thereon, to one Stanton, by a written contract of sale, providing for payments in future installments, with interest, for the full amount of which Stanton executed and delivered his note. Stanton entered into possession of the property, and paid installments of the purchase price to the extent of more than \$500, and continued in the undisputed right of possession of the property up to the time of the death of Orwig. The property thus sold had a dwelling house thereon, known as 1208 Pleasant Street. The remainder of Lot 1 constituted the homestead of the decedent, and was known as 1210 Pleasant Street. After Orwig's death, an administrator was appointed, and the Stanton contract and note passed into his possession without any controversy, and have been in his possession ever since, as such.

I. It is important to note first the nature of the proceeding before the trial court from whose order the appeal is taken. There was, in fact, no suit pending in the district court. Rebecca Orwig, as grantee of the deed, made a demand on the administrator for the possession of the note and contract, claiming thereby that her warranty deed carried the proceeds of such contract of sale. The administrator, in his report, asked the court, sitting in probate, for instructions as to who was entitled to such contract. The facts which I have already stated were made to appear by a

stipulation. The probate court held that the administrator was entitled to hold the contract of sale as personalty. It is from this finding that the appeal has been taken. I doubt very much whether there is any tangible record before us upon which this appeal can rest. To add still more to the irregularity of the record, the appellant filed in the lower court her affidavit, reciting alleged personal transactions and communications with deceased. This affidavit has been included in appellant's abstract, as a part of the record. Appellee has called our attention to the fact that it was no part of the record below. Nor was there any offer of it as such, except the filing. The appellee filed appropriate objection thereto. This is not denied by appellant. And yet the majority opinion has inadvertently resorted to this affidavit for much of its statement of facts. Passing this irregularity, however, I come to the legal question presented upon the face of the contract of sale and of the warranty deed. The question before us is one of law, purely. No equitable considerations are presented. Let it be conceded that the description in the warranty deed was sufficient to convey to the grantee all the real estate in Lot 1 owned by the grantor at the time of such conveyance. The deed purported to convey only realty; and in a purely legal sense, it could convey nothing else. Did Orwig own the Stanton property at the time of the execution of the warranty deed? The contention for the administrator and the creditors of the estate is that, by the Stanton contract of sale, Orwig had converted such realty into personalty, and that such personalty necessarily passed, at his death, to his administrator. This contention is rejected by the majority opinion, and white-haired cases from other states are cited in support of the argument. I think the question is not fairly open, under our own decisions. The opinion cites the case of *Miller*, 142 Iowa 563, 565. The holding in that case is contrary to the majority opinion.

That case follows previous cases cited therein, which are also contrary to the present holding. In the *Miller* case, the testator had devised to a named devisee all the land of which she should die seized in a certain Lot 1. Before her death, she had sold all the land owned by her in such lot, by a contract of sale precisely similar to the one before us. The terms of the devise were broad enough to cover every interest of realty that she had in such lot. The devisee claimed that he was entitled to the proceeds of such land contract, under his devise. But we held that he was entitled to nothing but realty, and that the testatrix had no realty in Lot 1 at the time of her death. It was held that the administrator took the contract of sale. If there is anything settled by our decisions, it is that such a contract terminates the ownership of the vendor in the real estate and that he holds the legal title only as security, precisely as a mortgagee would hold it. Manifestly, Orwig could have assigned the Stanton contract and the Stanton note to his sister, and such an assignment would have carried the security without any formal conveyance of the real estate. Manifestly, also, with such assignment of contract and note he could have conveyed the property to her as trustee, and as trustee only. Nor do I overlook that it would be within the power of a court of equity, upon a proper showing, to treat the warranty deed as the equitable equivalent of an assignment of the contract of sale and of the note. But this would involve evidence and a consideration of equities. If, for instance, the grantee had been misled, and the grantor were insolvent; if the consideration paid had included the consideration for such land contract; if the real contract in pursuance of which the deed was executed contemplated the proceeds of the land sale contract, then, in any such case, the power of equity would be adequate to extend full relief. I should have no doubt of the power of a court of equity to treat the warranty deed as the

equitable equivalent of an assignment of the contract and note. But this is not an equity suit. No equitable considerations are involved; none are pleaded; none are proved. We may, indeed, infer that the decedent was insolvent, in that the creditors are contending for this fund as the only resource for the payment of claims against the estate; but this in itself creates no equity in her favor. It is not claimed that she was misled in the transaction. Though the deed purports to be for a consideration which is sufficient to give it legal effect, yet, for the purposes of equity, the extent of the consideration is in no manner disclosed. The rights of the appellant, therefore, are purely legal, and not equitable, and must be determined upon the face of her deed. Concededly, a failure of title is shown as to the south 42 feet. What, therefore, is the legal remedy of the grantee? Manifestly, an action for a breach of the covenant of warranty. In pursuing this remedy, however, she stands in no better position than any other creditor of the insolvent. The purely legal effect of the warranty deed does not operate as an assignment of the contract and note. This is the precise holding of the Supreme Court of Michigan in *O'Brien v. Evans*, 107 Mich. 623 (65 N. W. 571), in a very similar case. The effect of the majority opinion is to extend equitable relief to the appellant, though no equitable issue is presented. The very authorities cited therein were chancery cases, and the relief granted therein by the chancellor was upon equitable issues. *Ten Eick v. Simpson*, 1 Sandf. Ch. (N. Y.) 244; *Taylor v. Stibbert*, 2 Ves. Jr., 437, 439.

II. The opinion devotes discussion to the proposition that the last clause of the description in the deed, "commonly known as Number 1210 Pleasant Street," should be deemed as surplusage and nugatory. In my foregoing discussion, I have assumed the correctness of this position. I think, however, that the discussion in the opinion loses

sight of the significance which this clause could have as a circumstance of evidence, in case the appeal were before us in an equitable suit, asking relief upon equitable issues. Surely, in such a case, where a court of equity sought to go behind the written papers, and sought to ascertain the real understanding and intent of the parties antecedent thereto, the fact that there were two properties, known as 1208 Pleasant Street and 1210 Pleasant Street, and that 1210 Pleasant Street was specifically included in the description, whereas 1208 was omitted, would be a proper circumstance for the consideration of the equity court, and would undoubtedly be deemed as of substantial significance. There is a further consideration here which is not considered in the opinion. No inconsistency or ambiguity appears on the face of the deed. By evidence *aliunde*, however, the description in the deed becomes either inconsistent or ambiguous. If ambiguous, the ambiguity is latent, and such ambiguity may be explained by the same kind of evidence as discloses it. In such case, it would be permissible to ascertain the intent of the deed by parol evidence. On the other hand, if the provisions in the deed are to be regarded as inconsistent, rather than ambiguous, then the one part must be deemed to control the other; or rather, one part must give way to the other. In such cases, the authorities are not wholly agreed whether the description "Lot 1" or the street number "1210 Pleasant" should prevail. Some authorities lay stress upon the fact that a lot owner is more likely to know with certainty his street number than he is his lot and block number. *Worthington v. Hyler*, 4 Mass. 196; *Ousby v. Jones*, 73 N. Y. 621. The question is one of considerable difficulty. In view of the fact that it is not decisive here, I should prefer to leave it open for later consideration in an appropriate case, and upon fuller dis-

cussion in the briefs. Upon the record before us herein, I would affirm.

PRESTON, C. J., joins in this dissent.

MILDRED MELDE LOVE, Appellee, v. J. G. LOVE, Appellant.

MARRIAGE: Common-Law Marriage—Essentials—Agreement Fol-

1 lowed by Consummation. If the parties are capable of contract-
ing, and mutually agree that they are husband and wife, with
present intention of becoming such, and this is followed by
consummation of the marriage relation, the contract of mar-
riage, under Section 3139, Code, 1897, is complete, and does not
depend upon cohabitation for a period of time.

MARRIAGE: Common-Law Marriage—Essentials—Presumptions—

2 Continued Cohabitation. Proof of continued cohabitation be-
tween parties who have held themselves out to the public as
husband and wife, justifies the inference that they are married.

MARRIAGE: Common-Law Marriage—Sufficiency of Evidence. Ev-

3 idence reviewed, and held to sustain finding of common-law
marriage.

DIVORCE: Desertion—Proof. Although parties may not live to-

4 gether in the usual way as husband and wife, there can be
desertion such as to be grounds for a divorce under Section
3174, Code, 1897.

DIVORCE: Desertion—Sufficiency of Evidence. Evidence reviewed,

5 and held insufficient to sustain finding of court of desertion by
husband.

Appeal from Cerro Gordo District Court.—J. J. CLARK,
Judge.

MARCH 24, 1919.

SUIT for divorce. Judgment and decree in favor of
plaintiff. Defendant appeals.—*Reversed.*

Senneff, Bliss, Witwer & Senneff, for appellant.

Blythe, Markley, Rule & Smith, for appellee.

STEVENS, J.—I. But two questions are presented for decision upon this appeal: (a) Were defendant and plaintiff husband and wife at the time the decree of divorce was entered; and (b) does the proof sustain her claim of statutory desertion, the only ground alleged in her petition for a divorce?

Plaintiff alleges, and relies upon, a common-law marriage. Marriage, as defined by Section 3139 of the Code, "is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared." The marriage is denied by the defendant, and the parties have not at any time lived together, in the usual sense, as husband and wife. Defendant, at the time of the alleged marriage, was 25 years of age, and employed by a railroad company as a switchman, and plaintiff was 23 years of age, and employed as a servant in a hotel at Sanborn, Iowa, where she claims the marriage took place in July or August, 1905.

Common-law marriages have long been recognized by the law of this state. *Blanchard v. Lambert*, 43 Iowa 228; *McFarland v. McFarland*, 51 Iowa 565. The difficulty is not

in defining common-law marriage, but arises generally from the uncertainty of proof.

1. MARRIAGE: common-law marriage: essentials: agreement followed by consummation.

If the parties are capable of contracting, and mutually agree that they are husband and wife, with the present intention of becoming such, and this is followed by a consummation of the marriage relation, the contract is complete. The consummation of the contract does not depend upon cohabitation for a period of time, but, like other contracts, it is complete when made. Marriage, whether sol-

emnized in the usual way or by mutual consent and agreement, is generally followed by the parties' dwelling together, and performing the duties and obligations of the

2. MARRIAGE: common-law marriage: essentials: presumptions: continued cohabitation.

marriage relation. Proof, therefore, of continued cohabitation between parties who have held themselves out to the public as husband and wife justifies the inference that the parties are married. If the marriage agreement testified to by plaintiff was admitted by the defendant, proof that the parties lived and cohabited together, or held themselves out to the public as husband and wife, would not be required. The Supreme Court of Minnesota, in *Hulett v. Carey*, 66 Minn. 327 (69 N. W. 31), referring to common-law marriage, said:

"Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de praesenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent. Comm., 87; 2 Greenl. Ev., Sec. 460; 1 Bishop, Mar. & Div., Secs. 218, 227, 229. The maxim of the civil law was, '*Consensus non concubitus facit matrimonium*.' The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bishop, Mar., Div. & Sep., Secs. 239, 313, 315, 317. See, also, the leading case of *Dalrymple v. Dalrymple*, 2 Hagg, Consist. 54, which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place."

This is in harmony with our holding in *State v. McKay*, 122 Iowa 658. See, also, *Davis v. Stouffer*, 132 Mo.

App. 555 (112 S. W. 282); *Bishop v. Brittain Inv. Co.*, 229 Mo. 699 (129 S. W. 668); Abbott on Trial Evidence (2d Ed.) 101.

Does the proof in this case establish a common-law marriage? Plaintiff testified that she kept company with defendant for several months before they were married;

that, during said time, defendant importuned her to have illicit relations with him, but that she always refused; that defendant finally proposed marriage, and she accepted; that he finally said to her that they

3. MARRIAGE:
common-law
marriage:
sufficiency of
evidence.

were the same as married, and he would take her as his wife and take care of her; that they thereafter had frequent acts of sexual intercourse; and that she always believed and understood that they were husband and wife, although she did not fully understand her legal rights. Some months following the alleged marriage, she went to La Crosse, Wisconsin, where her parents resided, and shortly thereafter gave birth to a female child, referred to in the evidence as Ruth Love, who, at the time of the trial, was 11 years of age. During the following years, defendant wrote her many letters, addressing them to Mrs. J. G. Love. They occasionally met at Austin, Minnesota, and other places, and at one time, he registered them at a hotel as husband and wife, under an assumed name. Plaintiff, however, denies that she knew he had not registered under their true name.

The record discloses a rather voluminous correspondence, though but few of plaintiff's letters were introduced. He addressed her always as "My Dear Girl," frequently mentioning Ruth, and closing the letter with "Love to both," "Goodbye to both," "Yours as ever," etc. In none of them does he refer to her directly as his wife. In many of the letters, he inquires after Ruth's health, and whether she can walk, and in 1909, wrote:

"How is Ruth? Is she walking yet? You wrote me in July that she was walking, and you have never told me of her getting worse. Now I want to know what condition she is in, and if she is getting worse, I will bring her down here to the hospital; so you let me know for sure. I have just been called, and I will close for this time. Yours as ever, Love to both. J. G."

It appears that Ruth is, as the result of infantile paralysis, a cripple, and this perhaps explains his frequent inquiry regarding her health, and whether she was able to walk. The correspondence is wholly free from offensive or forbidding language, and in it there is no reference to immoral relations between the parties. Plaintiff frequently urged a public marriage ceremony, and testified that defendant constantly promised that they would go to house-keeping. She was a member of the Lutheran Church, and stated that she desired a marriage which conformed to the rules thereof, and a record that could not be denied, and that would protect herself and Ruth. She further testified that he did not desire their marriage to become known at Mason City, where he lived, but that he informed her that his parents knew about it. Plaintiff and defendant did not live together in the usual manner, and he seldom had opportunity to introduce her as his wife. She claims, however, that he did introduce her as his wife, to a druggist, whose name she did not recall, in Mason City. This he denies. He occasionally sent her small sums of money, frequently in his letters protesting his inability to send more.

While defendant, testifying in his own behalf, emphatically denies the marriage, the court below, who saw and heard the witnesses testify, sustained the allegations of plaintiff's petition. With this finding, without further discussion, we are content. To hold otherwise, upon the record, would be a great injustice to the plaintiff, and illegiti-

mize defendant's crippled daughter. The evidence of the alleged common-law marriage is persuasive, and defendant's conduct during the intervening years toward plaintiff and Ruth has been such as to leave no doubt that plaintiff has told the truth.

II. Counsel for appellant vigorously argues that the evidence fails to establish desertion. As indicated, the parties have never, in the usual sense, lived and cohabited together as husband and wife. He has resided at Mason City, and she elsewhere, except for occasional brief visits to him at Mason City and other places. This, however, was originally in accordance with the mutual arrangement of the parties. The fact that they did not live together as husband and wife in the usual way does not prevent proof of desertion, within the meaning of that term as used in Section 3174 of the Code. *Tipton v. Tipton*, 169 Iowa 182. We said in *Kupka v. Kupka*, 132 Iowa 191, quoting from Nelson on Divorce and Separation, that:

4. DIVORCE: desertion: proof. "Four elements are essential to a divorce because of desertion: (1) The cessation of the marriage relation; (2) the intent to desert; (3) the continuance of the desertion during the statutory period; and (4) the absence of consent or misconduct of the deserted party."

It appears without dispute in the record that defendant frequently sent small sums of money to plaintiff, the aggregate amount of which is not shown. The correspondence between them continued at least until July 10, 1916, when defendant wrote plaintiff a letter of the same general character of those previously written to her since the marriage. In this letter, he requests plaintiff to "tell the little one I will be up to see her before the summer is over, if I have to ask Dad for more money." The parties did not meet for two or three years prior thereto; but in August, 1915, they met at LaCrosse, Wisconsin, and effected a reconciliation, at

which time defendant promised plaintiff that he would work steadily during the winter, save his money, and in the spring they would have a ceremony performed, and go to house-keeping. So far as the record discloses, there was no change in their relations thereafter, until shortly before the commencement of this suit. By an amendment to plaintiff's petition, filed November 8, 1917, she alleges a reconciliation, as above stated, and that they lived and cohabited together as husband and wife during various periods of that month. While it is true that the defendant, upon the trial, denied the marriage, and admitted that he was engaged to another woman, the record leaves it uncertain as to when this engagement was entered into. Defendant testified that he became engaged to a girl in Fort Dodge in 1902, who was later the subject of correspondence and some difficulty between the parties; but whether this is the engagement referred to by him in his testimony, is left in doubt.

The record does not establish desertion on the part of defendant for a period of two years before the commencement of this suit, but, on the contrary, shows a reconciliation within that period, followed by months of intimate correspondence, such correspondence as was carried on from the time of their marriage. It is our conclusion that the evidence abundantly establishes the marriage, and that the court below rightly held that plaintiff and defendant are husband and wife. The plaintiff may, therefore, have a decree in this court or in the court below, at her election, affirming and sustaining the marriage; but for the reason that plaintiff has failed to establish desertion, the judgment of the court below is—*Reversed*.

5. DIVORCE: desertion: sufficiency of evidence.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

BESSIE M. TAGGART et al., Appellees, v. ELLA M. BURGIN,
Appellant.

DEEDS: Validity—Mental Incapacity — Evidence. Evidence reviewed, and held to sustain finding that grantor, at the time of executing deeds to his wife, was of unsound mind, and incapable of comprehending the nature and effect of the conveyances executed.

APPEAL AND ERROR: Review—Questions of Fact—Conflicting Evidence. Weight must always be given, on appeal from decree canceling conveyance on ground of mental incapacity, to the findings of the lower court, on conflicting evidence.

Appeal from Clay District Court.—D. F. COYLE, Judge.

MARCH 24, 1919.

DEFENDANT appeals from a decree in the court below canceling and setting aside certain real estate conveyances.
—*Affirmed.*

Buck & Kirkpatrick, Francis & Owen, and Cosson & Francis, for appellant.

Hald & Cook, and E. A. & W. H. Morling, for appellees.

STEVENS, J.—On April 16, 1908, L. C. Burgin, by separate instruments conveyed certain real estate in Clay County, Iowa, and certain other real estate situated in Hutchinson County, South Dakota, to Ella M. Bur-

gin, his wife. The consideration recited in each of said deeds is love and affection.

Plaintiffs are the daughters of the parties to the above-mentioned instruments, and the sole heirs at law of the grantor. They allege in their petition that the grantor, at the time of the execution of said deeds, was of unsound mind, and incompetent to transact business. This presents the only question for decision.

The evidence is somewhat voluminous, and is, as usual in cases of this character, conflicting. We shall not undertake to review the evidence in detail, or make an extended statement thereof. The record does not reveal the age of L. C. Burgin, but we assume, from the fact that he was a soldier in the Civil War, that he must have been advanced in years.

On May 29th following the date of the above-mentioned deeds, an information was filed before the commissioners of insanity, alleging that Mr. Burgin was insane; and, on July 23d following, the grantee in said deeds subscribed and swore to a petition, filed in the district court of Clay County, alleging that her husband was of unsound mind, and praying the appointment of a guardian. Upon hearing before the commissioners, Mr. Burgin was found insane, and ordered confined in the hospital at Cherokee, to which institution he was taken, and where he remained until his death, on December 15, 1915. On August 27, 1908, an order was entered by the court, appointing defendant guardian of her husband. Many residents of Clay County who had known Mr. Burgin with varying degrees of intimacy for many years were called as witnesses, and testified to many changes in his personal appearance and habits, and expressed the opinion that he was not of sound mind. He does not appear to have been a man of eccentric habits; and changes in his appearance, conversation, and conduct appear to have been noticed by his friends for some time before the execution of the deeds. He formed impractical plans for accumulating wealth, became visionary, and, instead of manifesting characteristic cleanliness of his person and attire, became untidy, neglectful, and careless of his clothing and personal appearance; while his habits in other respects underwent a marked change. He had formerly been a regular attendant and officer of the church,

but became neglectful and indifferent thereto, failed to recognize those with whom he was acquainted, ceased his attendance at the Army Post and refused to pay his dues, and, upon one occasion, picked up and concealed two neckties from a store, and was seen to do indecent acts in daylight on the public streets. Some improvident business transactions were shown. All this was contrary to his former habits. He appears to have sustained friendly relations with his daughters, but conveyed all his property to his wife.

Medical witnesses, testifying as experts, expressed the opinion that he was of unsound mind, and that he was suffering from senile dementia. The superintendent, and one of the assistant physicians of the Cherokee Hospital for the Insane, where Mr. Burgin was confined, testified that he was afflicted with paresis, a disease which, they stated, is of syphilitic origin, and affects the patient both physically and mentally. They testified, however, that persons suffering from paresis frequently have lucid intervals, during which they may be capable of intelligently transacting business. Both senile dementia and paresis are progressive in character, and the mind of the patient gradually weakens. The attorney who prepared the deeds testified on behalf of the defendant, and expressed the opinion that Mr. Burgin, at the time the deeds were executed, was of sound mind, and gave him the necessary information for the preparation of the instruments without memoranda or other assistance. We are persuaded, however, that the weight of the evidence sustains the finding and decree of the court below that, at the time the instruments were executed, the grantor was of unsound mind and incapable of intelligently comprehending and understanding the nature and effect of the conveyances executed by him. Weight must always be given

2. **APPEAL AND ERROR:** review: questions of fact: conflicting evidence.

to the finding of the lower court in cases of this character. It will serve no good purpose to extend this opinion by reciting or discussing the evidence in detail. Suffice it to say that, in our opinion, the right conclusion was reached by the court below, and its decree is, therefore,—*Affirmed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

JULIA LANG, Appellee, v. MARSHALLTOWN LIGHT, POWER,
AND RAILWAY COMPANY, Appellant.

EVIDENCE: Interpreting X-Ray. An expert witness may not testify what an X-ray photograph shows, even though objector's own witness had so testified, but without objection.

WITNESSES: Undue Limitation on Examination. Unduly limiting examination on matters bearing on the interest of the witness in the pending action is not necessarily reversible error. So held as to whether the witness himself had an action pending which grew out of the accident in question.

Appeal from Marshall District Court.—JAMES W. WILLETT, Judge.

JANUARY 17, 1919.

REHEARING DENIED APRIL 4, 1919.

ACTION to recover damages for personal injury. There was a trial to a jury, verdict and judgment for \$5,000 for plaintiff, and defendant appeals.—*Affirmed*.

Hasner & Hasner, Binford & Farber, and Edwards, Longley, Ransier & Smith, for appellant.

Bradford & Johnson and U. S. Alderman, for appellee.

PRESTON, J.—This case has been here before. *Lang v.*

Marshalltown L., P. & R. Co., 166 Iowa 548. The opinion there states the nature of the case, and we shall not repeat. Twenty-three errors are assigned. They relate, for the most part, to rulings of the court in admitting and excluding evidence, and the alleged restriction of cross-examination of plaintiff's witnesses by defendant. It is also claimed that the trial judge made improper remarks, and that counsel for appellee, during the trial, were guilty of improper conduct in their remarks concerning counsel for appellant, and of improper argument to the jury concerning inefficiency of defendant's employee, the 17-year old conductor in charge of the car; improper questions asked witnesses, and the like. Complaint is also made of the refusal of the trial court to give an instruction requested by appellant, in which the court was asked to withdraw from the consideration of the jury certain alleged injuries to plaintiff, which were alleged in the petition, for the reason that it is contended by appellant there was no evidence in the case to show that such injuries existed. These have reference to injuries to the spinal cord and the nerves radiating therefrom, the alleged injuries to the ligaments of the neck, muscles of the left side, ribs, or the articulation and connection with the spinal column, and the like. It would not be practicable to discuss all the assignments in detail. Counsel for appellant say in argument that the questions asked and the objections are so numerous that it is practically impossible to set them out at length, and in each particular.

1. We shall attempt to cover those which seem to be of minor importance as briefly as may be, and in a general way, and notice more particularly those which seem to be more important. As said, this was the second trial of the case. After reversal in this court, the record shows, and it is so stated in argument, that this last trial was hotly contested by the several attorneys of ability and determina-

tion. There was naturally more or less sparring between counsel on both sides, and it may be that the trial court, under such circumstances, was not, at all times, as suave as he would have been under other circumstances. After an examination of the record, it is our conclusion that, as to these claims, the defendant had a fair trial, and has no just cause of complaint.

2. As to the appellant's offered instruction, before referred to, the argument is very brief. By the court's instruction No. 3, the trial court did say to the jury that, as to some of the alleged injuries, there was no evidence, and such were withdrawn from the consideration of the jury. As to others, there was evidence. Furthermore, by Instructions Nos. 10 and 11, the court left it to the jury to say, from the evidence, what injuries plaintiff proximately suffered by reason of the negligence of the defendant, as the natural result thereof, and the extent of her injuries and the damages resulting therefrom. We think there was no error at this point.

3. As to the alleged restriction of cross-examination, we think there was no error. With one or two exceptions, which will be noted later, the objections interposed by appellee, that the questions asked were not cross-examination, were properly sustained, or the ruling was within the discretion of the court. The cross-examination was quite extended.

4. Both plaintiff and defendant introduced witnesses who had taken X-ray photographs of portions of plaintiff's person, and the photographs were received in evidence.

Plaintiff's witnesses testified, without objection, as to plaintiff's condition, as revealed by the photographs, or in connection therewith. Complaint is made by appellant that the court erred in refusing to allow doctors called by defendant to testify as to what appeared in the skiagraphs. An illustra-

1. EVIDENCE: interpreting X-ray.

tive question asked by defendant of its witnesses is a question asked Doctor Cheshire:

"Q. State whether or not, Doctor, Exhibit B does or does not show a curvature of the spine, as appears in the negative."

Upon proper objection, the court sustained the objection to this question, whereupon counsel for defendant claimed that, in view of the fact that plaintiff's witnesses gave similar testimony, he was entitled to it; but the court stated that, had there been an objection at that time, the court would have ruled; and counsel for defendant stated that he thought plaintiff was entitled to such evidence, but the court stated he did not agree with counsel. Defendant's three doctors on this subject, Dr. Cheshire, Dr. McGready, and Dr. Johnson, testified at great length in regard to the X-ray photographs. Dr. Cheshire's testimony takes up 25 pages of the abstract. He also testified that he made a personal examination of the plaintiff, at a time prior to the taking of the X-ray photographs, and testified as to the condition of plaintiff's neck and muscles, and so on. These three doctors gave testimony interpreting the X-ray pictures. Appellant cites a number of cases to the proposition that X-ray negatives and photographs, properly verified, are admissible in evidence; and this proposition is not disputed by appellee. Cases are also cited by appellant, holding that it is proper for experts to interpret and explain X-ray plates to the jury. Among these is the case of *State v. Matheson*, 142 Iowa 414. They claim, too, that some of the cases hold that a witness may testify as to what the photograph shows. We think the questions asked in the instant case, and as before indicated, and the ruling thereon, are within the ruling of *Elsig v. Bales*, 135 Iowa 208, where it was said:

"As demonstrative evidence, they serve to explain or illustrate and apply the testimony, and are aids to the jury

in comprehending the questions in dispute. No argument is required to show that, when taken for either purpose, they are the best evidence of what appears on them. * * * The rule exacting the best evidence applies to the testimony of experts, as well as to that of other witnesses, and we are of the opinion that the court erred in permitting the doctor to testify to what appeared in the skiagraph."

It should have been said that, at one stage of the trial, and after the court had ruled that it was not competent to show what the skiagraph or X-ray photograph showed, counsel for appellee then withdrew their objection, and the court said that he in no wise receded from his interpretation of the law, and that, under the record made by counsel for plaintiff that all objections of that kind are withdrawn, there may be the fullest and extreme illustration made by the experts of these skiagraphs or pictures. This was when the witness Dr. McGready was on the stand, and thereafter, he was further interrogated. The principal objection made by counsel for defendant at that time was that he had discharged his witness, Dr. Cheshire, and he had no way he could get him back at any particular time, and that it would put him to inconvenience. But no request was made for a postponement, or for an opportunity to get the witness back. We think there was no error at this point.

5. It is assigned as error that the court erred in refusing appellant the right to question August Lang (the husband of plaintiff), on cross-examination, as to his having a suit pending in the same court against appellant, based upon the same alleged accident, for injuries to his wife. An objection to such question was sustained, as not cross-examination, the court so stating. The court also said that he was not determining the question of whether or not the defendant might prove that fact, when it came to putting in defendant's evidence. We think that, even though it

2. WITNESSES: un-
due limitation
on examination.

was not cross-examination, it is proper to show the interest of a witness, as bearing upon his credibility. We should have been better satisfied had the court permitted an answer to this question; but, under the record, we are of the opinion that it was without prejudice, and that we would not be justified in reversing the case on this alone. It was shown that this man was the husband of plaintiff, and that, of course, showed his interest to that extent. There was no offer by counsel to show that the husband did have such a suit pending. On the other hand, we infer, from a statement to be set out in a moment, that counsel did not really claim there was such a suit pending, but that he simply wanted to ask whether the husband did or did not have such a case. We ought not to reverse the case and send it back for an answer to this question, and then have him say that he did not have such a suit pending. We feel justified in so holding, in view of a statement by counsel for the defendant, which appears in the record as follows:

"If I was able to show by him that he was also claiming damages in a suit of his own, growing out of this particular incident and accident, it was proper. That was my belief, simply; and I didn't mean to transgress any well-known rule of law. It is possible that I am badly in error upon that point. I say that he had an interest of that kind; it was more or less dependent upon the success of this suit; and I have thought, under the circumstances, that the witness ought to state if he had any such interest."

We conclude that there was no reversible error at this point.

We have noticed the points which seem to require attention; and under the whole record, we think the judgment should be, and it is,—*Affirmed*.

EVANS, GAYNOR, and STEVENS, JJ., concur.

WILLIAM BAKY, Appellant, v. F. W. MOELLER,
Administrator, Appellee.

LIMITATION OF ACTIONS: Revival of Cause of Action—Evidence

1 —**Sufficiency of Written Admission.** A writing, to constitute a revival of a cause of action, under Section 3456, Code, 1897, must, by its terms, either admit or promise to pay some indebtedness of the writer; and a promise to pay may be implied from an admission of the indebtedness; but the writing need not specifically identify the indebtedness as that upon which suit is based, as that may be established by extrinsic evidence.

LIMITATION OF ACTIONS: Revival of Cause of Action—Insuffi-

2 **ciency of Writing.** A letter stating, "I think you have been negligent in waiting so long, but you need not worry about it, I will see to it and make it all right," was insufficient, under Section 3456, Code, 1897, to revive an indebtedness on a note barred by the statute of limitations, as it did not contain a direct or certain reference to the note in question, or to indebtedness in any other form.

Appeal from Calhoun District Court.—M. E. HUTCHISON,
Judge.

APRIL 8, 1919.

PROCEEDINGS upon a claim filed against the estate of Werner Moeller, deceased. Demurrer thereto was sustained and judgment entered against the claimant for costs.—*Affirmed.*

Healy & Faville, for appellant.

Gray & Gray and *S. A. Frick*, for appellee.

STEVENS, J.—On November 16, 1916, plaintiff filed a claim in the office of the clerk of the district court of Calhoun County against the estate of Werner Moeller, deceased, based upon a promissory note for \$300, dated November 25, 1903, due in one year after date. Later, an amendment was filed to said claim, alleging that, on the

22d day of May, 1916, the said Moeller, in writing signed by him, admitted that said note was unpaid, and in said writing promised to pay the same, copy of which, attached to said amendment, is as follows:

"Somers, Iowa, May 22, 1916.

"Mr. William Bakey,

"Dear Friend:

"Your letter was quite a surprise to me as you had never said anything about it to me. I think you have been negligent in waiting so long but you need not worry about it. I will see to it and make it all right.

"We are all well and hope this finds you the same.

"Your friend,

"Werner Moeller."

The defendant, executor of the estate of Werner Moeller, interposed a demurrer to plaintiff's claim, on the ground that the letter attached to the amendment does not identify the note in controversy, and that same contains neither an admission of, nor a promise to pay, indebtedness. Code Section 3456, providing for the revival of indebtedness by an admission of a promise to pay in writing, is as follows:

"Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same."

The writing must, by its terms, either admit or promise to pay some indebtedness of the writer. A promise to pay may be implied from an admission of the indebtedness.

Will v. Marker, 122 Iowa 627; *Kleis v. McGrath*, 127 Iowa 459; *Nelson v. Hanson*, 92 Iowa 356; *Stout v. Marshall*, 75 Iowa 498; *Doran v. Doran*, 145 Iowa 122.

The writing need not, however, specifically identify the indebtedness as that upon which suit is based. This may be established by extrinsic

1. LIMITATION OF
ACTIONS: revival
of cause of
action: evidence:
sufficiency of
written admis-
sion.

evidence. *Miller v. Beardsley*, 81 Iowa 720; *Fitzgerald v. Flanagan*, 155 Iowa 217; *Senninger v. Rowley*, 138 Iowa 617; *First Nat. Bank v. Woodman*, 93 Iowa 668; *McConaughy v. Wilsey*, 115 Iowa 589.

The writing relied upon by plaintiff was apparently written in answer to a letter from plaintiff. The petition contains no allegation of the purport or contents of the letter written by plaintiff to deceased, and

2. LIMITATION OF ACTIONS: revival of cause of action: insufficiency of writing.

the writing in question does not specifically refer to indebtedness owed by deceased to plaintiff, nor does it necessarily follow, from the language used, that the writer referred to any indebtedness. No decision holding that extrinsic evidence may be received for any other purpose than to identify the indebtedness referred to in the writing has been brought to our attention. The court, in *Kleis v. McGrath*, supra, said:

"It is an accepted doctrine that an acknowledgment of the existence of a debt is allowed to remove the bar of the statute, because such acknowledgment or admission carries with it an implied promise to pay. For that reason, the acknowledgment must be express, clear, and direct, for it will not do to infer or imply the acknowledgment, and therefrom imply the promise to pay, thus piling implication upon implication."

To the same effect, see *Will v. Marker*, supra.

There is no express, clear, and direct admission in the writing in question of indebtedness or promise to pay the same. It is argued by counsel for appellant that writings much more obscure and uncertain in terms and meaning have been held sufficient by this court, and in this connection, they cite *Miller v. Beardsley*, supra; *First Nat. Bank v. Woodman*, supra; *Jenckes v. Rice*, 119 Iowa 451, 454; *Will v. Marker*, supra.

A reference to the decisions referred to above will

show that in each of them there is a specific reference to a note. That the writing referred to indebtedness was not questioned in any of the above cases; while in each of the following cases, in which the writing was held insufficient, the reference to some indebtedness was much more certain and definite than in the case at bar: *Stout v. Marshall*, supra; *Stewart v. McFarland*, 84 Iowa 55; *Nelson v. Hanson*, supra.

Manifestly, the letter set out in plaintiff's claim contains no direct or certain reference to the note in question, or to indebtedness in any other form; and, therefore, the demurrer thereto was properly sustained. It follows that the judgment of the court below must be and is—*Affirmed*.

LADD, C. J., EVANS and GAYNOR, JJ., concur.

CATHERINE E. BURKE, Appellee, v. H. A. DUNLAP, Appellant.

VENUE: Change of Venue—Time to File—Waiver of Right. Defend-

1 ant, by asking for and obtaining time to answer, does not, under Sec. 3504, Code, 1897, waive his right to move for change of place of trial, at any time before answer. Section 3514, Code, 1897, requiring the defendant to appear and defend before noon of the second day of the term, does not require him to make answer at that time or demand such a change at that time.

JUDGMENT: Defaults—Filing of Answer Within Time Given by

2 Court. On the day after the day on which the court, upon overruling his motion for change of venue, had given him five days within which to file answer, the defendant was not in default for failure to file answer.

JUDGMENT: Opening and Vacating—Showing of Merits. The court

3 has no discretion as to setting aside a judgment *improperly* entered against a party, and such a party, on moving to set aside such a default, is not required to make a showing of merits.

VENUE: Change of Venue—Showing—Resistance. A motion for

4 change of place of trial to the county of defendant's residence is properly overruled where, in resistance, plaintiff's affidavits

showed that the transaction out of which the alleged damages arose was at an office maintained by the defendant in the county where the suit was brought, and there was no evidence to the contrary.

Appeal from Cedar Rapids Superior Court.—A. B. CLARK, Judge.

APRIL 8, 1919.

ACTION in the superior court of Cedar Rapids for damages on account of alleged false representations in the sale of a Ford automobile. Judgment for plaintiff. Defendant appeals.—*Reversed.*

W. E. Wallace and *Frank H. Randall*, for appellant.

Rickel, Dennis & Thompson, for appellee.

STEVENS, J.—Plaintiff's petition was filed on the 21st day of May, 1917, and on the 5th day of June, the defendant appeared in person, and requested an extension of time in which to file answer, and was granted five days by the court. Instead of answering, however, the defendant, on the 8th day of June, filed a motion, based upon Section 3504 of the Code, for a change of place of trial. On the 13th day of June, counsel for plaintiff filed a motion to strike defendant's application for a change of place of trial, and for default on account of his failure to answer within the time fixed by the court. Numerous motions and counter-motions to strike were thereafter filed by the parties; and on the 21st of August, the court overruled defendant's motion for a change of place of trial, and on October 10th, sustained plaintiff's motion to strike the same from the files, and gave defendant five days within which to answer. On October 13th, defendant filed a verified answer, and on the 16th of the same month, plaintiff moved to strike the same and asked a ruling upon her original motion for default. On October 23rd, plaintiff's motion to strike defendant's

answer from the files, and for default, was sustained. On the 26th, defendant filed a motion to set aside the default, which, on the same day, was overruled by the court. Thereupon, witnesses were called by plaintiff for the purpose of proving her damages, each of whom was cross-examined by counsel for defendant. At the conclusion of plaintiff's evidence, the court entered judgment in her favor for \$75 and costs.

It is contended by counsel for appellant that the court erred: (a) In overruling defendant's motion for a change of place of trial; and (b) in sustaining plaintiff's motion to strike defendant's answer, and entering default against him.

I. We will first consider appellant's contention that the court committed error in striking defendant's answer and entering default. As we understand the contention of counsel for appellee in argument, it is that

1. VENUE: change of venue: time to file: waiver of right. defendant, by asking and obtaining an extension of time within which to answer, waived his right to file a motion for a change of place of trial. It was held by this court, in *District Twp. of Newton v. White*, 42 Iowa 608, that the defendant, by asking and obtaining time to answer, did not waive his right to file a demurrer to plaintiff's petition; but the court held that extending time to file answer did not operate as an extension of time within which to demur. Section 3504 provides:

"If an action is brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county."

It will be observed that the motion for change of place of trial was filed within the time allowed defendant by the court within which to answer. Defendant was required, by Section 3514 of the Code, to appear and defend before

noon of the second day of the term, but was not required to answer at that time, and, under the order of the court, had five days from June 8th in which to do so. He was not required to file his motion for a change of place of trial on or before noon of the second day, but within the time allowed by statute, or the order of the court, to file answer, and before same was filed. *First Nat. Bank of Muscatine v. Krance*, 50 Iowa 235. In the *Krance* case, the court said:

"In this case, default having been made, it was proper for the court, in setting it aside, to prescribe that the defendants should answer in 20 days. If they desired to change the place of trial, they had 20 days in which to make the application, and we think that they could not properly claim more than that."

In the above case, the motion for change of place of trial was filed after the time allowed for filing answer had expired.

It is clear that defendant, by asking and obtaining time to answer, did not waive his right to move for a change of place of trial, and that, by filing same before answer, and within the time allowed by the court for that purpose, he was not in default on the 8th of June, when plaintiff's motion asking that same be entered was filed. He was not required to answer until the motion for change of place of trial was ruled on by the court, and, if sustained, default could not have been entered against him in the court in which the suit was brought. *District Twp. of Newton v. White*, supra.

The court, however, overruled defendant's motion for change of place of trial, on August 21st; but defendant, on September 12th, filed a motion to set aside the court's ruling, and on September 13th, plaintiff filed a resistance thereto. On October 4th, defendant filed a verified motion, asking the court to set aside his previous orders in reference to motions and change of place of

2. JUDGMENT: de-
faults: filing
of answer with-
in time given
by court.

trial. The court, on October 10th, overruled defendant's motion filed on October 4th, and sustained plaintiff's motion filed on October 5th to strike the same from the files, and gave defendant five days within which to answer. Defendant filed a verified answer on October 13th, and on October 16th, plaintiff filed a motion to strike the same from the files and for default, which motions were sustained, and default entered. On October 26th, defendant filed a motion to set aside the default, supporting the same by affidavit, which motion was overruled, and the trial proceeded with. Defendant was not in default on October 10th, when the order granting him five days in which to file answer was entered, and, as he had filed answer within that time, the court improperly sustained plaintiff's motion to strike the same from the files, and erred in entering default against him.

It is argued by counsel for appellee that defendant failed to make a sufficient showing, in his motion to set aside the default. The default was improperly entered, and defendant was not required to make a show-

3. JUDGMENT:
opening and
vacating: show-
ing of merits.

ing on the merits, in his motion to have same set aside. *Messenger v. Marsh*, 6 Iowa 491; *Boals v. Shules*, 29 Iowa 507; *Beasley v. Cooper*, 42 Iowa 542; *Brandt v. Wilson*, 58 Iowa 485; *First Nat. Bank v. Flynn*, 117 Iowa 493. It is true that, in the matter of entering or setting aside default, after same has been entered, the court, in the interest of justice between litigants, is allowed a large discretion, which will seldom be interfered with on appeal; but no question of the court's discretion can arise until the party required to plead is, in fact, in default. Plaintiff's motion to strike defendant's answer should, therefore, have been overruled.

II. Plaintiff, in resistance to defendant's motion for a change of place of trial, on June 13, 1917, filed the affidavit of plaintiff, reciting that defendant maintained an of-

4. **VENUE:** change of venue: showing: resistance. fice in Linn County, and that the transaction out of which the alleged damages arose was entered into at said office. The statements contained in the affidavit made a prima-facie showing against defendant's motion, which was based upon the claim that he was a resident of Iowa County. This did not entitle him to a change of place of trial, if the statements contained in plaintiff's affidavit, which were not denied of record, were true. In the absence of a showing to the contrary, the court could not well have done otherwise than overrule defendant's motion. For the reasons indicated, however, the judgment of the court below must be and is—*Reversed*.

LADD, C. J., GAYNOR and EVANS, JJ., concur.

MAE BUTTS, Appellee, v. WESLEY BUTTS, Appellant.

DIVORCE: Cruelty — Evidence — Sufficiency. Evidence reviewed, and held sufficient to sustain the finding of the court in granting the wife a divorce on the ground of cruel and inhuman treatment, and in dismissing husband's cross-petition on the ground of adultery.

Appeal from Harrison District Court.—SHELBY CULLISON, Judge.

APRIL 8, 1919.

PLAINTIFF brought her action for divorce on the ground of cruel and inhuman treatment. Defendant filed a cross-petition, asking a divorce on the ground of adultery. After a full trial on the merits, the trial court granted the plaintiff a divorce, and the custody of the two children, with a small amount of alimony. The defendant appeals.—*Affirmed*.

Cochran & Wolfe, for appellant.

J. A. Murray, for appellee.

PRESTON, J.—The parties were married in November, 1913, and lived together as husband and wife until May, 1917. There were two children, one 3 years, and the other 18 months of age. Plaintiff was 24 years of age, and defendant 23, at the time of the trial. It is argued by counsel for appellant that plaintiff's charge of cruelty is based solely on an imputation of unchastity; but the petition alleges that defendant has persisted in abusing plaintiff, by calling her vile names and cursing her violently; that he has charged her with being guilty of intimacy with other men, and of her own volition; that he has said he did not think he had married a whore. As said, defendant, in his answer and cross-petition, charged plaintiff with adultery, and by his testimony he sought to establish that fact. By an amendment to petition, plaintiff charges this, also, as a ground of cruelty, and alleges that the charge is untrue. Defendant also argues that all the acts of which plaintiff complains were after February 10, 1917, the time when defendant claims that plaintiff was guilty of adultery with one Babe. Doubtless defendant's charges and conduct in this respect were more pronounced after that date, but there is evidence that some of the acts charged were before. She testifies that, at one time, he called her a bitch, when she wanted him to get up to his breakfast; that she does not know how many times he called her that; that he said he would not get up for breakfast, and when he finally got up, he came into the kitchen and kicked the table over, and called her a damned bitch; that he said he didn't know he married a whore; that he said that one Kirby came to see her; that all this occurred before the Babe incident, except one time; that defendant got mad at her because she did not hear him call her, and threw a hammer through the

window, and said to her, "You damned old bitch, if you had been in there, I would have killed you;" that he called her a whore, the winter before. She says he would go out in a dark room at night, and stand behind her with a gun, and make her light matches, saying that there might be some man in there; that "he would just be cursing me, and I would go and do it." There is more of such conduct, but this is the general nature of it. Plaintiff is corroborated by other witnesses. Defendant denies plaintiff's testimony, and says they had no trouble until February 10, 1917; and others of his witnesses testify that the parties appeared to be living together harmoniously. As to the hammer throwing, defendant says he threw it at the pigs, and that the hammer accidentally went through the window, and that he was swearing at the pigs, and not at his wife. He doesn't remember lighting the matches, as testified to by her. Defendant and others, including a man by the name of Babe, had been shelling corn at defendant's place on February 10th, and defendant went to town, about 2 o'clock in the afternoon of that date, and left Babe on the place, and Babe was not there, when he returned at 6 o'clock. Defendant says that, when he came into the house on his return, the window curtains were down, and that she was rubbing her eyes; and he asked her what was the matter, and she said that Babe came into the house and stayed for a time; and he says that, the next night, she told him that Babe had thrown her on the floor and forced her, and that she told him this voluntarily. Plaintiff's theory and testimony are that, when defendant returned home, he at once accused plaintiff of illicit relations with Babe, and that she denied it. We are satisfied, from a reading of the record, that there was no improper conduct between plaintiff and Babe, at the time in question. They both deny any improper conduct, and there are many circumstances in the record tending to show that defendant did not think the charges were true. We

shall not enumerate many of these. One circumstance is that he offered to take her back, in May, 1917, and wrote her a letter sending her his love, and asking her to come back. Defendant had never had any suspicion of his wife before, and the only circumstances upon which he based his charge were that the curtains were down, and that she appeared to have been crying. We think it was proper enough that the curtains should be down. It was after dark, and she was alone in the house, with her two small children. Defendant appears to be a man of ungovernable temper, and very jealous and suspicious. When he came into the house on the 10th, he immediately charged her with having had illicit relations with Babe. Her evidence so shows, and defendant substantially admits it on cross-examination, and in response to questions by the court. Plaintiff testifies that, on the night of the 10th, he kept accusing her of improper relations with Babe, and told her that he was going to make her peel off her clothes and go naked for two days if she did not say Babe committed adultery with her; that he threatened to send her to the penitentiary, and threatened to kill her, if she did not admit it; and that she still refused; and that finally, the next night, he compelled her to say that she had been raped by Babe, and compelled her to file information, charging Babe with rape. The grand jury did not indict. Defendant says that, later, she admitted to him that she had had voluntary intercourse with Babe. This she denies. Some of the neighbors testified to conversations and conduct of the parties in regard to the transaction of the 10th, and they generally say that he would take her off by herself to talk to her. One says that she started to tell what had occurred, and that he would not let her answer, except in answer to his questions. One of the witnesses called by defendant says that, when he went to the house, plaintiff was in a terrible condition; that she was wringing her hands, and said, "I am in so much trouble, I am in so

much trouble, this trouble is going to kill me, I don't know what to do;" and that, at one of these times, after defendant had gone over these things many times, defendant was cursing plaintiff; and that, directly, she looked up, and pointed her finger at the defendant, and said, "Joe, that is a lie,—everything I have been telling you is a lie, for he never touched me," and that defendant said to her, "You stick to what you been saying,—now you stick to that."

In the jealous and suspicious frame of mind defendant was in, a denial by her would not satisfy him, and it did not satisfy him; for she did repeatedly deny his accusations; and finally, the only way out, as it appeared to her, to protect herself, was to yield to his demand that she should say that she was raped. There is much more of the testimony,—it is a fact case. After reading the record, we are satisfied with the finding of the trial court. The decree is, therefore,—*Affirmed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

GEORGE T. REEVES, Appellee, v. CHARLES L. HUNTER et al.
Appellants.

INSANE PERSONS: Contracts—When Voidable—Restoration of

- 1 **Status Quo.** A contract of an incompetent, entered into innocently by the other party, is voidable, and not void; and, if fair and reasonable, and if both parties cannot be placed in *status quo*, it may be enforced; and, where set aside as being voidable, the innocent party is entitled to be restored to the *status quo* or its equivalent.

WILLS: Testamentary Capacity—Effect of Permanent Guardianship.

- 2 A person under guardianship may be found competent to make a will, but the fact of the guardianship is presumptive proof of incompetency.

GUARDIAN AND WARD: Insane Persons—Contracts for Necessaries—Statutes.

- 3 The liability on their contracts or for necessities of the insane or spendthrift under guardianship, is not

affected or governed by the provisions of Section 3189, Code, 1897, notwithstanding the general provision of Section 3223, Code, 1897, that, as far as the same are applicable, Sections 3192 to 3228, Code, 1897, and other laws relating to minors, shall apply to the insane, spendthrifts, and habitual drunkards, and their guardians.

GUARDIAN AND WARD: Contracts of Ward—Constructive Notice
4 of Disability from Guardianship. Every person dealing with one under permanent guardianship is charged with constructive notice of the judgment of disability.

GUARDIAN AND WARD: Estate of Ward—Contracts for Necessaries—Jurisdiction of Court. Neither the guardian nor the insane person can make a valid contract, even for necessities, without the approval of the district court sitting in probate; and one furnishing a ward necessities must present his claim therefor for approval, to the court having jurisdiction of the ward's estate.

GUARDIAN AND WARD: Estate of Ward—Contracts for Necessaries—Refusal of Claim Without Restoration of Property. The disability of a person under guardianship is such that there can be no obligation on his part to restore property secured by him under contract, yet this disability does not prevent the other party from retaking it; and while the court, upon refusing approval of claim for necessities furnished the ward, has full power to order whatever restoration is practicable, yet its right to refuse approval is not dependent upon its ordering restoration.

GUARDIAN AND WARD: Estate of Ward—Contracts—Jurisdiction
7 of Court. A person who is under guardianship is under the protection of the court, and cannot make a contract which is obligatory upon him.

Appeal from Wapello District Court.—SENECA CORNELL,
Judge.

APRIL 8, 1919.

ACTION on a promissory note for \$325 against the maker, Charles L. Hunter, an incompetent and spendthrift, and against H. H. Harrold, his guardian. The plaintiff obtained the note from Hunter while he was under guardianship, the

consideration thereof being an old automobile, which was received by Hunter and soon thereafter abandoned by him at a repair shop. The defense of incompetency and guardianship was avoided by the plaintiff by pleading that he sold the automobile in regular course of business, without knowledge of the purchaser's incompetency or of the guardianship over him, and that the automobile has never been restored to the plaintiff. Evidence having been introduced in support of the allegations thus pleaded, the trial court directed a verdict for the plaintiff. The defendants appeal.—*Reversed.*

Thomas J. Bray, for appellants.

Jaques, Tisdale & Jaques, for appellee.

EVANS, J.—In September, 1915, a guardianship was established by regular proceedings over Charles L. Hunter on the ground that he was an incompetent, and that he was squandering his property. Daugherty was appointed his permanent guardian. On July 28, 1916, while said guardianship was in full force and effect, and while Daugherty was still acting as his permanent guardian, the plaintiff obtained from Charles L. Hunter the execution of the note in question, as the consideration for a secondhand automobile. Subsequently, Daugherty resigned as guardian, and the defendant Harrold was appointed, and is made defendant herein as such guardian. Counsel for defendant, appellant, contends that the note was void in its inception, and is of no force or effect; whereas counsel for the plaintiff, appellee, contend that the contract was voidable only, and that the restoration by the maker of the consideration received is a condition precedent to its avoidance. The brief of the appellant states the question as follows:

“Boiled down, the issue is, Can a person under guardianship execute an enforceable contract?”

On the other hand, the brief of appellee states the question as follows:

"Boiled down, Can a person of apparent normal mind make an ordinary contract in the ordinary way with another person in ignorance of the fact that he was under guardianship, and avoid his obligation incurred therein without restoring the consideration received?"

The foregoing brief statements indicate clearly the range and nature of the respective arguments put forth. The specific question is one which has not heretofore confronted

- us, and we find abundant difficulty in it. It is well settled in this state that a contract of an incompetent, when entered into innocently by the other party, is voidable only, and not void. It is settled also that such a contract may be enforced, if fair and reasonable, and if both parties cannot be put *in statu quo*. *Behrens v. McKenzie*, 23 Iowa 333. Such rule, however, has never been applied in this state to a case where the incompetent was under actual guardianship. Neither is any case cited to us from any other jurisdiction where the rule has been applied to an incompetent under guardianship, except, possibly, where a question of necessities is involved. It is generally true, also, that, where the contract of an incompetent with an innocent party is set aside as voidable, the innocent party is entitled to be restored to the *status quo* or its equivalent. It is settled in this state also that, though a person be under guardianship, he may yet be found competent to make a will. In such case, however, the fact of guardianship is presumptive proof of incompetency to make a will, and the burden is upon the proponent to overcome such presumption.
1. **INSANE PERSONS:** contracts: when voidable: restoration of *status quo*.
 2. **WILLS:** testamentary capacity: effect of permanent guardianship.

Cases from other jurisdictions are cited to us which hold that the fact of guardianship will not defeat a contract

for actual necessities furnished to the ward; nor are any cases cited to us holding otherwise on this point. In such a case, however, the vitality of the plaintiff's cause of action is not in his contract, but in the fact that he responded to the actual necessities of the ward. In such a case, the plaintiff's position before the court is just as strong without a contract as with one. The contract adds nothing to his right of recovery.

None of the foregoing propositions quite reach the case at bar. The question presented must be answered by a consideration of our statute and the necessary effect thereof.

The subject of guardianship is dealt with in Chapter 5, Title XVI, of the Code, being Sections 3192 to 3228 inclusive. The provisions of this chapter are made applicable

3. GUARDIAN AND
WARD: insane
persons: con-
tracts for nec-
essaries: stat-
utes.

alike to the guardianship of minors, idiots, lunatics, insane, drunkards, and spendthrifts who squander their property. Section 3223 provides:

"The provisions of this chapter, and all other laws relating to guardians for minors, and regulating or prescribing the powers, duties or liabilities of each, and of the court or judge thereof, so far as the same are applicable, shall apply to guardians and their wards appointed under the fourth preceding section of this chapter."

The "fourth preceding section" referred to in Section 3223 is Section 3219, which is as follows:

"When a petition, verified by affidavit, is presented to the district court that any inhabitant of the county is:

"1. An idiot, lunatic or person of unsound mind;

"2. An habitual drunkard, incapable of managing his affairs;

"3. A spendthrift who is squandering his property;

"And the allegations of the petition are satisfactorily proved upon the trial provided for in the following section,

the court may appoint a guardian of the property of such person, who shall be the guardian of the minor children of his ward, unless the court otherwise orders; and if such person is an habitual drunkard the court may appoint a guardian of his person, whether he has any estate or not."

The argument for appellee is made to rest largely upon Code Section 3189, which is as follows:

"A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided."

The argument is that, by the terms of Section 3223, the provisions of Section 3189 are made applicable to all persons under guardianship. It is to be noted that Section 3189 is not a part of Chapter 5, Title XVI, but is a part of Chapter 4. It declares the liability of a minor for his contracts, subject only to a right of disaffirmance upon certain conditions. It does not deal at all with the question of guardianship, nor with the "powers, duties or liabilities" of guardians. The argument that would make Section 3189 apply to the idiot and the insane, and to the drunkard and spendthrift, would make Sections 3190 and 3191 apply, likewise; and this would be a strained argument. We are clear, therefore, that the argument of appellee cannot be sustained at this point, and that the liability of the insane and the spendthrift is not to be ascertained from the terms of Section 3189.

Some reliance is put by plaintiff, appellee, upon the fact that he dealt innocently, and without knowledge of the guardianship. Does this furnish him any protection against

the invalidity or voidability of the contract?

4. GUARDIAN AND
WARD: contracts
of ward: con-
structive notice
of disability from
guardianship.

When the guardianship was established by the judgment of the court, such court, through the appointed guardian, took charge of the property and of the business of the ward. The property was thus, in a sense, *in custodia legis*. Suppose that the ward, by his contract, had traded off some of the property thus in the custody of the court or guardian, could the beneficiary of the trade take the property from the custody of the court or custodian without an approval of the trade by the court? Indeed, it appears that the ward in this case did execute a chattel mortgage, to secure this note, on ten head of cattle. Nothing is claimed herein, however, under that mortgage. Could the plaintiff have pleaded his innocence as a sufficient ground for enforcing such mortgage? The guardian was under bond to report and account to the court for the proper management of the ward's business. Was he bound to stand guard against possible encroachment upon his field of duty by the thousands of people living in Wapello County, any one of whom might, at any time, innocently enter into an unsuitable contract with his ward? Was he bound to see to it that every one of these thousands of people had actual notice of the judgment of the court? We think not. On the contrary, we think that every person so dealing with one who is, in fact, under permanent guardianship, is bound by constructive notice of the judgment of disability. No other rule would make it possible for the court or its appointed guardian to protect the interests of the ward. See *In re Will of Van Houten*, 147 Iowa 725, 732, 733.

It is also urged by the plaintiff, appellee, that Hunter was living upon a farm some miles out of town, and had need of the automobile. That is, the plaintiff claims to be

in the position of one who has furnished necessities to the ward. This question was in no manner litigated below. If the guardian had deemed this automobile a necessity to his ward, he could not have purchased it for him without the approval of the court. Code Section 3200; *Bates v. Dunham*, 58 Iowa 308. Why should the plaintiff be permitted to make a contract with the ward without the approval of the court, if he could not have so made it with the guardian? The court, sitting in probate, had full jurisdiction of the estate of this ward. To say that the plaintiff might enter into a contract with the ward in violation of the judgment of guardianship, and that he might obtain enforcement of that contract in another court, would be to oust the jurisdiction of the appointing court over the estate of the ward. We think it follows logically that, if the guardian could not make a valid contract without the approval of the court, the ward could not. A fatal infirmity, therefore, in plaintiff's contract is that it lacked the approval of the court, which had jurisdiction of the ward's estate. If the plaintiff really responded to the necessities of the ward, and furnished him with necessities, we may assume that he would have a meritorious claim. But even then, he would need to present it for approval to the court having jurisdiction of the estate. If his claim had such merit that the probate court would have approved it in advance, possibly that might be a sufficient reason for approval and allowance by the same court after the event. We do not now pass upon that question. See *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422 (22 Am. Dec. 655).

On the question of restoration of the consideration received, the same court, in the event of its refusal to approve the contract, would have full power to order whatever

restoration was practicable. In such a case, however, we do not think that the failure to restore would be a condition precedent to a refusal of its approval of the contract by the court. If the ward was under disability to contract, because of the judgment of guardianship, he was under the same disability to assume an obligation to restore property in the future. This disability, however, would not necessarily destroy the right of the other party to retake the property. Manifestly, it would be unjust to impose upon the guardian the obligation to search for and discover such property, if it had never come into his hands, but had been dissipated by his incompetent ward. Of what avail would it be for a court or a guardian to take possession of the property and estate of a spendthrift in order to conserve it from his squandering, if third parties might, at their own will, put their own property into the spendthrift's hands and hold him responsible for its restoration? If he was incompetent to withhold his own property from dissipation, he was likewise incompetent to withhold theirs. If such third parties could hold him to such a responsibility, it would follow that, in order to make up their own losses, resulting from the dissipation of their property by the incompetent, they could resort to and appropriate the very property under conservation, in the possession of court and guardian; and they could do this regardless of the lack of approval by the court of the transaction out of which the responsibility arose.

The following cases from other jurisdictions give support to our conclusion herein, by holding that a person under guardianship is under the protection of the court, and cannot make a contract which is obligatory upon him as such: *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Hovey v. Hobson*, 53 Me. 451 (89 Am. Dec. 705); *Wait v. Maxwell*, 5 Pick. (Mass.) 217 (16 Am. Dec. 391); *Gibson v.*

6. GUARDIAN AND WARD: estate of ward: contracts for necessities: refusal of claim without restoration of property.

7. GUARDIAN AND WARD: estate of ward: contracts: jurisdiction of court.

Soper, 6 Gray (Mass.) 279 (66 Am. Dec. 414); *Chew v. Bank*, 14 Md. 318; *Hughes v. Jones*, 116 N. Y. 67 (15 Am. St. 386); *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422 (22 Am. Dec. 655); *Wadsworth v. Sharpsteen*, 8 N. Y. 388 (59 Am. Dec. 499); 1 Elliott on Contracts, Sections 368-371; Clark on Contracts (2d Ed.) 182; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658 (20 Am. Dec. 199); *Schramek v. Shepeck*, 120 Wis. 643 (98 N. W. 213); *American Tr. & B. Co. v. Boone*, 102 Ga. 202 (66 Am. St. 167).

In reaching our conclusion herein, we are not unmindful of the fact that a guardianship is sometimes permitted to become dormant, and to cease in fact, though it exists in form upon the records of the court. If the ward be, in fact, restored to mental competency, and if the guardian, recognizing such fact, surrenders to him his estate, and thereby becomes entitled to an order of discharge, but neglects to obtain the same, this would present an illustrative case of dormant guardianship. See, also, *Hanrahan v. Hanrahan*, 182 Iowa 1242, for illustrative case. Whether, in such a case, the ward would be bound by his subsequent contracts, even though entered into before a formal discharge of the guardianship, is a question which we do not determine. The record before us presents a case of an active, "going" guardianship. Nor do we pass upon the question whether any remedy is open to the plaintiff to present his claim as for alleged necessities furnished to the ward. No such question was passed upon by the trial court. The verdict appears to have been directed for the plaintiff upon the ground that the automobile had not been restored to the plaintiff. The court thereby treated the rights of the parties as being defined by Section 3189. This was error. The judgment below is, therefore,—*Reversed*.

LADD, C. J., GAYNOR, PRESTON, and STEVENS, JJ., concur.

RURAL INDEPENDENT SCHOOL DISTRICT OF EDEN, Appellant.
v. VENTURA CONSOLIDATED INDEPENDENT SCHOOL
DISTRICT et al., Appellees.

SCHOOLS AND SCHOOL DISTRICTS: Consolidated Districts—Size of Remaining Corporation—Prohibition—"Four Government Sections" Does Not Include Unsurveyed Portion Covered by Lake. In determining the amount of land to be left in a school district, from which land has been taken to form a consolidated district, under the provisions of Section 2794-a, Code Supplement, 1913, that no school corporation from which said territory is taken shall, after the change, contain less than "four government sections," and so situated as to form a suitable school corporation, the unsurveyed portion of certain sections covered by a lake cannot be used in making up the necessary remaining "four sections," where the school district from which the land was taken did not extend beyond the shore line of the lake.

Appeal from Cerro Gordo District Court.—M. F. EDWARDS,
Judge.

APRIL 8, 1919.

THE plaintiff is an independent school corporation; the defendant, a consolidated independent school district. The action is brought to restrain the defendant from exercising any jurisdiction over any portion of plaintiff's territory, on the theory that, in the organization of the defendant district, it took territory from the plaintiff district, and did not leave to the plaintiff district four government sections, as required by Section 2794-a of the Supplement to the Code, 1913.—*Reversed.*

Senneff, Bliss, Witwer & Senneff, for appellant.

Blythe, Markley, Rule & Smith, and *Wichman & Hastings*, for appellees.

GAYNOR, J.—This action is brought by the plaintiff, a

rural independent school district, to restrain the defendant, a consolidated independent school district, from exercising jurisdiction over a certain portion of its territory. The plaintiff district, prior to the organization of the defendant consolidated independent district, had within its boundary all of Section 28, excepting the southwest quarter of the northwest quarter, all of 27, the west half of 26, all of 33, all of 34, and the west half of 35, and all territory lying south of Clear Lake in Sections 21, 22, and 23. The territory taken from the plaintiff district by the defendant district, and by it incorporated into the Ventura Consolidated Independent School District, is the southwest quarter of 34, the southeast quarter of 33, the west half of 33, the southwest quarter of 28, and the northwest quarter of the southeast quarter of 28, and the northwest quarter of 28. This left in the plaintiff district, after the consolidated independent district was formed, only the northeast quarter of 28; the east half of the southeast quarter of 28; the southwest quarter of the southeast quarter of 28; all of 27; the west half of 26; the northeast quarter of 33; the north half of 34; the southeast quarter of 34; the west half of 35, and the land in 21, 22, and 23 lying south of Clear Lake, containing 290 acres, making, in all, 2,490 acres over which it could exercise jurisdiction for school purposes. These figures are made on the assumption that each section left in the district contained 640 acres, and as showing the actual acreage left subject to assessment for school purposes. See plat herewith submitted.

In May, 1917, defendant district was organized as the Ventura Consolidated Independent School District, and the other defendants are its officers. It was organized under Section 2794-a of the Code Supplement of 1913. No question is made as to its organization. For the purposes of this case, we may assume that it was properly organized under the provisions of that statute, and contains not less

tions, which territory shall be contiguous and so situated as to form [that is, to leave] a suitable corporation."

Plaintiff's contention is that the defendant, in organizing its district, took from the plaintiff so much of its territory that there were not left four government sections over which it might exercise jurisdiction for school purposes; that the taking was, therefore, wrongful, and by the taking it acquired no rights, because the taking was in violation of the very statute under which the defendant district was organized.

Assuming that the sections originally in plaintiff's district were full sections, containing 640 acres, and assuming that the sections left in plaintiff district are all full sections (and we must assume this, unless the contrary appears), we find that, after the taking by the defendant district from the plaintiff of this territory, the plaintiff was left with about 70 acres less than four government sections. This is assuming, however, that no part of what is called 21, 22, and 23 is a part of the plaintiff district, except such portions as lie south of Clear Lake. We held, in *Powers v. Harten*, 183 Iowa 764, that the word "section," as used in the statute, meant a government section,—a subdivision of land staked out and marked by the government as a section, whether it contained more or less than 640 acres; and we held that the fact that a section is surveyed and staked out as a section makes it a "section," in contemplation of the statute, though it contains less than 640 acres; and that the fact that it contained less than 640 acres did not make it fractional. In that case, it was conceded that there were 16 sections in the consolidated district, but it was said that the actual measurement of the sections showed they did not contain, each, the full number of acres required to constitute a section; that, as the statute required not less than 16 sections to make a consolidated school district, yet it was not sufficient to meet the requirements of the stat-

ute unless these 16 sections each contained 640 acres. This contention was held bad. Here, however, we are confronted with a different situation.

The statute provides that, in the organization of a consolidated school district, and in the taking of land to make up the quantum of the district, it must not take from adjoining districts so as to reduce the existing district to less than four sections: that is, less than four government sections. Or, in other words, the consolidated independent district, in taking territory from other districts, must leave the district from which the territory is taken with not less than four government sections, and so situated as to form a suitable school corporation. That is, it must leave the district from which it takes territory with not less than four government sections of land so situated as to form a suitable corporation,—that is, a suitable school corporation. It evidently was the thought of the legislature that four sections were essential to make a suitable school corporation, and that less would make it unsuitable for that purpose.

It will be noted from the plat that Clear Lake lies immediately north of plaintiff district. It will be noted that Sections 28, 27, 26, 33, and 35 were surveyed as government sections, and so staked off; that, north of 26, 27, and 28, the south shores of Clear Lake meandered, and the government found that, south of the lake and north to 28, 27, and 26, there were but $7\frac{1}{4}$ government 40's. Clear Lake is a large body of water. It is not pretended that 21, 22 and 23 were surveyed beyond the shore line; that they were ever surveyed, or staked out as government sections, subject to sale, north of the south shore line. True, a meandering line is not a boundary line. The government undertook to survey, and did survey and mark out, the land south of the lake, and fixed the amount of land therein included. The real controversy here centers about the contention made by the

defendant, that, though the survey was made south of the lake, and the amount of territory indicated was south of the lake and north of 26, 27, and 28, yet plaintiff must be charged with having control and jurisdiction for school purposes over all of 22 and 23, and it assumes that all of 22 and 23 still belong to the plaintiff for school purposes, and are a part of the territory over which plaintiff is entitled to assert jurisdiction; and so defendants say they did leave the plaintiff more than four government sections. It appears, however, that the only part of Sections 22 and 23 over which any control can be exercised for school purposes, is that portion south of the lake. There is such a thing as fractional government sections. They are known to and recognized by the government in its subdivision of lands for sale. In the absence of any showing to the contrary, the government survey must prevail; and this would leave in 21, 22, and 23 only 290 acres subject to the jurisdiction of the plaintiff for school purposes; and this, added to the balance that is left to the plaintiff, leaves the plaintiff with less than four government sections. This is not disputed, unless we should assume, as contended for by the defendant, that 22 and 23 were surveyed into sections, and can be treated as full sections and as a part of plaintiff district. We cannot say this, and so plaintiff district is reduced below the minimum. As we said in the *Powers* case, supra, "Fractional sections are caused by lakes and streams and reservations." We may have been a little inaccurate in saying "and by township lines, when the township is more or less than six miles in extent in one or both dimensions." When the legislature said "not less than four government sections," its mandate was not satisfied by leaving but four sections, part of which was fractional. When the government caused the public domain to be surveyed, it was for the purpose of dividing it up into parts, and these parts were generally designated "sections." It was undoubtedly the intention and purpose

of the government that each section should contain 640 acres; but actual experience shows that this intention and purpose were not fully carried out by its surveyors, and many of the divisions staked out and marked as sections did not contain the contemplated acreage. Some contained more, and some contained less. Still, the government accepted the return of the surveyors as complying with its requirements, and the divisions became fixed and known as sections, and, in common parlance, the subdivisions as sections. The government, however, recognized that often obstacles would be met with in surveying which would prevent its officers from dividing the territory into sections containing the number of acres into which the government contemplated they should be divided,—that natural obstacles would be met with by its surveyors that made it impossible for full sections to be marked off; and so surveys were made up to these obstacles, and fractional pieces of the contemplated section were surveyed and staked out and shown as fractional. Surveys are fractional when the outer boundary lines of the territory surveyed cannot be carried out to include the full quantum contemplated, on account of the obstacles, such as watercourses, territory within Indian reservations, etc. It was the original and general purpose of the government, in surveying the public domain, to divide all territory into sections containing 640 acres. This became, of course, impracticable, sometimes, because of natural obstacles in the way of carrying it out. A surveyor, after laying out his township, found that, in the subdivision of the township into sections, there were certain natural obstacles which prevented him from subdividing it into sections containing 640 acres. The matter here considered was discussed in *Wilson v. Hoffman*, 70 Mich. 552 (38 N. W. 558); *Goltermann v. Schiermeyer*, 111 Mo. 404 (19 S. W. 484).

There is no competent evidence that the plaintiff dis-

trict, as originally formed, and as it existed at the time defendant undertook to appropriate a portion of its territory, extended beyond the south shore line of Clear Lake. We cannot assume that the school curriculum provided for instruction in the art of swimming, or that school children lived in or upon the water, or that the land under the water was subject to taxation for school purposes. All the record indicates that the north line of plaintiff district was the south water line of the lake. Assuming that plaintiff district did not extend beyond the south line of the lake, we must find that there is not left in the district, after the organization of the consolidated district, the quantum of land provided for by the statute, and that the court, therefore, erred in dismissing plaintiff's petition. Plaintiff was entitled to the relief demanded, and the cause is—*Reversed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

J. F. DOUGHERTY, Appellee, v. O. B. FRENCH, Appellant.

INTOXICATING LIQUORS: Promissory Note for Liquors Sold. In 1 an action on a promissory note for intoxicating liquors sold under the Mullet Act, plaintiff need only show that he had, prior to said sale, complied with all those requirements which are conditions precedent to the opening of a place for such sale.

INTOXICATING LIQUORS: Presumption Attending Consent, Findings, Etc. A consent petition for the sale of intoxicating liquors, duly found to be sufficient, carries a presumption of continuance until its revocation or expiration is made to appear.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

FEBRUARY 17, 1919.

REHEARING DENIED APRIL 10, 1919.

SUIT on promissory note. Trial to the court without a

jury. Judgment for plaintiff for the amount of the note. Defendant appeals.—*Affirmed*.

James S. Burrows, for appellant.

W. B. and H. R. Collins, for appellee.

PRESTON, J.—The note was given in settlement for intoxicating liquors sold by plaintiff to defendant in the city of Keokuk, in the year 1911. The execution of the note was admitted by defendant in his answer, but

1. INTOXICATING LIQUORS: promissory note for liquors sold. he alleges that there was no consideration, for that the note was given for intoxicating liquors sold to defendant contrary to law, within the state of Iowa. In reply, plaintiff denies that the note was given for intoxicating liquors sold contrary to the laws of Iowa, and avers that plaintiff did business in the city of Keokuk, and that the mulct law and the provisions of Section 2448 of the Code were in full force in Keokuk, and that plaintiff complied with the provisions of Section 2448, and paid the mulct tax. There was no evidence introduced on behalf of the defendant. It may be that plaintiff was not required to introduce any evidence in the first instance. We understand defendant to so concede, but plaintiff did take the stand, and, as a witness for himself, testified that he carried on the business alone, and that his son was working for him. On cross-examination, he said that the note was given in settlement of the account for intoxicating liquors which were delivered to defendant's place of business, on Main Street, in the city of Keokuk, and that they were sold in 1911. Plaintiff assumed that the burden of showing performance of the things which are conditions precedent to the opening of his saloon, that he had paid the mulct tax for the year 1911, the finding by the board of supervisors that the mulct petition of consent was sufficient that intoxicating liquors might be sold in Keokuk, consent

of resident freeholders within 50 feet, lists of persons employed, the giving of a bond, and the like. Appellant makes the broad claim that the burden is upon plaintiff to plead and prove that he had complied with all of the conditions of the mulct law, and states in argument that the main question in this case is whether or not appellee could recover on the note without first showing that he had complied with *all* of the conditions of the mulct law, and claims that plaintiff, in his attempt to bring himself within the exception to the general prohibitory law, did not go far enough, and prove that he had complied with all the provisions of Section 2448. Appellant cites *State v. Van Vliet*, 92 Iowa 476; *Westheimer v. Habinck*, 131 Iowa 643; and like cases. The *Van Vliet* case is perhaps the first decision on this question by this court, under the so-called mulct law. In that case, the trial court held that the burden of proof was on the State, as to all matters. The case was reversed, this court holding that the bar created by the mulct statute is operative only on certain conditions, and that the happening of these conditions must be pleaded and proved by the party who wishes to take the benefit of them. But it was not decided in that case just how far such party must go in his proof. In the *Westheimer* case, the question was as to whether the sale of liquor by the plaintiff was made in Missouri or in Iowa, and it was said that, if the sales were in Iowa, no recovery could be had for the purchase price, for there was no showing that such sale would have been lawful; and that, because prohibition is the rule in Iowa, the burden was upon plaintiff to show that the sales, if made in this state, were lawful. So that, in that case, there was no showing of any kind that plaintiff had complied with any of the provisions as to its right to do business in Iowa. It may be that, in some of the earlier cases, under the circumstances of such cases, the holdings were that all the provisions of the mulct law must be pleaded and

proved. Appellant concedes that he has not been able to find a case precisely like the instant one. In this connection, appellant makes this statement in argument:

"Appellant does not contend that there could not be a recovery: there undoubtedly could be; but there is a great burden cast upon he who would attempt it."

We are not quite able to understand the meaning of this, unless appellant means to admit that he has not much faith in his case on the merits, if all the facts had been shown. Appellee's contention is that the cases cited by appellant are not applicable to the facts in this case, and that appellant has not offered any evidence to sustain his claim that the note was given for intoxicating liquors sold contrary to law. Appellee concedes that he had the burden to show, and did show, the performance of all those things precedent to the opening of a place for the sale of intoxicating liquors. He contends that, this having been done, the burden is then upon appellant to show violations of the law. Appellee cites *Jones v. Byington*, 128 Iowa 397. It was there held that the dealer must take the burden of showing performance of all those things which are, in their nature, conditions precedent to the opening of a saloon, but that it is for the complaining party to show violations of the law involving matters of conduct only, as that sales were made to minors, and on Sunday, etc. See, also, *Hathaway v. Jepson*, 154 N. W. 454 (not officially reported). We think the ruling of the trial court at this point was in harmony with the last-cited cases.

One or two other questions are suggested, but we think there is no merit in them. For instance, it is said that the certified copy of the action of the board of supervisors, in finding the petition of consent sufficient, was not material or relevant, because such action of the board was taken December 27, 1910, and the liquors were sold in the year 1911. There is no suggestion that there was

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ever any revocation of the petition which was found sufficient on December 27, 1910. We think there is a presumption of the continuance of the consent under such petition until it is revoked, or has expired. We are of the opinion that the judgment should be affirmed. It is—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

JOSEPH S. ELLISON, Appellant, v. J. G. STOCKTON et al.,
Appellees.

PRINCIPAL AND AGENT: Authority to Sell or Find Purchaser.

- 1 Naked authority to sell land at a specified price, or simply to find a purchaser, embraces no implied authority to the agent to make representations as to the character or condition of the land.

FRAUD: Unpleaded but Proved Fraud. Unpleaded fraud, though
2 proved, affords no ground for relief.

FRAUD: Examination as Excluding Reliance on Fraud. An un-
3 obstructed examination of property by a prospective vendee, prior to purchase, does not necessarily exclude reliance on fraudulent representations.

VENDOR AND PURCHASER: Vendee Injured by Unauthorized

- 4 **Fraud.** A vendee of land may not maintain an action against the vendor for damages for *deceit* because of the false and fraudulent representations of the vendor's agent, when such representations were *wholly* unauthorized by the vendor, and were unknown to the vendor until after the sale was consummated; but such vendee may, within a reasonable time after the closing of the sale, bring such fraud to the attention of the vendor and demand rescission, and, if rescission be refused, may maintain an action against the vendor to recover the difference between the actual value of the land and the amount he agreed to pay for it. Vendors may not repudiate the unauthorized fraud of their agents *and retain the fruit of the rascality*.

WEAVER, J., concurs in reversal, but dissents to portions of discussion.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JANUARY 20, 1919.

REHEARING DENIED APRIL 10, 1919.

ACTION to recover damages for false representations in the sale of land. Opinion states the case. Directed verdict for the defendants. Judgment on the verdict. Plaintiff appeals.—*Reversed.*

Redmond & Stewart, for appellant.

E. A. Johnson and *F. L. Anderson*, for appellees.

GAYNOR, J.—In September, 1914, defendants were the owners of a certain tract of farm land, and listed the same for sale with Hall & McCall. Hall & McCall were real estate agents, whose business it was to negotiate sales for others, and to procure purchasers for land owned by others. These facts were known to plaintiff. The defendants had owned this land for about five years before listing it. Some time in September, "Train" McCall, one of these agents, called the plaintiff by phone, stating to him that he had a farm northwest of Cedar Rapids which he wanted to sell the plaintiff, if the plaintiff wanted to buy, and asking plaintiff to come in. Two or three days thereafter, the plaintiff came to McCall's home at Lisbon. He came about 8 o'clock in the morning. He then went immediately, in company with these agents and his son, to visit the farm. They left McCall's home about 8:30, and, after stopping some time on the way, reached the farm at about half past ten. The land in controversy is described as follows: The south one half of the northwest quarter, the southwest quarter of the northeast quarter, the north one half of the southwest quarter, and the northwest quarter of the southeast quarter. The house is situated on the south 80. On reaching the place.

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and purchaser.

plaintiff undertook to examine the land, for the purpose of determining whether or not he would purchase it. It is the claim of the plaintiff that he did not make a very thorough examination of it. After such examination had been made as plaintiff cared to make,—and it is not claimed that he was prevented from making any further examination of it,—on the way back, he made an offer of \$80 per acre. However, he was told by the agents that the land was listed with them at \$85 an acre. He returned by way of defendant's home, but did not stop, though the agents did. Subsequently, on the 21st day of September, the defendants and the plaintiff came together, and a written contract was entered into, by which the plaintiff agreed to purchase the entire farm of 240 acres, at \$80 an acre, to pay \$5,000 in cash, and secure the balance by a mortgage upon the premises, the deeds and mortgages to be executed on the 1st of March following, and possession then given to the plaintiff. On the 25th day of February, 1915, the plaintiff, having paid the \$5,000 provided for in the contract, executed and delivered to these defendants his note for the unpaid balance of the purchase price, and secured the same by a mortgage upon the premises. Thereupon, the defendants executed and delivered to the plaintiff a deed to the land, and on the 1st day of March, plaintiff took possession and continued in possession personally until some time in July, 1916. The record does not affirmatively show, but we take it from the record, that he has been in possession by others since that time. At least, it does not appear that he has surrendered possession to the defendants. It appears that, when the contract was drawn up, it was supposed that the farm contained 240 acres, but it was subsequently discovered that it was 7 acres short. Some time in January, 1915, a survey was made by the plaintiff and the defendants, and 7 acres agreed upon as the shortage in the acreage of the farm, and \$560, or \$80 an acre, was deducted from the contract price

on account thereof, and the note and mortgage were made for \$560 less than the contract called for.

On the 18th day of February, 1916, this action was brought to recover damages which the plaintiff claims he has sustained by reason of certain false and fraudulent representations made, touching the character of the land purchased. He claims that, when visiting the land for the first time with these agents, he asked one of them, while on the farm, what kind of soil it was, and the agent replied, "black, sandy loam." He asked him if the ground overflowed, and he said, "No, it never overflowed." His action for deceit is based on the ground that it was not black, sandy loam, and it did overflow, and that these representations were made by these agents for the purpose of having him believe that it was black, sandy loam, and did not overflow; that he did so believe, and, relying upon these statements, was induced to purchase the land. He further says that the defendants and their agents knew that the representations were not true. He wants damages in the difference between what the land would be worth if it had been as represented, and what it was in fact worth; says that it would have been worth what he agreed to pay, had it been as represented.

At the conclusion of the evidence, the court directed a verdict for the defendants. Judgment being entered upon the verdict, plaintiff appeals.

It is apparent from this record that these agents had no relationship with the defendants except that which grew out of their agency. The agency was to sell at \$85 an acre, or to procure a purchaser who was ready, able, and willing to buy the land on terms satisfactory to the defendants. The agents did not sell the land, but they did find in the plaintiff a purchaser who was ready, able, and willing, and who did buy the land on terms satisfactory to the defendants. There is nothing to show express authority, on the part of these agents, to make any representations touching the

character of the land. Is it implied? So far as this record shows, their business was to sell, or to secure a purchaser who was ready, able, and willing to buy the land in its *then condition*, on terms satisfactory to the defendant. They found this plaintiff, took him to the land, showed it to him, and informed him that they had it for sale at \$85 an acre. Plaintiff proposed to purchase the land, as he says, for \$80 an acre, if it was as represented by these agents, to wit, to be sandy loam, free from overflow. Subsequently, the plaintiff and these defendants met, and the terms were arranged upon which the plaintiff should purchase. Nowhere in the negotiations with the defendants were the defendants informed by anyone that any representations had been made to the plaintiff touching the character of the land. They were informed, however, that the plaintiff had been to examine the land. Defendants accepted plaintiff's proposition as he made it to them. It does not appear that these agents had anything to do with the making of the contract on the 21st day of September. The question then is, so far as this proposition is concerned: Are the defendants liable in damages on account of these fraudulent representations made by these agents, it not appearing that they were made with the express authority of these defendants, or that they were ever brought to the knowledge of the defendants before the consummation of the final contract and the surrender of the property to the plaintiff?

We may assume, for the purposes of this case, that these agents made the representations substantially as claimed. We may assume that the representations were not true. We may assume that the plaintiff believed they were true, and relied upon them in making the purchase. There is no evidence that the agents knew that their representations, if made, were not true, but we may assume that they did know they were not true. We may assume that plaintiff made his proposition to the agents to purchase at \$80

an acre, on the assumption that these representations were made, and were true. The question still remains: Are these defendants liable in damages as for deceit in the making of these representations?

It is not claimed that, when plaintiff came to make the contract with the defendants, he said anything to them touching these representations, or asked any questions of them, touching the character of the land. It is nowhere shown that he said to these defendants that the condition upon which he was making the purchase was that these representations were true. The record is barren even of suggestion of knowledge on the part of these defendants of the making of these representations. Were the representations so connected with the employment as to be binding upon these defendants? It is undoubtedly true that whatever an agent says or does, within the scope of his authority, binds his principal, and is deemed his act. The authority must be either express or implied,—expressly given or implied from the relationship created and existing. Had these agents the authority from these defendants to represent the land to be other than it was? Their authority was simply to make a sale, or procure a purchaser who was ready, able, and willing to buy. The plaintiff was procured by the agents as one who was ready, able, and willing to buy at a stipulated price. The price was stipulated by the plaintiff himself. He was brought by these agents to the defendants, and with them the contract was made. He gave the defendants no information touching any representations made, nor did he give them any information that he was buying on condition that the representations made were true. The scope of the agents' authority was to sell, or to procure a purchaser for the land. Thus far, they bound their principal by their acts. They could not bind him by untruthful and unauthorized representations touching the character of the thing which they were authorized to sell.

The authority to make these representations was not necessarily included within the terms of the agency. The representations, to bind the principal, must appear to be representations which the agent, by his employment, was authorized to make. It is a general rule, well recognized, and is an exception to the rule of *respondeat superior*, "that a principal is not responsible for the deceit practiced by his agent, unless there is something in the nature of the engagement, the terms of the employment, or the powers conferred, broad enough to include a power on the part of the agent to deal with the property in such manner that the principal, in good morals and equity, ought to be bound by what the agent may have said." Or, in other words, an innocent principal, who has simply authorized an agent to sell property, cannot be charged, on an action for deceit, for the agent's wrongs, unless in some manner he is connected with them. *Kennedy v. McKay*, 43 N. J. L. 288; *Titus v. Cairo & Fulton R. Co.*, 46 N. J. L. 393; *State v. Fredericks*, 47 N. J. L. 469 (1 Atl. 470); *Tondro v. Cushman*, 5 Wis. 279; *Mayo v. Wahlgreen*, 9 Colo. App. 506 (50 Pac. 40); *Samson v. Beale*, 27 Wash. 557 (68 Pac. 180).

A fraud, to be actionable, must be fraud that is either personally committed by the person sought to be charged, or some fraud which he has authorized another, either directly or impliedly, to be guilty of. The action here is based upon fraudulent representations made by the defendants. The defendants made no fraudulent representations before this written contract was entered into. They never knew the representations were made, until after the original written contract had been fully executed. All that these defendants did was to authorize these agents to sell this land, or to procure for them a purchaser. It has been frequently held by this court that, where the authority is limited to the finding of a purchaser, the duty of the agent is performed when the purchaser is produced. When the agent

jury. Judgment for plaintiff for the amount of the note. Defendant appeals.—*Affirmed*.

James S. Burrows, for appellant.

W. B. and H. R. Collins, for appellee.

PRESTON, J.—The note was given in settlement for intoxicating liquors sold by plaintiff to defendant in the city of Keokuk, in the year 1911. The execution of the note was admitted by defendant in his answer, but he alleges that there was no consideration, for that the note was given for intoxicating liquors sold to defendant contrary to law, within the state of Iowa. In reply, plaintiff denies that the note was given for intoxicating liquors sold contrary to the laws of Iowa, and avers that plaintiff did business in the city of Keokuk, and that the mulct law and the provisions of Section 2448 of the Code were in full force in Keokuk, and that plaintiff complied with the provisions of Section 2448, and paid the mulct tax. There was no evidence introduced on behalf of the defendant. It may be that plaintiff was not required to introduce any evidence in the first instance. We understand defendant to so concede, but plaintiff did take the stand, and, as a witness for himself, testified that he carried on the business alone, and that his son was working for him. On cross-examination, he said that the note was given in settlement of the account for intoxicating liquors which were delivered to defendant's place of business, on Main Street, in the city of Keokuk, and that they were sold in 1911. Plaintiff assumed that the burden of showing performance of the things which are conditions precedent to the opening of his saloon, that he had paid the mulct tax for the year 1911, the finding by the board of supervisors that the mulct petition of consent was sufficient that intoxicating liquors might be sold in Keokuk, consent

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of resident freeholders within 50 feet, lists of persons employed, the giving of a bond, and the like. Appellant makes the broad claim that the burden is upon plaintiff to plead and prove that he had complied with all of the conditions of the mulct law, and states in argument that the main question in this case is whether or not appellee could recover on the note without first showing that he had complied with *all* of the conditions of the mulct law, and claims that plaintiff, in his attempt to bring himself within the exception to the general prohibitory law, did not go far enough, and prove that he had complied with all the provisions of Section 2448. Appellant cites *State v. Van Vliet*, 92 Iowa 476; *Westheimer v. Habinck*, 131 Iowa 643; and like cases. The *Van Vliet* case is perhaps the first decision on this question by this court, under the so-called mulct law. In that case, the trial court held that the burden of proof was on the State, as to all matters. The case was reversed, this court holding that the bar created by the mulct statute is operative only on certain conditions, and that the happening of these conditions must be pleaded and proved by the party who wishes to take the benefit of them. But it was not decided in that case just how far such party must go in his proof. In the *Westheimer* case, the question was as to whether the sale of liquor by the plaintiff was made in Missouri or in Iowa, and it was said that, if the sales were in Iowa, no recovery could be had for the purchase price, for there was no showing that such sale would have been lawful; and that, because prohibition is the rule in Iowa, the burden was upon plaintiff to show that the sales, if made in this state, were lawful. So that, in that case, there was no showing of any kind that plaintiff had complied with any of the provisions as to its right to do business in Iowa. It may be that, in some of the earlier cases, under the circumstances of such cases, the holdings were that all the provisions of the mulct law must be pleaded and

proved. Appellant concedes that he has not been able to find a case precisely like the instant one. In this connection, appellant makes this statement in argument:

"Appellant does not contend that there could not be a recovery: there undoubtedly could be; but there is a great burden cast upon he who would attempt it."

We are not quite able to understand the meaning of this, unless appellant means to admit that he has not much faith in his case on the merits, if all the facts had been shown. Appellee's contention is that the cases cited by appellant are not applicable to the facts in this case, and that appellant has not offered any evidence to sustain his claim that the note was given for intoxicating liquors sold contrary to law. Appellee concedes that he had the burden to show, and did show, the performance of all those things precedent to the opening of a place for the sale of intoxicating liquors. He contends that, this having been done, the burden is then upon appellant to show violations of the law. Appellee cites *Jones v. Byington*, 128 Iowa 397. It was there held that the dealer must take the burden of showing performance of all those things which are, in their nature, conditions precedent to the opening of a saloon, but that it is for the complaining party to show violations of the law involving matters of conduct only, as that sales were made to minors, and on Sunday, etc. See, also, *Hathaway v. Jepson*, 154 N. W. 454 (not officially reported). We think the ruling of the trial court at this point was in harmony with the last-cited cases.

One or two other questions are suggested, but we think there is no merit in them. For instance, it is said that the certified copy of the action of the board of supervisors, in finding the petition of consent sufficient, was not material or relevant, because such action of the board was taken December 27, 1910, and the liquors were sold in the year 1911. There is no suggestion that there was

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ever any revocation of the petition which was found sufficient on December 27, 1910. We think there is a presumption of the continuance of the consent under such petition until it is revoked, or has expired. We are of the opinion that the judgment should be affirmed. It is—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

JOSEPH S. ELLISON, Appellant, v. J. G. STOCKTON et al.,
Appellees.

PRINCIPAL AND AGENT: Authority to Sell or Find Purchaser.

- 1 Naked authority to sell land at a specified price, or simply to find a purchaser, embraces no implied authority to the agent to make representations as to the character or condition of the land.

FRAUD: Unpleaded but Proved Fraud. Unpleaded fraud, though
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VENDOR AND PURCHASER: Vendee Injured by Unauthorized

- 4 **Fraud.** A vendee of land may not maintain an action against the vendor for damages for *deceit* because of the false and fraudulent representations of the vendor's agent, when such representations were *wholly* unauthorized by the vendor, and were unknown to the vendor until after the sale was consummated; but such vendee may, within a reasonable time after the closing of the sale, bring such fraud to the attention of the vendor and demand rescission, and, if rescission be refused, may maintain an action against the vendor to recover the difference between the actual value of the land and the amount he agreed to pay for it. Vendors may not repudiate the unauthorized fraud of their agents *and retain the fruit of the rascality*.

WEAVER, J., concurs in reversal, but dissents to portions of discussion.

from an examination whether it was land they desired to buy. Plaintiff had been the owner of land in this same county, not far distant from this land. He had sold for \$180 an acre. He said he desired to buy cheaper land. When he saw this land, it was in his mind to buy cheaper land. No obstacles were thrown in the way of his inspection. He did, unquestionably, examine a portion of it. He again visited the land on Thanksgiving, and again in December or January. On the 25th day of February, he consummated the contract by accepting a deed and executing to the defendants a note and mortgage for the unpaid purchase price. On the 1st of March, he took possession, retained possession, and made no complaint until some time in January, 1916.

On this fact question, we think a case was made for the jury, though it is exceedingly close to the line, and is not free from doubt.

While we find the plaintiff not entitled to recover damages against the defendants as for deceit, on account of the fraud practiced by their agents, the question still remains.

Is the plaintiff without right in this action?

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by unauthorized
fraud.

Is he without some right which the court will recognize and enforce?

As said before, the contract was consummated in February, 1915, the note and mortgage given, and the deed executed, and on the 1st of March, the land was turned over to the possession of the plaintiff. It appears, however, that, on the 15th day of January, 1916, after the consummation of the deal, the plaintiff wrote the defendants the following letter, properly addressed to them:

"I bought this land up north of Palo from you, on your statements that it was black, sandy loam, and that the land did not overflow. It is not black, sandy loam, and 60 acres of the land are under water constantly, and 160 of it has been overflowed this year, several times, so as to prac

tically prevent its use for anything. I write this letter to give you an option to return me my money and take a quit-claim for the land, or to give me credit for the overflow acreage at the price of \$80 an acre on the mortgage which you hold."

The jury might well find that this letter was written within a reasonable time after the plaintiff had discovered that the statements made by the agents touching the character of the land were not true. It gave to the defendants the option to call the contract off, or to pay to the plaintiff the difference between what the land was actually worth and what the plaintiff had contracted with the defendants to pay them for the land. Nothing seems to have been done by the defendants in response to this letter. We must assume that the defendants elected to retain the fruits of the fraud practiced by their agents.

On the 18th day of February, this action was begun. If the testimony of plaintiff's witnesses is to be believed,—and for the purposes of this case we must assume that their statements are true,—the land, in the condition in which it was, was not worth on the market more than \$30 an acre. If the plaintiff's testimony is reliable, and it was for the jury to say whether it was or not, the plaintiff, through the fraud of the agents of the defendants, was induced to obligate himself to pay \$50 an acre more for this land than it was actually worth. Defendants are, therefore, holding from the plaintiff money which they obtained through the fraudulent practices of their agents, far in excess of the value of the thing which plaintiff received in the transaction. It is not a violent assumption to say that, had the plaintiff known that the land was not as represented, he would not have bound himself to pay this large sum of money to the defendants for the land. While we hold that, in an action for deceit, strictly construed, the plaintiff is not entitled to recover damages of the defendant, based solely on the false

representations of his agents touching the character of the land, because the enforcement of such a rule would inevitably work great hardship on the innocent seller, and compel him to pay damages for a wrong to which he was in no way a culpable party, yet a different rule obtains when it is shown that the sum obtained through this fraud is far in excess of the value of the thing, and the action is to recover the excess only. If the purchaser, after he acquires knowledge of the fact that the buyer was induced to make the purchase and pay the price through fraud practiced on him by the defendant's agent, insists on holding the fruits of the fraud, an action will lie for the money so fraudulently obtained and withheld. The wronged party has two remedies. He may rescind the contract, tender back the property, and recover the amount which he agreed to pay, or he may offer rescission, and, if the offer be refused, maintain an action to recover the difference between what he contracted to pay, or did pay, and the actual value of the thing which he received. Or, in other words, the seller cannot retain the fruits of the fraud and repudiate the fraud at the same time. The fruits of the fraud are the difference between what the thing was actually worth and what the purchaser was fraudulently induced to pay for the thing. The wording of plaintiff's petition does not clearly indicate on which of the two theories he was prosecuting his suit. In construing the petition most favorably to the plaintiff, it can be said that the suit was to recover the difference between what he paid for the land and what the land was actually worth. To allow the plaintiff to recover the difference between what the thing sold was actually worth, and what he agreed to pay for it, is not mulcting the defendants in damages. It is requiring them to disgorge only so much of the purchase price as they obtained through the fraudulent representations of their agents. The seller cannot retain the fruits of the fraud, and at the same time repudiate

the fraud; or, as some of the books say, he cannot repudiate the fraud and yet hold onto its profits.

The authorities are not as one upon this proposition. See 2 Corpus Juris 858, where the authorities pro and con are collated; *Shepard v. Pabst*, 149 Wis. 35 (135 N. W. 158); *Gunter v. Ullrich*, 82 Wis. 222; *McKinnon v. Vollmar*, 75 Wis. 82; *Law v. Grant*, 37 Wis. 548; *Bennett v. Judson*, 21 N. Y. 238; *Rhoda v. Annis*, 75 Me. 17 (46 Am. Rep. 354); *Hoyer v. Ludington*, 100 Wis. 441.

Upon this theory of the case, we think the court was wrong in directing a verdict for the defendants, and for that reason, the case is—*Reversed*.

LADD, C. J., EVANS, PRESTON, SALINGER, and STEVENS, JJ.,
concur.

WEAVER, J. (concurring). I concur in the opinion prepared by Mr. Justice Gaynor that this case is one for reversal, as well as in his statement of the proper rule for the admeasurement of the plaintiff's damages. My disagreement with the opinion goes only to the discussion which precedes the words, "As said before, the contract was consummated in February, 1915," etc. A reading of the opinion will show that the discussion to which I refer is not at all vital or necessary to the disposition of the appeal; and, such being the case, I would not encumber the record with an expression of disagreement, were it not that, when our decision takes its place as a precedent for the guidance of the profession and the courts of the state, silence upon the subject by other members of the court is liable to be construed into an approval of all that is there said.

I have specific reference to the propositions therein mentioned, and summed up in the statement that, to bind the defendants by the false representations of the agent, the "representations must appear to be those which the agent, by his employment, was authorized to make," and again:

"He [the agent] could not bind his principal by untruthful and unauthorized representations touching the character of the land he was authorized to sell." As I have already suggested, this discussion, in view of the result, is dictum, or matter merely *arguendo*; but, to avoid any misunderstanding, it is proper that it be accompanied by my contention that the rule so asserted is opposed to the whole current of the law on that subject. Indeed, aside from a few cases in New Jersey, all the authorities, including text writers, courts, and annotators, are practically unanimous in holding to the doctrine which is expressed in 1 Am. & Eng. Encyc. of Law 1158, 1159, as follows:

"The principal is liable for the fraudulent act of his agent in the course and within the scope of his employment though in fact the principal did not authorize the practice of such acts. * * * The fraudulent representations of an agent acting in the course of his employment and in reference to business within the scope of his authority will be binding upon the principal, although, in perpetuating the fraud, the agent acted without the knowledge or consent of the principal."

The same proposition is affirmed in 2 Corpus Juris 856; 31 Cyc. 1582; Benjamin on Sales (7th Ed.) Sections 462-467; 1 Clark & Skyles on Agency 1102; Story on Agency (9th Ed.) Section 452; 21 R. C. L. 850; *Lloyd v. Grace S. & Co.*, A. C. (1912) 716 (Ann. Cas. 1913B, 819); *Franklin F. Ins. Co. v. Bradford*, 201 Pa. St. 32 (50 Atl. 286, 88 Am. St. 770 [and see note to same case in same volume, page 787]); *Law v. Grant*, 37 Wis. 548; *McKinnon v. Vollmar*, 75 Wis. 82; *Hoyer v. Ludington*, 100 Wis. 441; *Heiddegger v. Burg*, 137 Minn. 53 (*Carlson v. Burg*, 162 N. W. 889); *Rush v. Leavitt*, 99 Kan. 498 (162 Pac. 310). Citations of other authorities to the same effect could be extended quite indefinitely. The distinction sought to be drawn between the principal's liability "as for deceit," and

his liability for damages if he retains the fruits of the agent's fraud after notice thereof, is one of mere words, and not of substance, when we consider our practice, which recognizes no "forms of action." The petition in this case did charge fraud and misrepresentation by the defendants and their agents, and that, by means thereof, plaintiff had sustained large damages, and that defendants had refused to accept a rescission of the deal, or to pay the damages. It may be conceded that, in so far as he charged misrepresentation of the character of the soil, he did not make a case; but there was ample evidence of misrepresentation of the liability of the land to overflow, and that, by false statements in this respect, the property was foisted upon plaintiff at a price more than twice what it was worth. Having offered evidence clearly sufficient to take that issue to the jury, it is wholly immaterial whether defendants are chargeable for damages "as for deceit," or because they have ratified the fraud of their agents by approving the sale they had negotiated, or because they cannot be permitted to retain the fruits of the fraud practiced by them, and at the same time deny their liability for the injury so perpetrated upon the plaintiff.

For these reasons, and because I believe much of the language employed in that part of the opinion to which I have objected opens the gate to a wide departure from well-settled and salutary rules of law, I do not wish to be bound thereby.

J. V. HEARN, Appellee, v. CITY OF WATERLOO, Appellant.

LIMITATION OF ACTIONS: Waiver of Plea. One may not com-

- 1 plain that his plea of the statute of limitations was ignored by the court when he himself ignored said plea throughout the trial, and until the filing of his motion for new trial. Especially is this true when, on a hearing with reference to the lost

return of service, it appears that the notice was filed with the sheriff in proper time.

MUNICIPAL CORPORATIONS: Notice of Defect in Highway. The
2 existence for two weeks of an obvious defect in a public street carries constructive notice thereof to the municipality.

NEGLIGENCE: Falling into Hole Near Sidewalk. Evidence re-
3 viewed, and held insufficient to show contributory negligence *per se* in stepping into a hole near the edge of a sidewalk.

EVIDENCE: Improper Basis for Opinion. Expert evidence, de-
4 scriptive of the nature and extent of personal injuries, may not be wholly stricken on the ground that it appeared, on cross-examination, that, subsequent to the personal examination by the witness, he viewed an X-ray photograph made by *another* party, and testified that such photograph confirmed his former diagnosis.

Appeal from Black Hawk District Court.—C. W. MULLAN,
Judge.

NOVEMBER 19, 1918.

REHEARING DENIED APRIL 10, 1919.

ACTION for damages for personal injuries sustained upon the streets of the defendant. There was a verdict for the plaintiff, and judgment thereon. Defendant appeals.—*Affirmed.*

Burr A. Brown and *E. H. McCoy*, for appellant.

C. J. Rudolph and *Reed, Tuthill & Reed*, for appellee.

EVANS, J.—The accident in question occurred on the night of June 3, 1916, on one of the streets of the defendant city. The plaintiff was walking with others upon the sidewalk, and was on the outer edge thereof. By inadvertence, he stepped into a hole which extended to the very edge of the sidewalk. The hole was about 20 inches by 12 inches and about 2 feet deep. He sustained severe injuries as a result of his fall therein. There was evidence that the

hole had existed for a couple of weeks. Plaintiff was not aware of its existence. There was a street light near by, but the shadows of trees were cast over the hole, to a greater or less extent. The hole also contained some grass and rubbish, which tended to prevent its discovery in the dark.

I. The first question presented for our consideration by the appellant is that of the statute of limitations. Among other defenses, the defendant pleaded that the action was barred by the statute of limitations, because

1. LIMITATION OF
ACTIONS:
waiver of plea.

it was not commenced within three months from the time of the happening of the injury. The injury occurred on the night of June 3, 1916. The petition was filed on September 7th. The original notice and the return thereon were not introduced in evidence by either party. It appears from the abstracts that practically no attention was given to the statute of limitations by either party, upon the trial of the case. The facts pertaining thereto came into the record later, upon a hearing of the defendant's motion for a new trial and the plaintiff's resistance thereto. The defendant appeared to the action and filed a demurrer, which was overruled. Thereupon, the defendant filed an answer, and later, an amended and substituted answer. In none of these pleadings was there any reference to the statute of limitations. A later amendment, filed on the eve of trial, pleaded the statute. The abstracts indicate that the subject was not again mentioned during the trial proceedings. The defendant filed a motion, at the close of the plaintiff's evidence, to direct a verdict. It filed a like motion at the close of all the evidence. The bar of the statute was not made a ground of either motion. It submitted requested instructions to the court, but the bar of the statute was not mentioned therein. The subject was not mentioned in the instructions given by the court on its own motion. The defendant presented detailed exceptions to such instructions,

which exceptions included no reference to the bar of the statute. After verdict, the defendant filed a motion for a new trial, wherein it emphasized greatly the bar of the statute of limitations. In resistance to this motion, the plaintiff made a showing that the original notice was placed in the hands of the sheriff on September 2, 1916, with instruction that it be immediately served; that it was actually served on September 5th; and that the original notice and the return of the sheriff thereon were filed on September 7th. It was further made to appear that this notice had become lost from the files, and plaintiff filed a counter motion for a substitution of the lost record, and produced an alleged carbon copy of the lost paper. Its contents and the return thereon were proved by the affidavit of the sheriff, and by that of the attorney. The motion for a new trial was thereupon overruled by the trial court. No specific ruling appears upon the plaintiff's counter motion for a substitution of the lost record.

The defendant's contention before us is that, inasmuch as it pleaded the statute of limitations, and inasmuch as it appeared upon the face of the pleadings and record that the action was barred, the burden was upon the plaintiff to prove that his action was begun by the placing of notice in the hands of the sheriff within three months from the time of the injury.

It has frequently been held that the plea of the statute of limitations is an affirmative defense, and that the burden of proof is upon the pleader. The defendant pleaded that the action was not commenced within three months. We see no reason, from this record, why it should not be required to prove that it was not so commenced. It does not, in fact, appear upon the face of the petition or upon the face of the record, as contended by the defendant, that the action was not commenced within three months. The argument for defendant is that, inasmuch as the original notice, with the

return of the sheriff thereon, is not before us, we must, therefore, presume that the action was not commenced until the date of the defendant's appearance thereto. Particular emphasis is laid upon the holding in the case of *Dolan v. Burlington, C. R. & N. R. Co.*, 129 Iowa 626. It is assumed that we there held that, in the absence of proof by the plaintiff that he served his notice in time to interrupt the running of the statute, the date of filing the answer will be regarded as the time of commencement of the action. The defendant quite misconceives the scope of that opinion. In that case, the trial court had directed a verdict on the ground of the bar of the statute. We affirmed his order, on the ground that the appellant disclosed nothing in the record that would show error in the ruling. The burden was on the appellant in this court to show error. We did not hold that the mere pleading of the statute of limitations cast the burden of proof upon the plaintiff. Code Section 3520 prescribes the duties of the sheriff in the noting of the date of receipt of the notice, and in the making of his return and the filing thereof with the clerk. Code Section 3524 provides that the court shall take judicial notice of the return, when signed by the sheriff. In this case, it does appear that the notice was returned and filed by the sheriff. There was a time, therefore, when the court could have taken judicial notice thereof. If lost prior to the hearing on the motion for a new trial, we know of no reason why the court might not then inquire into its contents as a lost instrument. All that is material for our consideration now is to say that the appellant does not affirmatively show that the trial court erred in ignoring or withdrawing from the jury the plea of the statute of limitations. Indeed, the showing of the contents of the lost instrument and the return thereon is so conclusive that the notice was placed in the hands of the sheriff on September 2d that there is no room for doubt thereon. In the absence of proof to the contrary, we must

assume that the trial court took judicial notice of the sheriff's return, and ascertained therefrom that the notice came into his hands before the expiration of the three months from the time of the injury.

II. One of the grounds of the motion for a directed verdict was that the city had had no notice of the defective condition of the street. There was evidence to the effect that the hole had existed for the period of two weeks. This was sufficient evidence of constructive notice to go to the jury.

2. MUNICIPAL CORPORATIONS: notice of defect in highway.

III. Another ground of the motion was that plaintiff was guilty of contributory negligence, as a matter of law. This point is predicated upon the theory that the plaintiff voluntarily left the sidewalk and entered upon the parking. This is a strained construction of the evidence. The plaintiff had no purpose to leave the sidewalk. He was walking in the dark, and inadvertently stepped over the edge at the dangerous spot. The question of plaintiff's contributory negligence was one of fact, and was properly submitted to the jury. The refusal of defendant's Instruction No. 2 on that subject was proper. The purport of such instruction was to place an undue emphasis upon the degree of plaintiff's contribution to his accident.

3. NEGLIGENCE: falling into hole near sidewalk.

IV. The attending physicians testified as to the extent of the plaintiff's injuries. They had made an examination of the plaintiff without the help of an X-ray instrument, and had each testified to his diagnosis. It appeared, also, that, some time subsequently, an X-ray photograph had been taken by someone else. On cross-examination, each testified, in substance, that he was confirmed in his diagnosis by the X-ray photograph referred to. On the strength of this cross-examination, the defendant moved to strike their testimony. Though the defendant was entitled to

4. EVIDENCE: improper basis for opinion.

have the opinion of the witness confined to his own examination, it was not entitled to have the entire evidence stricken, on the ground indicated. We are impressed, also, that the error, if any, could not have been prejudicial. The evidence is undisputed that the injury was serious, and that plaintiff has been greatly disabled thereby. It was a dislocation of the ilio-sacral joint. He suffered much pain, and spent considerable time in a Chicago hospital. He had not recovered at the time of the trial, which was nearly one year after the accident. The verdict was for \$2,500. The moderation of it is strong evidence that the jury was not unduly influenced by the evidence complained of. The only hurtful effect which such evidence could have had would be to increase the verdict. A careful examination of the entire record satisfies us that it presents no prejudicial error, and the judgment below is—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

NELLIE HIGHLAND, Appellee, v. IOWA LIFE INSURANCE COMPANY, Appellant.

INSURANCE: Life Insurance—Note as Part Payment of Premium.

- 1 The mere giving of a note for a premium due on life insurance will not work the payment of the premium, but the insurer may so treat it as being the equivalent of cash, and so deal with the insured as to waive the right to deny that the note at maturity worked an actual payment, although not paid.

APPEAL AND ERROR: Review—Law Actions—Trial to Court—

- 2 **Finding Has Effect of Verdict.** In a case tried to the court without a jury, its findings have the effect of a verdict.

INSURANCE: Life Insurance—Evidence—Sufficiency. Evidence re-

- 3 viewed, and held sufficient to sustain the finding of the court that an insurance company which had accepted a note for part of the third premium on life insurance, and retained the note and demanded payment after it became due, waived its right to claim a forfeiture of the policy.

INSURANCE: Life Insurance—Right to Insurance Under Loan Value

4 —Failure to Present Policy for Endorsement. Where an insurance policy provided that, after the payment of three premiums, the policy would, upon presentation for endorsement, be extended for such length of time as the loan value would buy extended insurance, the failure of the insured to present the same for such endorsement did not prevent the extension of the policy, where such payments had been made, and the policy was extended, and continued effective without such endorsement.

Appeal from Wright District Court.—H. E. FRY, Judge.

APRIL 10, 1919.

SUIT on a policy of life insurance. Trial to court without a jury. Judgment for plaintiff. Defendant appeals.—*Affirmed.*

Pickett, Swisher & Farwell, for appellant.

Eugene Schaffter and Sylvester Flynn, for appellee.

SALINGER, J.—I. A careful analysis discloses that, as to some quite material matters, the parties are not in dispute. To obtain the advantages given the assured by Clause X of the policy, one thing necessary for plaintiff to prove is that three annual premiums had been duly paid. It is agreed that two were so paid. The first dispute is whether the third one was. Within the days of grace allowed, the insured paid \$20 to apply on the third premium, and delivered a premium note for so much as the premium exceeded \$20. This note

has never been paid. We agree with appellant that the mere giving of a note for a premium due will not work a payment of the premium. But though the mere taking of a note which is not paid at maturity will not give the assured the benefit of said Paragraph X, the insurer payee of the note may so treat it as being the equivalent of cash, and may so deal with the insured, as to waive the right to deny that the note, though not paid at maturity,

1. INSURANCE: Life insurance: note as part payment of premium.

worked an actual payment. The trial court held it to be the controlling question whether such a waiver

2. **APPEAL AND
ERROR:** review:
law actions:
trial to court:
finding has ef-
fect of verdict.

had been effectuated. And we think that is so. The case was tried to the court without a jury, and its findings have the effect of a verdict. So the question is whether the evi-

dence is sufficient to sustain a verdict based upon such a waiver. The trial judge wrote an able and exhaustive opinion, which is found in the abstract. Therein he sets out the

3. **INSURANCE:**
life insurance:
evidence:
sufficiency.

evidence upon which he bases his conclusions. He finds a waiver by finding as a fact what is undisputed: to wit, that the defendant has always retained this note, even

though it made some entries on its books indicating that it considered this note no longer a live asset, and that the policy had lapsed. It finds further that defendant made attempts to collect the note after it made said entries on its books. That fact, too, seems to be shown without conflict. One demand is by a letter from defendant. There is a sharp conflict on what the alleged agent of the defendant said and did, by way of expressly waiving default in payment of the note and giving an indefinite extension of the time wherein to pay. True, the authority of the agent to do this is challenged, both in testimony and argument; and, as said, there is sharp conflict on what the alleged agent said and did. But the authority of the agent, and whether and how he exercised it, are all questions of fact, on which the court found verdict against the defendant. The record discloses many other circumstances, some of which are dwelt on in the opinion of the trial judge. It would serve no useful purpose to extend this opinion by dealing specifically with every item of the proof. We have read the record with due care, and cannot say that the fact findings lack all substantial support. We think that the conclusions of law upon these findings of fact are well sustained. There is first the rule we laid down

in *Trotter v. Grand Lodge*, 132 Iowa 513, at 526:

"It is the universally recognized doctrine that forfeitures are not favored in law, and that the courts will be vigilant and quick to discover and give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against such defense may be founded."

The text of 25 Cyc. 871 declares:

"Indeed, a demand of a premium or assessment on account of which a forfeiture might be claimed, or an attempt to collect it, is a waiver of the forfeiture, for it is a recognition of the continuance of the contract."

In *Limerick v. Home Ins. Co.*, 150 Ky. 827 (150 S. W. 978), it was held that:

"The unconditional demand by an insurance company of payment of an overdue premium note is a waiver of the default, so that the insured may recover on the policy if he immediately complies with the demand by mailing a check for the amount, although the insured property is burning when the demand is received, and the policy provides that the company will not be liable for any loss which might occur while any premium note remains due and unpaid." (See syllabus in 44 L. R. A. [N. S.] 371.)

To the same effect is *New England Mut. L. Ins. Co. v. Springgate*, 129 Ky. 627 (112 S. W. 681).

We have frequently held that, where one is estopped to assert a defense, the situation is precisely as though he never had such defense. Since we hold that the finding of a waiver is sufficiently sustained by the evidence when such finding is treated as a verdict, it follows that what the parties did puts them in precisely the position they would be in if the third premium had been paid in cash. The remaining

4. **INSURANCE:**
life insurance:
right to insurance under loan
value: failure to present policy for endorsement.

question is what, if any, rights the plaintiff may build upon this premise. As we have said, with the third premium paid, certain rights accrue to the assured under Paragraph X of the policy. Therein, one right given the assured is an option to have the policy continued in force without further payment of premiums, for such a length of time as the loan value of the policy will buy insurance for at the stipulated rate. The loan value of the policy in question was enough to pay for extended insurance for a period up to and including the time at which assured died. It follows that the policy is effective though no premiums were paid beyond the third one.

An argument in avoidance is made. It is not very insistent. It was nowhere made in either the errors relied on for reversal or the brief points. The nearest specific reference in the errors relied on is that the court erred in holding that the unpaid note constituted a full payment of such premium, entitling the insured to paid-up or extended insurance. No reference whatever to extended insurance is found in the brief points. The exact avoidance argument is, in effect, that that clause of the policy which gives option to have extended insurance has a requirement that the policy shall be presented for endorsement. Neither the errors relied upon for reversal nor the brief points can be strained into making a reference to such a position. About the most that can be said is that such argument is made in pleading. A statement in petition that rights are claimed under said Paragraph X is met by an allegation that all the rights of assured or plaintiff by virtue of this paragraph were lapsed and forfeited by reason of nonpayment of said note. It will be noticed that failure to have the policy endorsed is not mentioned. There is nothing in the provisions of the note pleaded to work that the policy is to lapse though extended insurance is paid for, if assured failed to have the policy en-

dorsed. There is a denial in pleading that plaintiff is entitled to the credit referred to in petition by reason of Clause X. This denial, however, is limited to denying that defendant recognized and treated the policy as being entitled to the credit set forth in said paragraph. That pleading rests, not upon failure to have the policy endorsed, but upon the claim that the third premium was not, in fact, paid. And there was a specific allegation in the reply of plaintiff that the insured made no choice of the options provided for in Clause X; had borrowed no money from the company; what the loan value of the policy was; and that, by the terms thereof, said loan value became and was a credit on said policy, and automatically continued the same in full force until May 22, 1915, without the payment of any further sum. On the argument now advanced, this allegation in the reply was demurrable. But that pleading was in no manner assailed.

It is true the clause provides that the policy will be continued in force "on presentation thereof to the company for endorsement." It may be conceded that if, after the note had matured and remained unpaid, the company had demanded of assured that he present his policy for endorsement in order that he might obtain the benefits of the provision, there might be some question as to what the consequences would be if, after such notification or demand, the policy was not presented for endorsement. But, in view of the hostility of the law to forfeitures, it would be a hard rule, even on the law side, to hold that one who had in fact paid premium for a stated time in advance, forfeited his insurance for nonpayment during a period for which payment had been made, merely because he did not, on his own motion, present his policy for endorsement. Failing to have it endorsed was, of course, no advantage to the assured. Such failure gave him no additional rights. One who had let his note remain with the defendant after it had matured,

and without making cash payment, could make no claim to any advantage for failure to have the policy endorsed. The corollary is that, so far as the endorsement could accomplish anything useful to the insurer, it stood precisely where it would, had the endorsement been made. We can think of no useful end to be served by such endorsement, beyond its being the orderly method of having the record show that the policy had lapsed as a continuing contract, and was limited in duration to the period that the loan value of the policy would pay for. The endorsement would not be more than a mere matter of evidence of something that it is now fully shown did, in fact, exist. That certain formal steps were not taken to make of record what is found to be true at all events, should not work that one who had paid for insurance shall be held to have lost the insurance for nonpayment. when, in fact, he had paid for it.

There might well be a distinction if the past-due note was for the payment of a premium that had been fully earned before death of insured. The trial judge states it well:

"If a note is given to pay the premium on a policy of insurance for a particular time, and the policy is continued in force for such time, it could not be claimed, of course, that a demand of payment by the company after the default would amount to a waiver of nonpayment of premium for any period of the time not covered by the note. * * * In demanding payment of this note, defendant was not, in effect, merely demanding payment to keep the policy alive for the year ending May 22, 1911, but it was demanding payment of premium that would keep it alive until May 22, 1913; and I think that, if it amounts to a waiver at all, it amounts to a waiver of forfeiture for the full time that the policy would have been continued if the payment had, in fact, been made in cash, or the note paid when due."

He treats the matter as if the note had been paid in

cash, and holds, therefore, that the policy was automatically continued in force until assured died. We agree with the conclusion of the trial court that defendant waived the default in payment of the note when it became due, and waived its right to claim a forfeiture of the policy, and that the policy was in force and effect at the time of the death of insured. It follows there must be an affirmance.—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

FRANCIS McDONALD, Appellant, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellee.

INSURANCE: Retention of Delinquent Premium. An insurance

- 1 company irrevocably waives its right to declare a forfeiture of a policy because of the failure of the insured to pay the premium on or before the maturity date, when it receives and unreasonably retains the delinquent premium, with knowledge that it was paid by the insured in the reasonable belief, *induced by an unauthorized agent*, that he (the insured) might make such payment after said maturity date, and that such payment would preserve the life of his policy. To avoid such a result on the plea that the company retained the money on the condition that the insured should reinstate his forfeited policy by furnishing a certificate of continued good health, the company must affirmatively show that, upon receipt of the money, it *promptly and actually* brought home to the insured its intention to so hold the money, and thereby gave the insured an opportunity to consent to its new and self-created condition.

PRINCIPLE APPLIED: A policy provided that cashiers had authority to receive premiums, but that no agent had authority to waive time of payment or to reinstate a lapsed policy. Failure to pay a premium on or before March 10th forfeited the policy. Some few days before this date, the agent called at the office or home of insured at Des Moines, to collect the premium. The insured was in St. Paul. He was expected home at an early date. His wife so informed the agent, and offered to go to the bank and get the money and pay the pre-

mium. The agent said she need not do so, and that he would wait until the insured returned. It is conceded, *arguendo*, that this agent had no authority to bind the company by any such statement. The agent told the wife that, after the dividends on the policy were applied, the premium balance would be about \$101. The wife went to her husband at St. Paul, where he was sick. She told him what the agent had said. The insured, on March 14th, sent said agent a check for \$101, saying he would have remitted sooner, had he not understood from his wife that the matter could rest until he reached home. (This remittance was 68 cents short, but no point was ever made thereon.) The agent delivered this letter and check to the company's cashier at Des Moines. This was some two or three days after March 10th. The check was cashed. The cashier testified that at once, and repeatedly thereafter, he mailed a notification to the insured that the policy stood forfeited, and that the company held the money on condition, as provided by the policy, that the insured furnish a medical certificate of continued good health, as a basis for reinstating the policy. These notices were mailed to the insured at the address specified in the policy, and also to the insured at St. Paul. The company produced no evidence that the insured *actually* received these notices. The jury *might* have found that plaintiff had fairly shown that they had never been received. Some 40 days after the money was received, the company returned the money to the insured, and, by letter, explained that this was because insured had failed to furnish the required certificate. The insured kept the money. The jury *might* have found that the insured at this time was mentally incompetent to intelligently transact any business.

Held, a directed verdict in favor of the company was erroneous.

INSURANCE: Reinstating Waived Right. An insurance company 2, 6 which, by unduly retaining a delinquent premium, has waived its right to declare a forfeiture of the policy, may not reinstate its said right by returning the premium to the insured and causing him to retain it at a time *when he is mentally incompetent to transact business*.

PRINCIPLE APPLIED: See No. 1.

INSURANCE: Prohibited Waivers by Agents. A policy condition 3 which is for the sole benefit of the insurer may be waived by any agent who has authority to act in reference thereto, *even though the policy provides to the contrary*.

PRINCIPLE APPLIED: See No. 1.

PAYMENT: Retention on Uncommunicated Condition. One who
4 receives a payment with knowledge that it has been made on
a particular condition will be presumed to irrevocably assent to
such condition, unless he affirmatively shows that, upon receipt
of such payment, he *promptly* and *actually* brought home to the
one making the payment the intention to hold it on some other
and different condition.

PRINCIPLE APPLIED: See No. 1.

INSURANCE: Provisions Governing Notices. A policy provision
5 that notices to the insured shall be sent to a designated address
has reference solely to notices which give *effect* to the terms
of the contract,—not to notices as to which the law requires
actual notice, and which could not have been contemplated by
the parties when the policy was issued.

PRINCIPLE APPLIED: See No. 1.

INSURANCE: Reinstating Waived Right.
2, 6

INSURANCE: Authority of Agents. The authority of an insur-
7 ance agent, as far as the public is concerned, must be measured,
not so much by the terms of his employment or by the terms of
the policies, *as by the things which the principal permits him*
to do. Evidence held to show that the agent in question was
a "general" agent.

Appeal from Clarke District Court.—THOMAS L. MAXWELL,
Judge.

NOVEMBER 16, 1918.

REHEARING DENIED APRIL 10, 1919.

ACTION at law to recover upon a policy of life insurance.
There was a directed verdict and judgment for the defend-
ant, and the plaintiff appeals.—*Reversed and remanded.*

O. M. Slaymaker, for appellant.

Henry & Henry and *Temple & Temple*, for appellee.

WEAVER, J.—The plaintiff sues as assignee of Katherine
E. McKee, the widow of Samuel C. McKee, deceased. Many

of the material facts are the subject of no dispute. Among them we mention the following: On Feb-

1. **INSURANCE:**
retention of de-
linquent pre-
mium.

bruary 15, 1915, the defendant life insurance company issued its policy for the sum of \$2,000 upon the life of Samuel C. McKee, payable to his wife, Katherine E. McKee. At that time, McKee paid the first year's premium, \$116, all or in part by giving his promissory note, which he subsequently took up. The policy provided for the payment of subsequent annual premiums at the same rate on the 9th day of February of each year, until 20 of these premiums had been paid. The policy also provided for payment of dividends annually, which sums could, at the option of the insured, be "applied toward the payment of premiums." Among other stipulations of the instrument, it was provided that "all premiums are payable in advance at the home office, or to any agent or agency or cashier of the society, upon delivery, on or before their due date of a receipt," signed by an executive officer of the company. It was also provided that a grace of 31 days, subject to an interest charge of 5 per cent per annum, would be allowed for the payment of every premium after the first, during which period the policy should remain in force. Another provision was as follows:

"Agents are not authorized to modify, or, in event of lapse, to reinstate this policy, or to extend the time for payment of any premium or installment thereof."

Samuel C. McKee died on September 10, 1916. Very soon after the death of the insured, the widow, by her counsel, notified defendant of his death, called upon it to furnish blanks for the formal proof thereof, and demanded payment, according to the terms of the contract. The defendant acknowledged receipt of these communications, but alleged that the policy had been forfeited by the failure of the insured to pay the second annual premium, and for this reason, it refused to make payment or to acknowledge any

liability therefor. Suit having been brought to enforce payment, the company made defense on the ground indicated. Trial was had to a jury, and, at the close of all the evidence offered by the respective parties, there was a directed verdict and judgment for the defendant.

I. The vital inquiry in this case is whether, as a matter of law, the plaintiff failed to make a case on which she was entitled to the verdict of a jury. The plaintiff denies that there was any default in the payment of the second annual premium. Her testimony tends to show that she and her husband were residents of Des Moines, Iowa; that the policy was originally issued upon an application obtained from McKee at Des Moines by one J. A. Blum, an alleged general agent of the defendant's, to whom the first premium was paid; that, about the time the second premium payment fell due, and before the contract days of grace had expired, McKee being away from home, Mrs. McKee, the beneficiary in the policy, saw Blum, and told him of the absence of her husband and of her expectation of his early return, and said to the agent that, if he wanted the payment then, she would go to the bank and get the money for him, and he replied that it was not necessary, and he would wait until Mr. McKee came home. This conversation she says was repeated several times. She further says that Blum informed her that, after applying the first dividend on the premium, it would leave a remainder due thereon of about \$101, and that she made a memorandum of it. Soon thereafter, and about the expiration of the 31 days of grace, she went to her husband, who was sick at St. Paul, Minnesota, and reported to him her understanding had with Blum, when he undertook to make payment of the premium in the following manner: On March 14, 1916, 33 days after the due date of the premium, he wrote a letter to Blum, and enclosed to him a check for \$101. The letter and check were in the following form:

"St. Paul, Minnesota, March 14, 1916.

"J. A. Blum: Please find enclosed check for \$101.00. I know there is a small amount over this, but whatever it is, will pay when I come home. Mrs. McKee said you would let the matter rest until I came home, or I would have mailed check sooner.

"Yours truly,

"S. C. McKee."

"Dallas Center, Iowa, March 13, 1916.

"Bank of Dallas Center, 72-759

"Pay to Equitable Life Assurance Company, or order, \$101.00 one hundred and one and no/100 Dollars.

"[Signed] Samuel C. McKee."

"Insurance premium due February, 1916, \$2,000.00 policy."

This check was received by Blum and passed over, with McKee's letter, to the company's cashier at Des Moines, by whom it was endorsed, and deposited to the credit of the company, and, through the usual course of banking business, was collected from the bank at Dallas Center, on March 21, 1916. In this connection, the agency cashier, who received the check from Blum, testifies that, on the same day, he wrote and mailed a letter to McKee, enclosing therein a conditional receipt for the money so remitted. The letter and receipt, he says, were in the following form:

"March 18, 1916.

"Samuel C. McKee, St. Paul, Minn.

"Dear Sir: Your letter of the 14th written to our Mr. J. A. Blum, enclosing a check for \$101.00, in connection with the premium due February 9, 1916, on policy No. 1948164, has been referred to the undersigned for attention, and in this regard you should be advised that the amount of your check has been placed in escrow, for which I enclose a proper receipt. I desire to request that you kindly sign the attached declaration of health, which must be at this office

no later than the 9th proximo, when restoration of this policy will have immediate attention. You have been previously advised that the said policy lapsed as to February 9th.

"In reference to your remittance of \$101.00, kindly be advised that it is sixty-eight (68) cents short. This is made up as follows:

Premium	\$116.40
Less dividend	15.30
	<u>\$101.10</u>
Int. on premium58
	<u>\$101.68</u>
Credit by check	101.00
Short	<u>.68</u>

"Receipt.

"The Equitable Life Assurance Society of the United States.

"165 Broadway, New York City.

"Receipt No. 66051.

"Agency at Des Moines, Ia., 3/18/1916.

"Received from Samuel C. McKee one hundred one & 00/100 dollars (\$101.00), offered for on account annual prem. less dividend due Feb. 9th, 1916, policy No. 1,948,164—rein-statement pending.

"Said sum is received only for transmission to the home office of the society in New York, for the account of the depositor, and the society is in no way committed thereby to the acceptance thereof for the purpose offered nor to any action in the premises, and nothing herein or connected with the receipt of said sum shall be held to waive any default in payment of any premium, interest or other sum due, or to extend the time for payment of any premium, interest or other sum, or in any manner to affect the rights of the society under any policy or contract of insurance or otherwise. If the said amount be not accepted by the so-

ciety for the purpose offered it will be returned to the depositor upon demand.

"C. H. Nicolet,

"D. S. Agency Cashier."

There is also the copy of another letter, of same date and of similar import, directed to McKee at "508 Observatory Building, Des Moines, Iowa," which the cashier testifies he wrote and mailed. Still other communications put in the record were mailed to McKee, he says, at different dates during the spring and summer of 1916, urging and advising him to take the necessary steps for the reinstatement of his insurance. The same witness further says that, on April 26th, 42 days after the receipt of the money, he sent McKee another letter, as follows:

"April 26, 1916.

"Samuel C. McKee,

"508 Observatory Building, City.

"Dear Sir:

"Re Policy No. 1,948,164.

"We are refunding herewith your deposit of \$101.00, in connection with the premium due February 9, 1916, on this policy, and beg to state that in your not furnishing us with a medical certificate of your good health, we have been unable to consider the re-instatement of this policy, which lapsed February 9, 1916, for the nonpayment of the premium then due. Therefore, we are making the return of this deposit.

"We will be glad to open this matter up again on receiving the requirements as set forth above, or in arranging a re-instatement, and trust you will make such application at once.

"Yours truly,

"C. H. Nicolet, Cashier."

This letter enclosed a check for \$101, payable to the order of Samuel McKee, "for return deposit a/c policy No.

1948164, as per statement of account No. 24110;" and endorsed thereon were the following printed words:

"Received of the Equitable Life Assurance Society of the United States the within amount in settlement of account as stated."

It is stipulated by the parties, in the record of the trial, that, on May 3, 1916, this check was deposited to the credit of McKee in the National Bank of Commerce of St. Paul, Minnesota; that it was duly collected,

2. INSURANCE: and proceeds credited to McKee; and that
re-instating
waived right. the same has been drawn from the bank by
his administrators. The plaintiff offered

evidence from which the jury could find that neither the alleged letter of March 18th from the company's cashier, notifying McKee that the check sent to Blum was accepted only upon certain conditions, nor any of the other communications of a later date, alleged to have been sent to him by the company, were ever received by or made known to McKee, with the exception of the one of April 26th, containing the check for the return of the \$101. To counteract the effect of McKee's act in receiving the company's check for a return of the money and placing the same in the bank to his credit, the plaintiff offered evidence tending to show that her husband was, at the time, sick, and so enfeebled in body and mind as to be incompetent for the transaction of business, and unable to intelligently comprehend the effect of such action upon his rights. This showing was met by the defendant with other evidence, tending to show the mental competency of the insured at that time. This issue was clearly one of fact, which, unless plaintiff is to be held, as a matter of law, to have failed to establish either payment or waiver of payment of the second annual premium within the time prescribed by the policy, should have been submitted to the jury.

It appears to have been the opinion of the trial court

that Blum, even if he be regarded as a general agent, was not shown to have any authority to waive or extend the time for payment of the premium; and that, as it was conceded that the payment of \$101 was not remitted until two or three days after the expiration of the grace of 31 days, there was a forfeiture of the insurance. The court also held that the act of the company's cashier in receiving and collecting the check from McKee could not be held a waiver of the forfeiture, and that the acts of the cashier and the company in respect thereto must be construed with reference to the conditions embodied in the cashier's receipt for the money, to the effect that such payment was accepted subject to the production of a proper health certificate by McKee. Having this view of the record, the court further held that, forfeiture being complete, the mental condition or competency of McKee at the time the money was returned could have no material bearing upon the rights of the parties. To the exceptions taken to these rulings we now turn our attention.

Is there any evidence from which we can say that the insured was justified in relying upon the authority of Blum to accept payment of the premium after it became due?

That the company had the right to stand upon the terms of its policy, and refuse to receive payment of the premium after the expiration of the grace of 31 days therein provided for, cannot be denied. It is equally true

3. **INSURANCE:** prohibited waivers by agents.

that these restrictions and limitations are provided by the insurer for its own protection, and it may waive any or all of them, if it shall so elect. If it does waive them, or any of them, and the insured acts thereon, then the rule, regulation, or condition so waived ceases to be available as a defense to an action on the policy. The company, being a corporation, can manifest its intent through its officers and agents only; and, when the question of an alleged waiver arises, its acts

by and through such officers and agents become a matter of material inquiry. Limitations upon the authority of agents with respect to payment of premiums are quite commonly, if not generally, found in life insurance policies; and the question whether, in given instances, they may be held to have been waived, has often had the consideration of the courts.

It may be said at the outset that the precedents, though numerous, fall into two more or less widely diverging lines. In some of the older states, the courts early construed policy limitations and conditions with respect to the authority and acts of the insurer's agents quite strictly, and policy holders and beneficiaries seeking to establish waivers thereof found little encouragement in the decisions. It was not long, however, before the disinclination to allow forfeitures of insurance save for clearly good cause led to a more liberal policy, which is now observed by practically all the courts of the country. In our own state, the question had its first thorough examination in *Viele v. Germania Ins. Co.*, 26 Iowa 9, where it was held, in substance, that, no matter how strict the conditions of the policy, they are made by the insurer, for its own protection and benefit, and may be waived or disregarded if it so elects; and, as a corporation can act only by or through its officers and agents, a waiver by them may, under some circumstances, become binding upon the corporation which they represent. To quote from the decision in the cited case:

"Circumstances proving that the party treated the contract as subsisting, and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with, or forfeiture waived, will be sufficient to preclude the setting up of the breaches of the condition as a defense."

And without further multiplying citations upon this

question, we quote from the Supreme Court of the United States the statement of the generally recognized rule, as follows:

"Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, * * * will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Insurance Co. v. Eggleston*, 96 U. S. 572.

This is not saying that the mere promise or agreement of the agent, contrary to the express terms or limitations of the policy, will operate to estop or prevent the company from insisting upon a forfeiture; but if the insured, to the knowledge of the company, relies and acts upon such promise or agreement, and in such reliance pays his money to the company, or if the company so acts in the premises that the insured, as an ordinarily reasonable person, is led to believe that it waives the condition or waives the forfeiture, the courts will be prompt to declare the waiver effectual. We quote again from the opinion of this court in the *Viele* case, where it says that, although the policy explicitly declares that, upon the breach of certain conditions, the policy will become void, yet this means no more than that, upon the violation of such condition, the policy will become void at the option of the insurer; and if the company waives the breach, "the contract stands as if no such breach had occurred." Or, as said by the Minnesota court:

"A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement.

contrary to the terms of the written contract." *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129 (39 N. W. 76).

Speaking of a policy provision providing that no waiver of its terms could be made except by the insurer's president or secretary, and then to be endorsed in writing upon the policy, the Wisconsin court has said:

"We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy, are ineffectual. Especially is this true in respect to a foreign insurance company, whose officers are practically inaccessible to the assured." *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89 (42 N. W. 208); *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 46 (65 N. W. 742).

Acts and conduct which are insufficient to constitute a technical estoppel against a forfeiture may yet be sufficient to effect a waiver. *Hollis v. State Ins. Co.*, 65 Iowa 454; *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641; *Bloom v. State Ins. Co.*, 94 Iowa 359. In *King v. Council Bluffs Ins. Co.*, 72 Iowa 310, 315, this court reaffirms the *Viele* case, saying:

"It has become the settled law of this state, and no one now questions its binding authority upon this court. Under the doctrine of that case, any conditions of a contract of insurance may be waived by the insurance company. The only question about which any question can arise is whether the company had notice, and thereby waived the conditions. This is a question of fact; and if the evidence warrants the finding that it did have such notice, it is an end of the case. And this depends upon the relation Ayers (the alleged agent) sustained to the company."

Without further reference to the precedents, of which there are many, upon this phase of the case, let us now turn

to a few cases in which a practical application of the principle has been made. In *Insurance Co. v. Eggleston*, 96 U. S. 572, action was brought upon a life insurance policy which, as in this case, was conditioned upon prompt payment of the yearly premium as it should fall due. It was also, as in this case, further provided that "agents for the company are not authorized to make, alter, or discharge contracts, or waive forfeitures." The insured resided at Columbus, Mississippi, and the policy was procured through a local agent, to whom the first premium was paid. Before the next premium was due, the agency at Columbus was revoked, and the insured was notified to pay it to a firm of agents at Savannah, Georgia. Later, he was notified to pay premiums to an agent at Vicksburg, Mississippi, and this he did for several years, but failed to pay the one falling due in November, 1871; and with this premium unpaid, he died, the following January. The only showing made in excuse for this default was the testimony of the son, and the banker through whom the deceased had made former payments, that, if any notice had been given to deceased as to where and to whom to make the payment, they knew nothing of it, and that the insured had the money to pay the premium, had notice been given. It was also shown that, *after the premium was due and payable*, the banker telegraphed to the Savannah agency, inquiring to whom payment should be made, and received answer to apply to the Vicksburg agency; and from this agency, directions were received to make payments to a certain subagency at Macon, Mississippi, where the receipt would be found. The money was then sent to the agents at Macon, who refused to accept it unless accompanied by a health certificate. This demand could not be complied with, for the insured was then sick, and died a few days later. The company also produced a witness from the agency at Macon, who testified that, before the premium became due, he mailed to the insured a notice addressed to

him at his home in Columbus, thirty miles from Macon, to make the payment to the agents at that place, and that they held the proper premium receipt. It will be seen that the cited case is, in many essential respects, not unlike the case at bar. They are quite alike in the fact that the waiver relied upon in each case is to be found, if at all, in the acts or omissions of agents, and that, in each, the policy provides that the company's agents have no power to waive forfeitures. It is with reference to the case as above stated that the court uses the language hereinbefore quoted, concerning the disposition of the courts to refuse to uphold forfeitures where the policy holder has been misled by the acts of the company and its agents. In that case, the trial court charged the jury that, if payment of premiums before the default had been made by the insured to such agents as the company had, from time to time, given him notice, and that no notice was given before this last premium fell due, where and to whom to pay it, and that, as soon as he did receive such notice, he did tender payment, and that the failure to pay before default was caused by his failure to receive the proper notice, then the policy was not forfeited. This instruction was sustained on the appeal, and the company held liable on the policy. It will be observed that there was a conceded failure to pay the premium when due, and that the tender of payment was not made until several weeks after the default, and while the insured was at the door of death. The policy in that case contained no provision requiring the company to give notice each year where or to whom payment of premium should be made. Indeed, it had but recently been held by the same court, in construing another policy of the same company, that the legal effect of the contract was to make the premiums payable at the home office of the company in New York City (*Insurance Co. v. Davis*, 95 U. S. 425 [24 L. Ed. 453]); yet it was here held that, under the circumstances stated, the failure of the com-

pany or of its agent to give the notice was a waiver of the right to forfeit the policy for nonpayment of a premium. It is also quite pertinent here to notice that, as in the case at bar, the agency charged with the collection offered direct evidence that it did send the notice by mail in due time to the insured at his proper address, and that the evidence that such notice was not delivered or received by the insured is even less definite and conclusive than is the evidence upon the like proposition in the instant case; and yet the question of fact so raised was found sufficient to take it to the jury. In *Insurance Co. v. Norton*, 96 U. S. 234 [24 L. Ed. 689], the policy, like those already mentioned, provides that agents have no power or authority to waive forfeitures; and it was held that, where the agents were accustomed to disregard this restriction, and to extend the time for payment of premiums, a forfeiture for nonpayment on contract time was waived. Speaking of the policy restrictions, the court says:

"These terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. * * * And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing."

In a subsequent case, *Phoenix Ins. Co. v. Doster*, 106 U. S. 30 (27 L. Ed. 65), the cases already cited are reaffirmed; and it was there held that, where the policy permits the insured to apply his dividends as a payment upon his annual premiums, a forfeiture would not take place until the insured had been notified of the applicable dividend, and of the remainder necessary for him to pay in addition thereto. See also, to the same general effect, *Hartford L. & Ann. Ins. Co. v. Unsell*, 144 U. S. 439 (36 L. Ed. 496). It has been held by the Tennessee court that, where the insured had

been led to omit the payment due, because of the agent's direction to wait until called upon by the collector, there was no forfeiture. *Aetna L. Ins. Co. v. Fallow*, 110 Tenn. 720, 736 (77 S. W. 937, 941). Also, as having more or less direct bearing upon the questions raised by this appeal, see *Arnold v. Empire Mut. A. & L. Ins. Co.*, 3 Ga. App. 685 (60 S. E. 470, 475); *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658 (65 N. E. 15, 17); *Sweetser v. Odd Fellows Mut. A. Assn.*, 117 Ind. 97; *Coile v. Order of U. C. T. of A.*, 161 N. C. 104, 107 (76 S. E. 622, 623); *Grand Lodge v. Smith*, 76 Kan. 509, 514 (92 Pac. 710, 712); *Graham v. Security Mut. L. Ins. Co.*, 72 N. J. L. 298 (62 Atl. 681); *Warnebold v. Grand Lodge*, 83 Iowa 23; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487, 498; *McCorkle v. Texas Ben. Assn.*, 71 Tex. 149, 155 (8 S. W. 516, 519). Quite in point, in fact and in principle, is the very recent case, *National Life Ins. Co. v. Clayton*, (Okla.) 173 Pac. 356.

In the light of the law as thus indicated, let us look to the facts which the jury could have found under the evidence. It could have found that, very shortly before the period of grace provided for by the contract expired, the company's agent, Blum, went to the office of the insured, for the purpose of collecting the second yearly premium; that he there met Mrs. McKee, the beneficiary named in the policy, who informed him that her husband was temporarily absent, and expected to return, but, if the agent desired, she would go to the bank and get the money to pay him; that the agent said it was not necessary, and that the matter could wait until McKee returned; that, very soon thereafter, the wife went to her husband in St. Paul, and there informed him of the understanding with the agent, and, relying and acting thereon, he wrote the letter and enclosed the check set out in the foregoing statement, and mailed it to Blum; that the letter was received at the agent's office in the city of Des Moines, and that both papers, letter, and

check were passed into the hands of the company's district treasurer at the same agency; that, although the check was so sent about three days after the expiration of the period of grace, the treasurer received it, cashed and placed the same to the company's credit, and retained it for a period of about 40 days, before returning it to McKee. The jury could also have found that McKee sent the check, honestly believing and understanding that, although the payment was three days in default, yet the favor extended to him by the company or by the agent or both was keeping the door open for its receipt. That understanding and belief, whether well or ill founded, was clearly indicated on the face of the letter and check, and neither Blum nor the treasurer could have failed to perceive it. They were self-explanatory. He was not asking or demanding re-instatement. He did not understand that re-instatement was needed. He was tendering a payment which he believed he had an unconditional right to make, and thereby preserve and extend his insurance for another year. Whatever may have been the true relation of Blum to the company, or the technical extent of his powers as an agent, there is no question that the treasurer was authorized to represent the company in the collection of premiums, and his acts in transacting the business entrusted to him were the acts of the company. Let it be conceded, for the purposes of this case, that the company, through him, being thus advised of the act of Blum and of McKee's reliance and action thereon, could have repudiated the act of Blum, as being unauthorized, and treated the insurance as forfeited, and because thereof could have rightfully refused to accept or retain the money. This it did not do. It took the money. True, the cashier asserts that he refused to accept it as payment of the premium, but that he collected the check and continued to hold the money conditionally only, to be finally accepted if the insured should satisfy the company's demand for a health certificate. But

the payment had not been tendered or made for any such purpose. The condition was one imposed or sought to be imposed by the company, without any agreement or consent of the insured, either express or implied. It was a use of the money for another and different purpose from the one for which it had been remitted. The rule of

4. PAYMENT: retention on uncommunicated condition.

law, as well as of reason, required the company, if it proposed to assert a forfeiture of the insurance, to return the money at once to McKee, stating the reason for the refusal to accept. Receipt and retention by the insurer of an overdue premium is universally held to operate as a waiver of forfeiture for the failure to make such payment on time, and the waiver will be effectual here, unless this result is to be avoided by the defendant's evidence that it accepted the money only on the conditions named. We are aware that some courts have held that a temporary retention of an overdue payment, to give the insured opportunity to secure a re-instatement, will not, under all circumstances, waive the default; and, without stopping to consider the soundness or propriety of this rule, we may, for the purposes of this appeal, concede the authority of the precedents referred to. But even with this concession, the question remains one of fact, and not of law. No case goes to the extent of saying that the company may so retain the money as a matter of right, without the consent, express or implied, of the person insured who pays it. Every principle of law and fair dealing requires that, if the company proposes to reject the payment of the premium and hold the money for another purpose, it shall promptly notify the insured of that fact, and give him opportunity to say for himself whether he desires the money to be so used. Retention of the money an unreasonable length of time without giving such notice will necessarily work a waiver of the forfeiture. It is true, the cashier testifies that he did send McKee a notice by mail, addressed to him both at Des

Moines and St. Paul, that the money was being held conditionally; but there is no evidence that such notice was ever received or delivered. On the contrary, there is evidence fairly tending to negative any such receipt. Assuming, then, that no actual notice of that nature was ever given to the insured until about the time the money was returned, some 40 days after its payment, what is the effect of such omission or delay? The law applicable to such a situation is clearly and forcibly stated by the Massachusetts court in *Shea v. Massachusetts Ben. Assn.*, 160 Mass. 289, where the insurer received the money for an overdue premium, and, as in this case, claimed to have receipted for it conditionally, awaiting the production of a health certificate, and to have sent the same to the insured by mail. In holding the plea unavailable to the defense, the court says:

"The money was tendered unconditionally; and, if the company should retain it without objection, it would be held to assent to the terms of the payor. One who receives and retains money which is sent to him to be kept on certain terms must be deemed to assent to those terms if he keeps the money, unless he makes it known to the sender that he will only keep the money on some other and different terms; and, if he seeks to establish different terms, while keeping the money, it rests upon him to make that fact known. If the defendant would establish different terms from those upon which the money was sent, it must do something to make it known that its acceptance and retention of the money were conditional. It could not impose a condition binding upon Shea, merely by determining in its own mind to do so. A secret vote of the directors that they would keep the money, but that the payment should be deemed valid only in case Shea was then in good health, would be of no avail. An uncommunicated condition is no condition. The company must certainly take some step to inform Shea or his agents that the money, though retained, would not be

held upon the terms upon which it was sent. The duty arose from its actual retention of the money which was sent on specified terms. To keep the money, and insist on different uncommunicated terms, would savor of fraud. Good faith required that the defendant should not remain passive, but should do something, if it objected to the payment's being considered unconditional. But then, how much was it incumbent on the defendant to do? Must it be held to bring notice home to Shea or his agents, or was its duty satisfied by merely posting its communication in the mail? There is nothing in the policy, or in the rules of the company annexed thereto, or in the by-laws, providing that such an effect shall be given to mailing a communication of this character. No fact is stated from which a request can be implied or inferred from Shea that the company should communicate such a condition in that way. In the absence of any stipulation in the contract between the parties or in the rules of the company, or of any express or implied request on the part of Shea or his agents, or those acting for him, we are acquainted with no rule of law under which he can be held to be bound by the defendant's act of imposing a condition upon its acceptance and retention of the money, unless notice of such condition is actually brought home to him, or to those acting for him. There is some analogy between this case and the ordinary case where one is under a duty to make a payment of money. If he uses the mail for that purpose, without express or implied authority, he must take the risk of the payment reaching its proper destination. *Gurney v. Howe*, 9 Gray 404; *Crane v. Pratt*, 12 Gray 348."

The same rule is recognized in *Rockwell v. Mutual L. Ins. Co.*, 20 Wis. 356. Such, also, is the effect of the holding in the *Eggleston* case, *supra*, and in *McQuillan v. Mutual Reserve F. L. Assn.*, 112 Wis. 665, 671.

Counsel for appellant endeavor to avoid the effect of this rule by saying that, in the contract of insurance in this

case, it was agreed that notices to the assured should be sent to a designated address in Des Moines, and that the cashier of the company testifies that he did send a conditional receipt and notice to such address, and that this is all which could be required. Our examination of the contract, as shown by the printed record, does not disclose any agreement of that nature; and even if it did, we do not think it would affect the rights of the parties as to this particular notice, if one was, in fact, mailed. The agreement, if any, as to post-office address should be limited in its application to such notices as may at any time be required to give effect to the terms of the contract. There is no provision in the contract by which the company reserved the right to retain a rejected payment of premiums for any other purpose, and if it desires or proposes so to do, it ought to be held to the rules which the law provides for cases of that nature.

It follows that, under the evidence in this case, questions of fact arose whether the company did or did not, in truth, elect to insist upon the forfeiture of the insurance; whether its retention of the money of the insured was or was not conditional upon the production of a satisfactory health certificate and the re-instatement of his insurance; whether notice of such condition was or was not given to the insured; and if so, whether it was given with reasonable promptness. If, upon these questions, the findings were in plaintiff's favor, then a further finding that the company waived the alleged forfeiture could not properly have been set aside, as being without support in the record.

II. Thus far, we have given no attention to the effect of the return of the money upon the rights of the parties. That the money was eventually returned was conceded, and

6. INSURANCE:
re-instating
waived right.

if McKee was, at that time, of sound mind, and competent to transact business intelligently and understandingly, his act in accepting and receipting for it in satisfaction of his claims under the policy would doubtless be a complete defense to this action; for, no matter how perfect his right to deny the forfeiture of his insurance, he had also the right to compromise or settle and release his claims, in consideration of a return of his payment. It is alleged, however, and evidence was offered tending to prove, that he was then unsound in mind and body, and by reason thereof, was unfit and incompetent to enter into a binding agreement of that nature. If the jury should find this to be true, then it would be the right of the claimant under the policy to have that transaction and agreement treated as being without force or effect; and in that event, the other issues in the case will be determined as if the alleged agreement of settlement had never been made. *Hicks v. Northwestern M. L. Ins. Co.*, 166 Iowa 532; *Nutter v. Des Moines L. Ins. Co.*, 156 Iowa 539.

III. Counsel on either side have given considerable attention to the question whether Blum was a general or special agent of the company. We have not given the question any prominence in the discussion, because we have not thought it vital to a determination of the appeal. We think, however, that the evidence would warrant a finding that his agency was general, within the meaning of that word as used in the law of agency. He, with the cashier, appears to have had general, though possibly not exclusive, charge of the defendant's business in the central district of Iowa, consisting of a dozen or more counties. It appears, also, that his title was that of agency manager; that he had the power to appoint, superintend, and remove local agents; that he, himself, took McKee's application for the insurance, and sub-

7. INSURANCE:
authority of
agents.

scribed his name upon the printed blank over the words, "General Agent;" that he allowed McKee to give his note or notes for the first premium, which he afterwards collected, and when the second year's premium became due, he took up the matter of collecting that, also. Moreover, the defendant was a New York corporation, and, so far as the record discloses, the agency manager and the cashier were its only representatives at Des Moines through whom it came in touch with its policy holders and patrons. Life insurance agents are rarely, if ever, "general," in the sense that they execute and deliver policies, as is often done in the business of fire insurance, but they often have and exercise general control or power with respect to the particular branch of the business committed to their hands, and to that extent, at least, they are general agents. The fact that the agent represents a foreign company, and is the only visible or only convenient medium of approach to such corporation, has been recognized by the courts as a fact to be considered in such cases. See, for example, *Insurance Co. v. Wilkinson*, 13 Wall. 222 (20 L. Ed. 617), where the subject is discussed with characteristic clearness and vigor by Mr. Justice Miller. See, also, *Viele v. Insurance Co.*, supra, and note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. 92, 122. The authority of agents, so far as the public with whom they deal is concerned, is controlled not so much by the terms of their employment, or even by the terms of the policies which they procure for applicants, as by the things which the principal permits them to do, and by the nature and extent of the business for which they are employed, and permitted to carry on. But, as we have before said, so far as the agent Blum is concerned, if he transcended his powers in promising an extension of time of payment a few days, and thereby induced the insured to send him the check, and the cashier, acting for the company, and knowing that fact, received and retained the money, it would be a ratification

of the unauthorized act, and the forfeiture would thereby be waived, unless that effect is found to be obviated, either by prompt notice to the insured or by a subsequent valid settlement and discharge of his claim, as hereinbefore indicated. *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144.

The motion of the defendant for a directed verdict should have been denied.

For the reasons stated, the judgment of the district court will be reversed, and cause remanded for a new trial.
—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., CONCUR.

NORTH VIEW LAND COMPANY, Appellant, v. CITY OF CEDAR RAPIDS, Appellee (and one other case).

MUNICIPAL CORPORATIONS: Contract to Illegal Bidder. A con-

- 1 tract, entered into in good faith for the construction of a public sewer, and fully executed, will not be declared illegal because the same was let on a bid which was, in part, illegal, and consequently in excess of other bids, (1) when the illegality in such bid might have been eliminated by the council in letting the contract, (2) when the excess cost resulting from such illegality in the bid is, after the completion of the work, accurately ascertainable, and is eliminated in the making of assessments, and (3) when such latter elimination reduces the cost below all offered bids.

PRINCIPLE APPLIED: Sewer specifications called for two kinds of "excavations:" (1) "Rock excavation," which was defined as excavation requiring blasting; and (2) ordinary excavation, which was specifically defined as including loose rock. Blank bids corresponding to the specifications were furnished to bidders. One bid was in strict compliance with the blank. Another bid departed therefrom, to the extent of adding: "Loose rock excavation, \$5.50 per cu. yd." Estimate of loose rock excavation was made by the council; and the latter bid being deemed the lowest, the contract was, in good faith, let accordingly. The estimate proved to be inadequate, and, by reason of such unauthorized bid, the assessment was increased a def-

nitely ascertainable amount above the proper bid. On appeal from an assessment, the court wholly rejected this illegal increase, and confirmed the remaining assessment. This elimination reduced the cost below both bids. The appellant was objecting to the assessment on an entire addition owned by him, and had, by his prior conduct, largely estopped himself from making objection. *Held* that, as the council might have ignored that part of the bid for "loose rock," so also might the court, under the circumstances, eliminate the definitely determined excess in cost.

EVIDENCE: Unallowable Basis. Uncontradicted expert testimony
2 as to the extent of benefits afforded to a lot by a public improvement is not persuasive, when such testimony reveals the fact that it is based on the unallowable assumption that no lot, under any circumstances, can be benefited by any such improvement in excess of a named arbitrary sum.

ESTOPPEL: Denying Validity of Assessment. One who actively
3 encourages the construction of a public improvement for which his property may be assessed, has full knowledge of the proposed cost, makes no suggestion that such costs would exceed the benefits, and informs the public authorities that he "approves of the construction and consents to the usual statutory and legal assessment," estops himself to assert, after the improvement is completed, that the fair cost thereof is in excess of the special benefits which his property, as a whole, will receive.

Appeal from Linn District Court.—JOHN T. MORFIT, Judge.

DECEMBER 14, 1918.

REHEARING DENIED APRIL 10, 1919.

APPEAL from an assessment of benefits in the construction of a sewer. The appellant obtained a partial reduction of its assessments in the district court, but was otherwise unsuccessful in its contention. From the order of the district court, it has appealed.—*Affirmed.*

Deacon, Good, Sargent & Spangler, for appellant.

O. N. Elliott, and *Redmond & Stewart*, for appellees.

EVANS, J.—The specific objections filed by the appellant to the assessment are reducible to two:

(1) That the assessments were wholly invalid and void, because the contract therefor was not let to the lowest bidder.

(2) That the assessments are excessive, in that they exceed the special benefits conferred on the assessed property, and in that they exceed 25 per cent of the value thereof at the time of the levying.

The North View Land Company is the owner of a large number of lots, comprising the "North View Addition." Its enterprise consisted in platting certain territory into town lots and streets, and in improving the streets to some extent, with the view of rendering its property habitable and salable for residence property. The sewer in question was constructed through its property, and therefore abutted upon many of its town lots.

I. The successful bidder for the sewer contract was W. A. Edgar, intervener herein. It is urged that he was not the lowest bidder. It appears that, in advertising for bids,

the city council provided a blank form to

1. MUNICIPAL COR-
PORATIONS: con-
tract to illegal
bidder.

which the proposed bids should conform.

The specifications on file classified "rock excavation" as including only such rock as required blasting, in order to secure its removal, and provided that loose rock excavation should be deemed ordinary excavation. The form provided for a rate per cubic yard to be bid for "rock excavation." No such rate was to be bid for ordinary excavation. There were two bidders for the contract. Each placed his bid upon the various items indicated in the blank form. Edgar's bid for rock excavation was \$6.50 per cubic yard. That of his competitor was \$7.00 per cubic yard. To his bid upon this item, Edgar added the following: "Loose rock excavation, \$5.50 per cubic yard." Taking account of Edgar's bid in this form, it re-

quired an estimate more or less uncertain of the number of cubic yards of loose rock excavation to be removed. Under the estimate made by the city council for the purpose of a comparison of bids, it was estimated that Edgar's bid was about \$600 lower than the bid of his competitor. The contract was accordingly awarded to him. Upon final settlement, however, the actual computation of the number of cubic yards of "loose rock excavation" proved to be higher than the estimate, and the actual cost of the sewer, computed upon the bid as made, amounted to about \$200 more than the bid of the competitor. By reason of the facts here stated, the appellant contends that the contract was wholly void, and that the city council had no power to levy any assessment whatever thereunder. The trial court found that the bid was in improper form, in so far as it contained the stipulation for \$5.50 per cubic yard for loose rock excavation, and that this stipulation was void and of no effect. It appears, however, that the amount assessed by virtue of this stipulation was accurately ascertainable, and was made to appear; and the court eliminated the same from every assessment. This elimination reduces the cost of the improvement below both competitive bids. The real question between the parties is as to whether it was permissible thus to sever the legal from the illegal, and to enforce the contract in its purged form. Inasmuch as it was possible to do this accurately, under the evidence in this case, we see no sound reason why it may not be done. The city council could have made this separation in the first instance, and could have ignored the superfluous stipulation inserted by the bidder, and could have accepted the bid in its purged form. *Miller v. City of Oelwein*, 155 Iowa 706. There was no intentional fraud or bad faith in the acceptance of the bid by the city council. The contract has been fully performed, in strict accord with the specifications. Its benefits have inured to abutting owners. Sound reason dictates

that, if the bid could have been purged in advance by action of the city council, it ought not to be forbidden to do so after a full performance by the contractor. If the contract had been challenged in the inception of the proceedings, and before the contractor had constructed the improvement, the rule of conformity would have been applied with greater strictness than is justified after the full benefits of the construction have been conferred upon the property owners without objection. *Hedge v. City of Des Moines*, 141 Iowa 4, 13. Strict and technical as the requirements are in this class of cases, in order to impose liability upon private property for public improvements, yet we cannot wholly escape the operation of the principles of equity. To sustain the contention of the appellant would be, to say the least, highly inequitable.

In the present case, there is also an element of estoppel, which will be noted in the next paragraph hereof. We think the trial court properly held that the illegality of this contract was severable, and the extent thereof ascertainable; and that it properly enforced the contract in its purged form.

II. Were the assessments excessive? The appellant introduced the testimony of a number of witnesses who were real estate men of large experience. These witnesses, by their testimony, reduced the benefits conferred to an exceedingly small sum, as compared with the amount assessed. Appellant presses upon our attention the undoubted experience of the witnesses in question, and urges that their testimony should have great, if not controlling, weight with the court. One trouble, however, with these witnesses, great as their experience was, is that they had their own legal conception of how special benefits ought to be computed. This conception was, in substance, that 50 cents a frontal linear foot was the maximum benefit that could be conferred. This legal

2. EVIDENCE: unallowable basis.

conception has been long ago repudiated, both by statute and decision. If the views of these witnesses were to be accepted, then the sewer scheme was unjustified from the beginning, for the reason that its cost would greatly exceed its benefits.

This appellant had full knowledge of the inception of the sewer scheme, and abetted and encouraged it. It had knowledge of the bid for its construction before it was accepted.

There was no suggestion then that the cost would exceed the benefits. This is a proper circumstance for our consideration, in weighing the present testimony offered by the interested parties now. It further appears that this same appellant was actively instrumental in having this sewer scheme instituted and prosecuted. At a prior time, it had built an unconnected sewer on Avenue B of its addition, and procured the city council to adopt it as a public improvement, and to make assessments of the cost thereof upon the abutting property in the usual statutory method. This was done by giving its waivers as owner of the abutting lots, and by procuring other waivers when necessary. When the present scheme was under the consideration of the city council, the appellant, by its secretary, addressed a letter to such council, stating that:

"The company will approve of the construction of such sewer, and consent to the usual statutory and legal assessment thereof."

We think this letter should be deemed as in the nature of an admission by the appellant that it deemed the fair cost of such a sewer as not in excess of its special benefits to the addition; and that it should be quite estopped from taking a different attitude now. True, such former attitude would not estop the appellant from attacking the assessment of a particular lot as being excessive. But the attack made by the appellant is consistent in its application to all the lots, and if sustained, would reduce the assessment far

3. ESTOPPEL: denying validity of assessment.

below the cost. Our conclusion is that the testimony of appellant's expert witnesses on this question of special benefits is neither controlling nor persuasive. The trial court was justified in finding the greater weight with the testimony for appellees.

What we have here already said is also quite decisive of the contention that the assessment exceeded 25 per cent of the value of the lots. This claim is not confined to a particular lot or lots, but is directed with quite equal force to all the lots. Of course, the question of the value of lots in a new addition is more or less speculative and tentative. Its ultimate answer is in the success or want of success of the enterprise. It is not claimed that this enterprise has proven a failure. It is still a going concern. The testimony of the witnesses on behalf of the appellant is not at all consistent with the attitude of the appellant in its original encouragement to the enterprise. Its weight is, therefore, greatly diminished by this inconsistency. We reach the conclusion that the district court extended to the appellant all the relief to which it was entitled. Its decree is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. LOUIS NAGEL, Appellant.

CRIMINAL LAW: Nonprejudicial Opening Statement. It is not reversible error for the county attorney to assert, in his opening statement in the trial of a charge of perjury, that the accused had been indicted for a certain other offense which was involved in the transaction out of which the perjury charge grew.

CRIMINAL LAW: Right of Accused to Confront Witness. An accused who has been confronted by a witness on one trial may not, on a retrial, when the personal presence of the witness cannot be had, successfully contest the introduction of a transcript of the witness' testimony. (Sec. 245-a, Code Supp., 1913.)

WITNESSES: Scope of Examination. Prejudicial error does not
3 result from the curtailment of an examination relative to matters bearing on credibility, when the matters have been elsewhere fairly and substantially brought out. So held as to an inquiry as to the quantity of liquors possessed by a party, and as to the extent of intoxication.

CRIMINAL LAW: Improper Argument Cured by Withdrawal. An
4 unwarranted deduction, drawn by the county attorney in argument from what he claimed the defendant's attorney had said to the jury, in argument, to the effect that defendant's counsel knew that his client was guilty, is non-prejudicial when it appears that the unwarranted statement was promptly condemned by the court and promptly withdrawn by the county attorney.

EVANS and SALINGER, JJ., dissent as to the effect of the language used by the county attorney.

Appeal from Guthrie District Court.—J. H. APPLGATE,
Judge.

JANUARY 20, 1919.

REHEARING DENIED APRIL 10, 1919.

THE defendant was convicted of the crime of perjury, and appeals.—*Affirmed.*

W. D. Milligan, for appellant.

H. M. Havner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

LADD, C. J.—I. The accused is charged in the indictment with having sworn falsely before the grand jury, in an investigation then pending wherein Daisy Craver and May Lynch also were charged with having committed perjury, in that he then swore that he was not present at certain times and places with said women, whereas he was, in fact, then and there present; that he had not seen said women before that night, and started from the fair ground at about 11 o'clock, and found his car, lighted, standing in the road; that he didn't know that the said women were there

with the boys, and other details not necessary to enumerate, whereas he had seen them before that night, did not so state, and knew they were there with said boys, etc.

The evidence bearing upon the defendant's guilt was in sharp conflict, and for this reason the verdict ought not to be disturbed.

II. In his opening statement, the county attorney said:

"This matter was investigated by the grand jury,—I do not know just what term,—and an indictment was brought against Mr. Nagel for soliciting for the purpose of prostitution. (Counsel for defendant objected to this as incompetent, irrelevant, and immaterial to the presentation. Court: The court is unable to say at this time just how much of this is necessary, to the end that the jury may understand the connection. The fact that he was so indicted would have no bearing on the guilt or innocence of the defendant in this case, except as it may be historical.)"

1. CRIMINAL LAW:
nonprejudicial
opening state-
ment.

The offense mentioned rested on the transaction concerning which defendant is alleged to have testified falsely, and in the prosecution of which, as we understand the record, these women were accused before the grand jury, and in the investigation of which the accused is said to have committed perjury. If so, the recital was not improper, but necessary to a full understanding of the situation by the jury. Other statements were in line with the above, and for like reason were not objectionable.

III. This was the third trial of the case. On a former trial, Marion Rape testified; but, though subpoenaed at this trial, failed to appear, being detained at Camp Grant, near Rockford, Illinois. The State introduced

2. CRIMINAL LAW:
right of ac-
cused to con-
front witness.

and read in evidence a transcript of his evidence given at the previous trial, the court overruling an objection as incompetent, immaterial, and irrelevant, and for that the defendant is not

now confronted by the witness on this trial. The objection was overruled, and rightly so. See *State v. Brown*, 152 Iowa 427, where the subject is fully considered, and *State v. Thomas*, 158 Iowa 687.

IV. One Shroyer, having testified to what occurred near the cornfield, and that he, Rape, and others "were drinking, going out, and had whisky with us," was asked, "How much did Rape have?" Objection as

3. WITNESSES:
scope of ex-
amination.

immaterial and incompetent was sustained. The ruling might well have been otherwise; but, as he subsequently testified that "Rape

had liquor," there was no prejudice, the fact of carrying liquor, rather than the amount, being significant. The same witness was asked whether he was intoxicated.

"A. I do not know what you call intoxicated. Q. Were you under the influence of liquor? A. I had been drinking,—yes, sir. Q. You know when you are intoxicated, don't you? A. Well, it is hard to tell. Lots of people think a man is intoxicated when he is not, and lots think he is not when he is. Q. Was your judgment impaired? (Objection as incompetent was sustained)."

The only possible bearing of such inquiry was on the credibility of the witness. How far an examination of this kind shall be pursued is largely a matter of discretion, and we are of opinion, in view of the previous answers of the witness, that there was no abuse thereof in limiting it by excluding further inquiry along the line being pursued. A somewhat similar ruling on a question propounded to Badger has our approval.

V. After the evidence had been introduced, the county attorney, in his opening argument to the jury, said that:

"Deep down in Mr. Milligan's heart, he knows the defendant is guilty, and I will now tell you how he has said it to me." Here, counsel for defendant objected to "this language as improper, and as misconduct of counsel, and

4. CRIMINAL LAW:
improper argu-
ment cured by
withdrawal.

prejudicial to defendant, and a statement that no prosecuting attorney should make, in addressing a jury in a criminal case. Mr. Taylor (county attorney): I want to say that I added to that, 'and how he told it to the jury,' and I intended to make reference to something that occurred before the court in this trial. Mr. Milligan: I deny that he made that statement. Mr. Taylor: The jury will know whether I did or not. Court: The court will say this, to complete the record, that Mr. Taylor did make the statement 'that Mr. Milligan knew deep down in his heart that Mr. Nagel, this defendant, was guilty,' and then went on to say 'and he said it to me,' or in substance that, and just at that point he was interrupted, so that the court is unable to say what further remarks the county attorney was about to make to the jury. To the end, therefore, that he may be put in the attitude of what he intended to say, he will be permitted by the court to finish it, and I will pass on the matter then. Mr. Taylor: I will state that my recollection of what I said was that I will tell the jury how he told it to me and how he told it to you. Court: You may finish your statement. Mr. Taylor: In Mr. Milligan's opening statement to you gentlemen, he did not say to you that the facts are so and so, and defendant will prove so and so, he said to you gentlemen that Mr. Nagel's story is so and so. That is what I meant to say. Court: Now, gentlemen of the jury, I think Mr. Taylor should withdraw from his statement the statement that he made that Mr. Milligan knows, deep down in his heart, that his client is guilty. I think that is not a proper statement for the county attorney to make, and in your consideration of this case, you gentlemen ought not give it any weight at all. Mr. Taylor: Upon the suggestion of the court, I will withdraw it. Court: The other statement, I think, is not out of the road in the argument. Mr. Taylor: I will withdraw it; I will say frankly I did not know it was improper.

Court: I hardly think it proper for the jury to take it into consideration."

It will be observed that the court admonished the jury to take no heed of what Taylor said of what Milligan believed in his heart, and that Taylor withdrew that part of the statement. To charge counsel for the other side with want of sincerity in presenting such defense as the accused may have, does not rise to the dignity of argument, would be unfair, and ought never to be indulged in; but we think that, even if what Taylor said be construed as so charging, the court's condemnation, together with the prompt withdrawal of what was said, precluded all possible prejudice. We entertain more doubt as to what followed: "And I will tell you how he said it to me." This plainly indicated that something was to be added, and, though he was then interrupted, the court allowed the county attorney to add what he was about to say, and this is what it was:

"And I will tell the jury how he told it to me and how he told it to you. In Mr. Milligan's opening statement to you, gentlemen, he did not say to you that the facts are so and so and defendant will prove so and so. He said to you gentlemen that Mr. Nagel's story is so and so."

This statement also was withdrawn, and the court held it not proper for the jury's consideration.

The jury could not have been misled by what occurred. The county attorney did not pretend to have any ground for what he said of Milligan, other than that the latter, in making the opening statement, did not say what the facts were, and he would prove, but merely declared what defendant's story would be. This distinction was too fine on which to deduce what Milligan may have known down deep in his heart, and, of course, was not good argument. Nor would any juror of fair intelligence be likely to have so regarded it. The opening statement of defendant's counsel, however, was made in the orderly course of the trial, and was fair

matter of comment in the arguments following the introduction of evidence. It was made to the jury, and apprised the county attorney, as well as the court, of the nature of the defense to be interposed. To say, then, that defendant's attorney said what he did say to the jury and to the county attorney was not aside from the fact, and the only error was in the latter's deduction of the situation in Milligan's heart. What counsel for the defense may have believed concerning defendant's guilt or innocence was entirely immaterial, and had, and should have had, no bearing on the case. Nor do we think it did, for that no sensible juror would have drawn the inference the county attorney suggested, and the latter withdrew the same, and the court admonished the jury to give the matter no consideration.

Other rulings are not fairly debatable, and for this reason, are approved without discussion.—*Affirmed*.

GAYNOR, PRESTON, and STEVENS, JJ., concur.

EVANS, J. (dissenting). I cannot agree with Division V of the opinion. In his address to the jury, the county attorney said:

(1) "Deep down in Mr. Milligan's heart, he knows the defendant is guilty, and (2) I will tell you how he has said it to me."

On objection by defendant, the court struck out part (1) and approved part (2) as "not out of the road" [way].

I think part (2) was even more objectionable than the first part, and should have been condemned, promptly and unequivocally. The attempted explanation by the county attorney of what he intended to say, availed nothing and explained nothing. The attempted explanation was itself improper, and should not have been permitted. It only intensified the prejudice. No explanation could justify the statement actually made. Later, the explanation was itself withdrawn by the county attorney. But the objectionable statement remained in the record, with the express approval of

the court. Such statement implied that the attorney for defendant had privately confided to the county attorney his conviction of his client's guilt.

If it were open to us to presume a finding of fact in support of the ruling of the court, we might presume that the defendant failed to satisfy the court that the statement objected to was, in fact, made. But the court expressly found, as a fact, that such statement was made. We are compelled, therefore, either to approve or to disapprove as prejudicial such statement by the county attorney.

SALINGER, J., concurs in this dissent.

W. T. TROTTER, Administrator, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

RAILROADS: Negligence—Trespassers—Only Duty Not to Injure

- 1 **Willfully or Wantonly.** No duty toward a trespasser arises until he is actually seen in a position of peril, and the extent of the duty then is, not to injure him wantonly or willfully, and to do everything that can reasonably be done to avoid injuring him.

TRIAL: Direction of Verdict—Review—Favorable Inferences to

- 2 **Losing Party.** In determining whether a verdict was rightfully directed, it is the duty of the Supreme Court to give the party against whom the verdict has been directed, the most that can reasonably be claimed for the effect of his testimony and the inferences therefrom.

RAILROADS: Negligence—Trespassers—Duty to Warn after Dis-

- 3 **covering Peril.** Where a trespasser was seen in such a place that there was no reason to anticipate his going on the railway track, there was no negligence in not slowing up the train or giving him warning.

Appeal from Washington District Court.—JOHN F. TALBOTT,
Judge.

APRIL 10, 1919.

THE trial court instructed a verdict in favor of the de-

pendant. It sustained a motion to direct verdict, generally. Its action must be sustained here if any of the grounds of the motion were well taken. Plaintiff contends that none of them were.—*Affirmed.*

Gibson & Davis and *Chas. A. Dewey*, for appellant.

F. W. Sargent, Eicher & Livingston, and *Robert J. Banister*, for appellee.

SALINGER, J.—I. The petition alleges that the plaintiff's decedent was walking along and upon defendant's railroad track in the town of Ainsworth, in a westerly direction, and in walking, followed the main track; that, while so walking along and upon the track, he was approached from the rear by a passenger train of the defendant; that the engineer and other employees of defendant in charge of the train saw him on, along, and upon the track over which the train was about to pass, and in position of danger from the approaching train; that the employees had knowledge decedent did not hear or know of the approach of the train, knew that a strong wind was blowing from the place where the train was toward where decedent was walking, knew that this wind hindered decedent from hearing the noise of the approach of the train; that they saw decedent in a position of danger in plenty of time to have given warning, and to permit decedent to reach a place of safety; that the employees had the means, opportunity, and ability to give warning and notice of the approach of the train after they saw decedent, and if they had used these means, it would have enabled decedent to reach a place of safety; that the employees, having seen decedent in a position of danger, and having full knowledge of his peril, negligently failed to give any warning of the approach of the train, negligently failed to slacken the speed of the train, or to make any attempt to protect decedent; that they willfully and wantonly and

with gross carelessness and negligence, as aforesaid, ran upon and against decedent, and so the train struck him from behind and caused his death; and that the failure to blow a whistle or give any alarm of the approach of the train, after seeing decedent in a position of danger, was grossly negligent, careless, willful, and wanton, and was the direct cause of the killing of decedent.

The decedent of the plaintiff was confessedly a trespasser. There was no duty on the defendant to slacken the speed of its passenger train, or to give an alarm by bell, whistle, or otherwise to protect *possible* trespassers.

In other words, there was no duty to anticipate that there would be a trespasser on or near the track, and in that anticipation to slacken speed or give warning. There was no duty towards this trespasser until he was actually seen in a position of peril.

When thus seen, there was a duty not to injure him wantonly or willfully, and a duty to do everything that could in reason be done, after his peril was perceived, to avoid injuring him. This is the extent of the duty, even where the trespasser is an infant, who cannot be charged with contributory negligence. *Papich v. Chicago, M. & St. P. R. Co.*, 183 Iowa 601, and cases therein cited. In that case, it is said:

"Since no duty to the trespasser arises until he is actually seen, it follows, of necessity, no care is due him before his peril is known. On that theory the general rule has been worked out that an owner of property trespassed upon is not liable for an injury resulting from the trespass, merely because care might have successfully guarded against such injury;" that, until the trespasser is seen in a position of peril, there is no duty to give warning; that the railroad need not take into consideration that there may be trespassers on its line; that it "owes the trespasser no duty, and is not required to be on the lookout for him."

1. RAILROADS :
negligence :
trespassers :
only duty not
to injure will-
fully or wan-
tonly.

It becomes plain, then, that the essence of the petition is its charge that the defendant, after it knew the trespasser to be in a position of peril, wantonly refrained from all attempts to avoid injuring him, though successful attempts might have been made. Therefore, whether there was anything to go to the jury on depends wholly upon whether a jury would have been warranted in finding that this charge was true. It does not matter that no warning was given, nor that the speed of the train was not slackened. The right to go to a jury depends upon whether there is any substantial evidence that the engineer knew the trespasser was in a place of peril, and with that knowledge failed to use means at hand which would have saved the trespasser from injury.

No one speaks from personal knowledge as to just what the situation was at the very instant when the train struck decedent. One Woodburn did not see decedent until just before the latter was struck. This witness is unable to say whether decedent was walking on the track, or at the side of the track in a path parallel with the track. If decedent was walking on this path, the oncoming train could not injure him, and seeing him there would not be seeing him in a place of peril. His position could become perilous only if he left the path, climbed a rise of some 18 inches, and then turned north and went upon the track. Wheeler was some 150 feet from the place where the accident occurred. He says he saw a hat that moved west as the train came on, and that "it did not look like it (the hat) moved very much toward the track. The hat looked to be four or five feet north of the north rail of the track, before it (the hat) moved south, as I have described." Assuming for the plaintiff that Wheeler is describing the decedent, all that plaintiff may claim from this testimony is that decedent was walking on the path, when first seen by the witness, and that then he seemed to turn toward the track. All the remaining testimony consists of statements said to have been made by the

engineer. Woodburn testifies that, in talking to him about the accident, the engineer said, "It seemed just like, an instant before the engine got there, he stepped on a stone and tripped toward the engine, is the way it looked to me;" that the engineer had seen the man before, but "supposed he would get out of the way; he supposed he was far enough away so he would not hit him." On cross-examination, Woodburn says that what the engineer told him was that the engineer saw the man,—thought he was far enough away that he would not hit him; that he was walking beside the track, and it seemed to the engineer that, just as he got up to him, he stumbled, or stepped toward the track.

According to the witness Smylie, the engineer said he saw "the man walking in the path along the right of way, and he was not in any danger until he came within an engine's length of him. He seemed to stumble sidewise in front of the engine." According to Woods, the engineer said he saw the man "walking along the side of the track, and that he stumbled toward the train; that he was walking in that path ahead of the train, and he stumbled toward the train and the timber,—the cross-timber on the engine; that he saw the man walking in this path. When it got close to him, he tripped or stumbled toward the engine."

On determining whether a verdict was rightly directed against a party, it is our duty to give that party the most that can reasonably be claimed for the effect of his testimony and inferences to be drawn therefrom.

2. TRIAL: direction of verdict: review: favorable inferences to losing party.

When we do so here, what have we? The utmost of it is that a man was seen walking ahead of an oncoming train, on a path beside the track, and where he was safe; that, when the train was practically up to him, he left the path and went upon the track, and did this without giving any

3. RAILROADS :
negligence :
trespassers :
duty to warn
after discover-
ing peril.

indication that he intended leaving the path for the track. We are unable to find in this any evidence of a wanton failure to give warning. All that was seen during the time when warning might have been effective was a trespasser in a safe place. It was not negligence in that situation to refrain from giving warning or to slow up the train. It all comes to this: How can it be said there was the wantonness which enables a trespasser to recover, when he went from a place of safety upon the track, so suddenly that no diligence on part of the train crew could save him? As said, we think the *Papich* case, *supra*, quite fully rules this case. *Sandell v. Des Moines City R. Co.*, 184 Iowa 525, gives some support to the action of the trial court. That was a case where a woman in a buggy drove by the side of a street car track, and parallel with the direction in which a car was approaching on that track. She would have remained in safety, had she continued in the direction she was going when the street car crew saw her; but without warning, she suddenly turned, and went across the track. We think, too, that *Walters v. C., R. I. & P. R. Co.*, 41 Iowa 71, at 76, gives more or less support to the direction of this verdict. And see *Oaks v. Chicago, R. I. & P. R. Co.*, 174 Iowa 648. All that we can find in *Clemens v. Chicago, R. I. & P. R. Co.*, 163 Iowa 499, is that, when applied to the record here, about all that it accomplishes is to hold that the doctrine of last clear chance has no application in this case. And it is our opinion that that doctrine is not involved here. The case of *Christiansen v. Illinois Cent. R. Co.*, 140 Iowa 345, is not applicable, because in that case no trespasser is involved.

On the whole, we are satisfied that the court rightly instructed a verdict for the defendant.—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

CITY OF OSKALOOSA, Appellee, v. JOSEPH BOYD, Appellant.

PLEADING: Estoppel—Unassailed Plea—Point Raised Sua Sponte.

Proof of the plea that there had been a full settlement of all matters involved in a cross-petition which was in no way challenged in the trial court, made a defense, even though, on challenge, such plea would have been held insufficient; and the Supreme Court will, on its own motion, raise the point that the fact that the plea is insufficient presents no reversible error.

Appeal from Mahaska District Court.—JOHN F. TALBOTT,
Judge.

APRIL 11, 1919.

THE plaintiff, city of Oskaloosa, brought a suit in equity, demanding the reformation of a certain agreement of settlement that had been entered into between the parties. Its petition was dismissed, and it does not appeal. The defendant filed a cross-bill, asserting, in effect, that the city had injured him by maintaining a described nuisance, and he prayed that an injunction issue to restrain the further continuance of the alleged nuisance. Issue was joined on this cross-petition. It, too, was dismissed. Each party was adjudged to pay half the costs.—*Affirmed.*

C. C. Orvis, for appellant.

McCoy & McCoy, for appellee.

SALINGER, J.—I. The brief for appellant begins with the caption "Statement of the case." This is followed by some four pages of print. Then comes the caption, "Brief." This brief cites a very large number of cases, and fills some nine pages of print, without subdivision of any sort. It seems to deal wholly with the law of injunction, as applied to restraining nuisances. No "Errors relied on for reversal" are set out. The one thing that is outstandingly clear

as to the presentation on part of appellant is that it wholly ignores one issue tendered by appellee. As said, the cross-bill complains of a described nuisance, and demands that its further continuance be restrained. The city answered with a general denial, and alleged affirmatively that the parties had made a settlement in full as to all the matters asserted by the cross-bill. By reference, Exhibit A, attached to the original petition of the city, is made a part of its answer to the cross-bill. This exhibit purports to evidence a settlement between the parties. The appellant is not alone in ignoring this issue of settlement, or accord and satisfaction. Appellee, too, makes no reference to the settlement which it had pleaded. Now, the decree dismisses the cross-petition on the merits, and stops at that. It is self-evident that such dismissal may rest upon finding said claim of settlement to be established. In analogy to the appellate rule dealing with sustained objections, it is immaterial what argument the appellee makes in support of the decree. If there be any good reason why the decree should be affirmed, there can never be a reversal merely because the appellee makes no argument in support of the decree, or makes a poor one.

Now, the city pleaded there had been a full settlement of all matters involved in the cross-petition, and in support, made reference to a described stipulation, attached to its original petition. Assume, for the sake of argument, that said stipulation did not work the settlement asserted. If so, this plea constituted no defense. But defendant in no way and at no time challenged the sufficiency of the plea, or as much as made claim that said stipulation did not effect what the city claimed for it. It would seem that no such claim is made even now. It is settled in this court that, if the plea be not challenged below, proving the plea, as made, makes a cause of action or defense, respectively, even though, on challenge, such plea could be held to be insufficient. This

we have decided so often that we pretermitt citation. True, appellee has said nothing about the failure to attack the pleading. But we have held that, to save the judgment, we will raise such a point on our own motion; that, when the decree rests on proof of an unchallenged plea, the fact that the plea is insufficient presents no reversible error. See *Heiman v. Felder*, 178 Iowa 740.

II. Both parties make some claim that there is an estoppel by former adjudication. We are in some doubt whether the claim of either is tenable. But our holding that the plea of settlement is established ends the case for the appellant. Therefore, we do not determine whether said claims are or are not tenable. In view of this conclusion, it is unnecessary to determine whether defendant has proved the allegations of his cross-petition. We have, however, given this last question some consideration, and feel satisfied that, on reasonable allowance for the advantage possessed by the trial court in determining this question of fact, we would not be justified in reversing on the ground that defendant had so proved the nuisance charged by him as that the decree appealed from is contrary to the weight of the evidence. The decree will stand—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

JOSEPHINE T. ELLER, Appellee, v. CHESTER J. ELLER,
Appellee, et al., Appellants.

APPEAL AND ERROR: Right of Appeal—Statutory. The right of
1 appeal is purely statutory, and no constitutional right thereto
exists.

APPEAL AND ERROR: Right of Appeal—Witness to Perpetuate
2 **Testimony.** Under Sections 4100, 4101, Code, 1897, a person summoned as a witness in a proceeding to perpetuate testimony under Section 4718, Code, 1897, cannot appeal from an order of the court refusing to set aside an order for his examination.

Appeal from Polk District Court.—LAWRENCE DEGRAFF,
Judge.

APRIL 11, 1919.

THE opinion states the case.—*Dismissed.*

H. L. Bump, for appellants.

Chester J. Eller, Parsons & Mills, and Miller & Wallingford, for appellees.

STEVENS, J.—The defendant Chester J. Eller, and plaintiff, Josephine T. Eller, were formerly husband and wife. Plaintiff brought an action for divorce, which was granted in 1915. The decree awarded the custody of Ariel Ann Eller, a minor child of the marriage, to the plaintiff. Later, defendant applied for and obtained a modification of the decree, granting him the privilege of visiting and being visited by the child at least once each week, and further ordering that neither party should remove the child from the jurisdiction of the court. On April 26, 1918, appellee herein applied to the court for and obtained an order for the perpetuation by deposition of the testimony of M. M. Schouboe and C. W. Schouboe, the same to be taken on May 9, 1918, after five days' notice. The former wife, plaintiff in the divorce case, whom defendant charges, in his application for a modification of the decree and to perpetuate testimony, with secretly, and in violation of the order of the court, taking the minor child of plaintiff and defendant beyond the jurisdiction of the court, and thereby depriving defendant of the privilege of visiting said child, as allowed by the decree, was not served with notice of this application; but the court appointed an attorney to examine the same and file cross-interrogatories, if found advisable. Before the day arrived for taking said depositions, the said C. W. and M. M. Schouboe appeared in court and filed a

motion, in which they style themselves as interveners, but which is, in fact, a motion to quash and set aside the order of the court for their examination. The grounds alleged therefor are, in substance, that both of said parties are residents of Polk County, in good health, and available for examination as witnesses when necessary; that M. M. Schouboe is the mother and C. W. Schouboe the brother of the plaintiff, Josephine T. Eller; and that the only purpose of the proposed examination is to harass and annoy them, and to obtain information upon which a proceeding to punish them for contempt of court may be based. A further ground upon which appellants asked that the order for their examination be set aside was that no sufficient ground is alleged therein for their examination.

The court overruled the motion, and the said witnesses, otherwise designated in their motion as interveners, to cancel the order for their examination appeal.

Their right to appeal is challenged by defendant. The application upon which the order for the examination of appellants was issued, fully complies with the provisions of Code Section 4718, authorizing proceedings to perpetuate testimony. The interrogatories to be propounded to appellants are attached to the application, as required there-

1. APPEAL AND
ERROR: right
of appeal:
statutory.

by. Appellants are not parties to the litigation, have no other than a sympathetic interest therein, and are not otherwise involved in the application of defendant for a modification of the decree. No judgment can possibly be entered against them, nor is the proceeding in any way adverse to them. The court has inherent power to compel witnesses to answer proper questions propounded to them in a proceeding to take depositions and of this character. *Finn v. Winneshiek Dist. Ct.*, 145 Iowa 157. The right of appeal is purely statutory, and no constitutional right thereto exists. *Horrabin v. City of Iowa City*, 160 Iowa 650; *Thomas*

v. Elliott, 215 Mo. 598 (114 S. W. 987); *State v. State B. & T. Co.*, 36 Nev. 526 (137 Pac. 400); *Mitchell v. Bay Probate Judge*, 155 Mich. 550 (119 N. W. 916).

Section 4100 of the Code confers appellate jurisdiction upon the Supreme Court over all judgments and decisions of all courts of record, except as otherwise provided by law; and Code Section 4101 specifies in detail from what orders an appeal to the Supreme Court will lie. Under neither section is a person summoned as a witness in a proceeding under the statute for the perpetuation of testimony authorized to appeal from an order of the court refusing to set aside an order for his examination. While this question has not previously been passed upon by this court, what is said in *Finn v. Winneshiek Dist. Court*, *supra*, although a certiorari proceeding, is pertinent. We quote from the opinion in that case, as follows:

“Even though many of the questions propounded were subject to objection properly interposed, which objection would undoubtedly have been considered and made effective upon the trial of the case, this was no reason in itself why the witness should not have answered them when before the commissioner. It would be intolerable to hold that a witness whose testimony is being taken by deposition may refuse to answer, have the propriety of the question determined by the court, and upon an adverse ruling bring the case to this court on certiorari, and delay and prolong the trial of the case upon its merits indefinitely. It has been frequently held that a witness cannot refuse to answer questions simply because he deems them incompetent or irrelevant. — *Ex parte Livingston*, 12 Mo. App. 80; *DeCamp v. Archibald*, 50 Ohio St. 618 (35 N. E. 1056); *Thomson-Houston Co. v. Jeffrey Co.* (C. C.), 83 Fed. 614; *Winder v. Dufferffer*, 2 Bland. (Md.) 166; *Stewart v. Turner*, 3 Edw. Ch.

2. APPEAL AND
ERROR: right
of appeal: wit-
ness to perpet-
uate testimony.

(N. Y.) 458. Of course, if the question calls for privileged matter, the witness may decline to answer, subject to proceedings for contempt. *Press Pub. Co. v. Lefferts*, 67 N. J. L. 172 (50 Atl. 342); *In re Bradley*, 71 N. H. 54 (51 Atl. 264). Even if the trial court were authorized to pass upon the competency, materiality, or relevancy of the testimony upon the application made, its decision, even though erroneous, would not, for that reason alone, be illegal and subject to review upon certiorari."

It may be safely assumed that the court below will not compel appellants to answer questions the answers to which may tend to incriminate them, or which may be otherwise improper or not permitted by the usual procedure. They may refuse to answer, if they believe they have legal excuse therefor, and upon proper application, if held in contempt of court, their legal rights will be fully protected. The appeal herein is not authorized by statute, and the ruling of the court below, refusing to sustain the motion to set aside the order for the examination of appellants, is, therefore,—*Affirmed*.

Appeal dismissed.

LADD, C. J., EVANS, GAYNOR, and PRESTON, JJ., concur.

WEAVER, J., dissents.

G. B. HADDOCK, Appellant, v. GENEVIEVE S. JACOBS et al.,
Appellees.

WILLS: Testamentary Capacity—Unsound Mind—Sufficiency of Evidence. Evidence reviewed, and held sufficient to submit to the jury the question of testator's capacity to make a will.

EVIDENCE: Opinion Evidence—Testamentary Capacity—Discretion of Court. Testimony to the effect that the decedent was very nervous, physically weak, and was slow in answering questions.

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and that decedent had said to the witness that she (decedent) did not know what she wanted to do with her property, is sufficient upon which to base an opinion that the testator was of unsound mind, the principle being recognized that the trial court has some discretion in admitting such testimony.

EVIDENCE: Opinion Evidence—Hypothetical Question—Assumption of Facts. Evidence in a will contest reviewed, and held to prove matters upon which hypothetical questions were based, the question whether such facts had been established being for the jury.

Appeal from Taylor District Court.—H. K. EVANS, Judge.

APRIL 11, 1919.

THIS is a will contest. The objections to the probate of the will were that deceased was of unsound mind, and that the will was executed as the result of undue influence. The case was tried to a jury, which found a general verdict for the contestants, and answered two special interrogatories, one of which answers was that undue influence was not exercised, and the other, that deceased was of such unsound mind as to be incapable of making a valid will. Judgment was entered, refusing probate. The proponents appeal.—*Affirmed.*

Haddock & Son, for appellant.

Flick & Flick, for appellees.

PRESTON, J.—1. The estate of deceased amounted to from \$2,500 to \$3,000. Deceased had had some misunderstanding with her sister Genevieve Jacobs, one of the contestants, over the will of a deceased sister; but the jury could have found from the evidence that there had been a complete reconciliation, and that nothing had occurred to disturb the friendly relations with her mute brother, or two nieces, daughters of a deceased sister, and contestants, or with another niece of her husband's, of whom deceased

seemed to have been very fond. It was the expressed desire of deceased that the last-named niece should have a collection of solid silver pieces, which deceased and her daughter had collected, each piece of which was engraved with the Kersey name. The two principal beneficiaries in the will were neighbors of deceased's, who had been kind to her. The provisions of the will, stated as briefly as may be, are that, after the payment of debts and funeral expenses, she gives \$100 to the Cemetery Association, to be invested, and the interest applied in keeping up the Kersey lot, and provides for a monument, to cost about \$500; that her books be given to the Benefit Library Association, such donation to be known as the Isaac and Margaret Kersey Donation; that the dresser and bedstead in a certain room be given to Mrs. Josephine Ray; and that all the rest and residue of the property be sold, and the proceeds be divided between Mrs. Josephine Ray and Mrs. Ella Keith, G. B. Haddock to act as executor. It was signed by her mark, Sunday, January 28, 1917. She died a few hours after the will was executed. She was 81 years of age. She had sustained a fractured femur, about 12 weeks prior to her death, during which time she suffered intense pain, according to some of the testimony, and took opiates to alleviate the pain; and contestants' evidence tended to show that she had hallucinations. Proponents placed two witnesses on the stand, in the first instance, who testified to the execution of the will and to what was said and done at that time, and that she was of sound mind. At the close of contestants' evidence, proponent moved for a directed verdict, which was overruled. Thereupon, proponents put in their rebutting evidence, without renewing the motion for a verdict.

There are but two or three errors and points relied upon for reversal. The main proposition is as to whether the evidence was sufficient to take the case to the jury, and to

1. WILLS: testimony: unsound mind: sufficiency of evidence.

sustain the verdict. We shall set out the substance of the testimony, as briefly as we can, offered on behalf of contestants, and enough to show that, even though it was contradicted by witnesses for proponents, there was a case for the jury. It may be conceded that it is a border line case on the facts. We are not, however, the triers of the facts. Had the verdict been the other way, we would not be justified in interfering. A witness testifies that she became acquainted with deceased about the middle of November, 1916, and did the housework, and took care of deceased. Deceased was then in bed, with a broken hip. She staid until January 13th. She says that, the last three weeks she was there, deceased seemed to see different things, in different places; claimed there was something there, and that witness had to take it off of the mind of deceased. Other times, she would see things on the wall. The 18th of January, 1916, she said, was on the mirror in front of her, but witness could not see anything. There was a vase of flowers which witness moved, and deceased said they were still there, after all. Another time, she thought she saw Dr. Sollis, on the motorcycle, sitting outside the house, and that he had his hands over his head; but the doctor was not there. Deceased insisted that he was. Deceased suffered quite a good deal of pain with her limb while witness was there. Witness says that Josephine Ray was over at the home of deceased almost every day; that she had some conversation with Mrs. Ray about deceased's making a will. Nora Thompson testified that she lived across the street from deceased, and visited her frequently,—nearly every day; was present when the will was drawn, sitting not far from the folding door in the next room; could distinctly hear what was said, and was watching the proceedings; that—

"Mr. Haddock would ask Mrs. Kersey questions, and it took her some time to answer them, and then he suggested some things to her, and he says, 'Now I want you to just tell your own opinion,—I merely suggest these things to you;' and she would say, 'Uh huh.' Some things she would tell in her own way, what she wanted, but it took quite a while. She wanted all her books left to the public library, and then she wanted some expenses set aside to the Cemetery Association, and for a monument. She did not say anything about the bedroom furniture, what she wanted to do with that. I heard that read in the will."

When asked to tell how that came to be in the will, she says:

"Well, Mrs. Ray had it written down on a slip of paper, and she handed it to Mr. Haddock, and he read it. On the slip of paper was, 'I give Mrs. Josephine Ray the bed and dresser and its contents.' Before this was said, Mr. Haddock asked Mrs. Kersey if she had any relatives or friends that she would like to have her property go to. She hesitated for a while, and then she said, 'Mrs. Ray and Mrs. Keith have been good to me.' Then, at that time, Mrs. Ray handed Mrs. Kersey the slip of paper. Well, that was all that was said. They just jumped to the conclusion she wanted it left to those two ladies. I think that, if she had been given time, she would have said other people were good to her. Mrs. Kersey did not say she wanted to leave it to these two ladies. She said they had been good to her. As to the balance of the property, the home and that sort of thing, Mr. Haddock asked her what she wanted to do with these. She said, 'I don't know.' Mr. Haddock says, 'Mrs. Kersey, you will have to sign this. If you are unable to write your name, just make your cross.' He said, 'There will have to be two witnesses;' and he turned to Dr. Sollis and said, 'You will be one,' and he said Miss Iva Larison would be the other. I did not hear Mrs. Kersey say any-

thing to that. Q. State how she appeared. Tell the jury what she looked like, and that sort of thing. A. She was just lying there, and seemed to be very nervous, physically weak. Q. Now, basing your opinion on what you saw, or what you have detailed to the jury, what would you say, whether or not Mrs. Kersey was of sound or unsound mind at the time this will was executed? (Mr. Haddock: Objected to because there are not sufficient facts testified to to base an opinion on. The Court: Witness may answer. Proponent excepts.) A. Well, I think she was of unsound mind."

Error is predicated upon the ruling of the court just stated, and this will be referred to later.

Another witness testifies that she was at the home of deceased, one evening after deceased had been hurt, at which time deceased contended that there was a black cat on the foot of her bed.

"I thought that was queer, and said, 'What is the matter?' Mrs. Keith was there, and she says, 'Oh, she has been that way frequently since she was hurt.' There was no black cat there. She thought there was a coat or something else on her bed, and there was nothing there at all."

Dr. Paschal was the family physician for deceased and her family for years, but was himself sick at the time of her last sickness; was well acquainted with her. He testifies that the tendency of the mind is to weaken, along with the body; that the tendency of administering opiates and anodynes to patients of that age is always to affect the mental condition, if continued for any length of time. It is weakened. In answer to a hypothetical question, he gave his opinion that she was weak-minded, and that, knowing her as he did, all his life before that, she wouldn't be of a competent mind,—wasn't at that time,—from the effect partly of the suffering and pain, and perhaps as much from the drugs. Other witnesses testify to her appearance and

physical condition, and there may be some circumstances in cross-examination of proponent's witnesses tending to support contestants' theory, and circumstances in cross-examination of contestants' witnesses tending to show mental capacity. There is some impeaching testimony as to proponent's witnesses, more particularly, perhaps, as to Dr. Sollis, tending to show that he said to several others that deceased was not in a fit condition to make a will at the time it was made, or during that day. There was other such evidence as to her being in a stupor, for some hours before the will was made. Witnesses were called for proponents in rebuttal, some of whom testify that, in their opinion, deceased was of sound mind. We shall not take the space to set out proponent's evidence. It is enough to say that it is in conflict with the contestants' testimony. Appellees so concede. After an examination of the entire record, we think the evidence is sufficient, and that it was for the jury to say whether deceased possessed testamentary capacity, and understood, in a general way, the nature of the instrument she was executing, the natural objects of her bounty, the nature and extent of her property, and the manner in which she wished to dispose of her estate.

2. Taking up now the ruling of the trial court on the objection of proponents to the testimony of Nora Thompson, heretofore set out. There is no argument for appellee on this point. We think the question was not

2. EVIDENCE: objectionable. True, a witness testifying to
opinion evidence: unsoundness should detail the facts upon
testamentary capacity: dis- which opinion is based. It is evident that
cretion of court. counsel started his question on the thought
that witness could give her opinion on what she saw, then
corrected himself and the question, by asking her to base
her opinion on what she had detailed; or the word "or" can
be, as is often done, considered as synonymous with "and."
Appellant seems to have so construed the question, for the

objection made was not on the specific ground now urged. We shall not repeat the testimony of this witness, as we have heretofore set it out somewhat in detail. Some of it indicates conditions of deceased that are out of the ordinary, and tend to indicate unsoundness of mind; that deceased was very nervous, physically weak; said she did not know what she wanted to do with her other property; that she was slow in answering, and so on. There were sufficient facts testified to upon which to base an opinion. There is some discretion in the trial court as to such matters. There was no error as to this.

3. Complaint is made of the hypothetical question propounded to Dr. Paschal. The complaint is that it contains statements as facts not proven to be such. Cases are cited.

holding that such a question should be based on facts which the evidence proves, or tends to prove. The question is too long to set out in the opinion. We think there is evidence tending fairly to prove all the facts assumed. Whether they had been established, was for the jury. We reach the conclusion that there is no prejudicial error, and the judgment is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

JULIA KIFFNER, Appellant, v. CHARLES H. KIFFNER et al.
Appellees.

TRUSTS: Spendthrift Trusts—Not Subject to Debts of Oestui Quo Trust. Where a testator created a trust fund in the hands of a third person, with full and *unlimited* power of control in the trustee, who was authorized to pay to testator's son, from time to time, such sums as, in his discretion and judgment, he deemed wise and prudent and just for the son's welfare, *held* that the testator had the right to confer upon the trustee such full power over the fund as he would have had, if living, and that

such a fund *was not subject to the debts of the son until it passed into his hands.*

SALINGER, J., dissents.

Appeal from Bremer District Court.—M. F. EDWARDS,
Judge.

APRIL 11, 1919.

THIS is, in effect, a creditor's suit, wherein the creditor, as plaintiff, seeks to subject to her judgment a testamentary trust fund, on the theory that the judgment debtor, as the beneficiary of the trust, is the equitable owner of the fund. There was a decree dismissing the petition, and the plaintiff has appealed.—*Affirmed.*

T. A. Kingland, for appellant.

Sager & Sweet, for appellees.

EVANS, J.—The judgment debtor is the defendant Charles H. Kiffner. By the will of his father, he was a qualified legatee, to the amount of \$10,000, to which a condition was attached that the sum should be held in trust by Frank A. Kiffner, as trustee, to whom was given the full and unlimited power of control over such fund "as, in his discretion and judgment, may be deemed wise and prudent, without any restriction or restrictions whatsoever." The trustee was specifically authorized to pay to Charles Kiffner, from time to time, such sum "as, in his judgment and discretion, may be deemed wise, prudent, and just for the welfare and well-being of my said son Charles H. Kiffner." ✓

It will be seen from the foregoing that the case involves a testamentary trust created by the testator for the purpose of the support of an improvident son. In its facts, the case does not differ materially from those involved in *Meek v. Briggs*, 87 Iowa 610. The decree of the district court was in harmony with our holding in the cited case. This case

has been followed by us a number of times in our more recent holdings. *Merchants Nat. Bank v. Crist*, 140 Iowa 308; *Robertson v. Schard*, 142 Iowa 500; *Hunter v. Citizens Sav. & Tr. Co.*, 157 Iowa 168; *Olsen v. Youngerman*, 136 Iowa 404. The reasons underlying the law as pronounced in the *Meek* case are fully discussed in the above cases. No useful purpose can be subserved by repeating the discussion here. Sufficient to say, in general terms, that the testator owed no duty, legal or moral, to provide for the debts of his son; that he had a right to dispose of his own estate as he would; that he had a right to create a trust fund and place the same in the hands of a third party as trustee, and to confer upon such trustee such full power over the fund as the testator himself would have had if living; and that he had a right to adopt this course for the very purpose of enabling the trustee to support the improvident son, and yet prevent his creditors from appropriating the benefaction. The creditors are not thereby wronged. It is true, of course, that, when the fund has once passed into the hands of the beneficiary, it becomes his unqualified property, and is subject to the same processes in his hands as any other property. But as long as it is withheld from the control of the debtor, it is beyond the reach of the creditor, also. *Nichols v. Eaton*, 91 U. S. 716.

The plaintiff first sought to reach the fund by garnishment of the trustee. Thereupon, this suit was brought, in aid of the garnishment. Later, the garnishment was dismissed, and equitable relief alone is now asked. If the grounds upon which plaintiff bases her equity suit are good, we see no reason why she might not have maintained a garnishment on the same grounds. As a ground for equitable relief, she avers that her debtor and the trustee are in collusion against her, to prevent the collection of her judgment. This allegation is a mere legal conclusion, and an erroneous

one. The trustee owes no duty to the creditor. On the contrary, his trusteeship is in hostility to the creditor. He was not bound, therefore, to exercise his discretion in favor of the creditor. Indeed, the clear implication of the condition of the trust was that he should not do so. The decree of the district court being in harmony with our previous cases, above cited, it is, accordingly,—*Affirmed*.

LADD, C. J., GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). Somewhere, this appellant ought to have a day in court on the suit she tenders. Up to this time, all consideration, including that given by the majority, is devoted to denying claims which appellant has never made. The father of her husband made a will, bequeathing a sum of money to the son absolutely, so far as title thereto is concerned. The only limitation is that it shall be in the discretion of a trustee appointed when the fund, in whole or in part, shall be paid over, and that the trustee may pay it over whenever it is his judgment that such payment is for the good of the *cestui*. In other words, the *cestui* has title; the ancestor contemplates that he may be given possession,—does not forbid it; but the trustee is saved harmless, if he pay over, or if he do not pay over. It cannot be denied that, if the *cestui* gave someone an order upon the trustee, and the latter saw fit to honor it, that he has the right to do so. It cannot be denied that, if the trustee paid over all the fund to the *cestui*, and the latter deposited it in bank, the latter would have perfect title to the deposit, and execution issued on the alimony decree which his wife has, could effectively be levied upon the deposit. The appellant is not asking that the trustee be compelled to exercise his discretion, or she allowed to seize any part of the fund while the trustee has it. She applies to a court of equity to safeguard such rights as she will have when, if ever, the trustee shall elect to pay. She is met by

the citation of cases like *Meek v. Briggs*, 87 Iowa 610, where the testator created a fund for an improvident, under which the title could never pass to the son, and under which no part of the fund could be paid over, even by the concurrent act of the trustee and the *cestui*. I am not denying that one who gives may attach such conditions as that creditors can, under no circumstance, seize what has been given. My position is that no such trust is created in this case. The trustee has power at any time to surrender to the *cestui*. When he does so, nothing written by the testator stands in the way of seizure by creditors. The question is not what the rights of creditors are in a fund that they can never touch, but whether, where it is possible that the act of a trustee may lawfully subject a fund to seizure by creditors, equity has any power to see to it that, when the surrender is made, the creditor shall be assured of satisfaction. So far as real property is concerned, Section 3801 of the Code creates such a safeguard. It provides that a judgment shall be a lien upon real estate which the debtor may subsequently acquire. It does not seem a strained use of the powers of the chancery court to provide a similar safeguard as to personal property. The reasons which dictate this statute give full support to such an exercise of equitable jurisdiction. In my opinion, *Jewell v. Nuhn*, 173 Iowa 112, is, in principle, quite applicable. It holds that equity may so deal with property as that one whose lien is not yet effective, because steps must yet be taken to make it effective, shall have priority saved until those steps are taken. We said, in that case:

"True, my demand is not yet enforceable, and, therefore, my contract lien cannot yet be effectuated, but I can and will turn my demand into a judgment; then it will be a debt; my lien will be security for the collection of that debt.
* * * You can make me wait in collecting until I obtain judgment, but you may not have it said that your lien is

superior to mine, and that my security which covers the future shall be ineffectual when I do turn the obligations due me into a debt."

What the plaintiff asks may not prove very helpful to her. Eliminating the question of what may be done if the trustee captiously or dishonestly refused to pay over, she may never get anything because the trustee elects not to pay over. But that the relief prayed may not be greatly helpful to the applicant is not an objection that lies in the mouth of either trustee or *cestui*. Equity has not usually been deemed an ally of dishonest purpose. To grant the relief prayed cannot possibly interfere with an honest act. So long as the trustee honestly refrains from paying over, the plaintiff seeks nothing, and can have nothing. What she does ask is effective only should the trustee exercise his power to pay over, and make the payment in such manner as to hinder and delay the satisfying of plaintiff's judgment out of what has been paid over. What the majority affirms is a refusal to see to it that, if the trustee does turn over the fund to the *cestui*, the right to enforce the judgment of the plaintiff shall be assured. In my opinion, there should be a reversal, and a decree ordering that, while the trustee need not pay over until, in his discretion, such payment is for the good of the *cestui*, that, at the time of such payment, a lien shall attach to the fund surrendered, to the extent of the amount of plaintiff's judgment.

C. C. TAFT COMPANY et al., Appellants, v. F. J. ALBER, County Auditor, Appellee.

TAXATION: Constitution—Requirements as to Laws—Purpose and
1 Need of Revenue. Under Article 7, Section 7, Constitution of Iowa, the purpose for which revenue is needed must be set out in the act which authorizes the tax out of which the revenue

comes; and the legislature is required to declare the need of revenue and the purposes for which it is needed; and the tax must be levied and exacted to meet the needs so found to exist.

CONSTITUTIONAL LAW: Mandatory Purposes—Legislature Must
2 **Obey.** The provisions of the Iowa Constitution are mandatory and binding upon the state legislature, which is but one of the agencies of the government.

TAXATION: Statutes—Constitutionality—Cigarette Law—Penalty
3 **Not for Revenue.** The provisions of Section 5007, Code, 1897, providing for the assessment of a tax of \$300 against persons selling cigarettes, and places where cigarettes are sold, are not for the purpose of securing revenue, but to aid in the enforcement of the inhibitions of Section 5006, Code, 1897, against such illegal traffic, and therefore do not violate Article 7, Section 7, of the Constitution of Iowa.

Appeal from Polk District Court.—CHARLES HUTCHINSON,
Judge.

APRIL 11, 1919.

ACTION to enjoin the enforcement of the penalty provided for in Section 5007 of the Code. The district court dismissed plaintiffs' petition. Plaintiffs appeal.—*A affirmed.*

Dunshee, Haines & Brody and *Charles F. Maxwell*, for appellants.

H. M. Hawner, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *Arthur T. Wallace*, Acting County Attorney, for appellee.

GAYNOR, J.—This action is to restrain, by injunction, the auditor of Polk County from certifying to the treasurer of the same county the names of these plaintiffs and others as the owners of real estate in the city of Des Moines on which illegal traffic in cigarettes is carried on. Plaintiffs' petition was dismissed, and plaintiffs appeal.

The complaint is that, if these names are certified by the auditor to the treasurer, a tax will be assessed against

these plaintiffs and their property, under the provisions of Section 5007 of the Code of 1897, which reads:

"There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state."

The contention of the plaintiffs is that this law is absolutely void, as made in contravention of Section 7 of Article VII of the Constitution of this state, which reads as follows:

"Every law which imposes, continues, or revives a tax, *shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.*"

It is claimed that the statute is an attempted exercise of the taxing power, and an attempt to impose a tax upon property and person for revenue; that it fails to state the object to which the tax is to be applied, and is in contravention of the Constitution, in so far as it refers to another law for the purpose of fixing the tax and its object. It will be

noted that the statute against which the complaint is lodged provides that the tax shall be in addition to all other taxes and penalties, and shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a lien, etc. A tax, in the broad sense, is

1. TAXATION: Constitution: requirements as to laws: purpose and need of revenue.

for the purpose of raising revenue, and the revenue, when raised, is intended to meet the specific demands of the government. The government assumes, or may assume, certain financial obligations which it is bound to discharge. These obligations must rise out of governmental necessity. Each governmental demand for revenue is capable of ascertainment before the revenue is created to meet it. It is through the taxing power that revenue is produced. The revenue so produced is to be held by proper government officers to meet the obligations of the state; to be distributed and applied to authorized purposes. When taxes are authorized and revenue contemplated through that means, the need of and purposes to which the revenue is to be applied must be ascertained and determined. There must be a need of revenue for governmental purposes, and these purposes must be stated in the act which authorizes the tax out of which the revenue comes. The object of this constitutional provision is to safeguard the exaction of revenue,—the imposition of taxes. To this end, the requirement is made that the legislature determine, in the first place, the need of revenue, and second, the purpose or purposes for which it is needed; and the tax must be levied and exacted to meet the needs so found to exist. Otherwise, without the need of revenue, without any specific purpose in mind to which revenue can be applied, the legislature could authorize the levy of a tax and force its collection, secure the revenue, and hold it for no definite purpose. It is not conceivable that a body of men representing the people can intelligently determine the need of revenue until they have ascertained wherein the need lies

to which the revenue is to be applied. To impose a tax for no specific purpose is to provide revenue for no specific purpose. A government cannot be economically administered where its legislative officers do not anticipate and know the need of revenue and the purposes to which it is applied, before they enter upon the field of levying taxes to meet the need or satisfy the purpose. Of course, there are expenses incident to government which are general in their nature. They always exist, though the amount of the need cannot be definitely determined. Yet these general needs can be approximately determined, though the amount cannot be definitely known. So the levy of taxes for general purposes is sufficiently definite in scope and purpose to limit the revenue collected by means of the tax to a specific and definite purpose.

The people are sovereign, and speak through their Constitution, and when they thus speak, its mandates are binding upon all people, and on the legislature, which is but one of the agencies of government. The govern-

2. CONSTITUTIONAL
LAW: manda-
tory purposes:
legislature must
obey.

ment is a fictitious entity, created by the people; a corporate entity, through which the people act. All departments of government and officers are only the instrumentalities through which the government acts. They are, in one sense, the agencies through which the government acts, and all the power and authority to act and the manner of acting are controlled by the fundamental law found in the Constitution. We start, then, with the proposition that the provisions of our Constitution are mandatory, and that their mandates bind as closely and as firmly the legislative branch of the government as they do the citizen of the commonwealth. The legislative branch must obey the Constitution, or fundamental law, and must follow and obey its requirements and directions. It is true, some courts have held that constitutional provisions are not mandatory. This court,

however, has held consistently that the provisions of the Constitution are mandatory and binding upon the legislature, and that any act that contravenes the provisions of the Constitution, or fails to come up to the measurement of the constitutional requirements, is not binding upon the people or any of the agencies of government; because, when the people speak, it is *vox populi, vox dei*, so far as the agencies of government are concerned. See *Koehler & Lange v. Hill*, 60 Iowa 543; *State v. Lynch*, 169 Iowa 148.

So it follows that, if this statute were enacted under the general taxing power, and for the purpose of raising revenue for the support of the government, we would be compelled to hold with the appellant, and say that it does not come up to the requirements of the provision of the Constitution hereinbefore quoted. This, however, we cannot do. No doubt, the legislature, recognizing, or thinking that it recognized, an evil

3. TAXATION: statutes: constitutionality: cigarette law: penalty not for revenue. ing, or thinking that it recognized, an evil in the traffic in cigarettes, felt that the public good demanded that the restraining hand of the law be placed upon the traffic. There-

upon, the legislature, in its seeming wisdom, enacted Section 5006 of the Code of 1897, through which it undertook to prohibit this sort of traffic, and provided a penalty for any violation of its inhibition. The thought of the legislature evidently was that the traffic in cigarettes was inimical to the public good, and ought to be suppressed. The traffic was made unlawful. This unlawful traffic was carried on in buildings not owned by the person carrying on the illegal traffic. The thought of the legislature seems, then, to have been that, as an additional deterrent to the unlawful business, a penalty ought to be exacted of any person who allowed his building to be used for the unlawful purpose; and so a penalty of \$300 was imposed upon the person so permitting it to be unlawfully used, and upon the property permitted to be used. This was in no sense a

tax for revenue, though it may afford revenue. Its primary purpose was, not to secure revenue, but to aid in the enforcement of the inhibition found in Section 5006.

We think this action is controlled by what was said by this court in *Hodge v. Muscatine County*, 121 Iowa 482, and *Cook v. Marshall County*, 119 Iowa 384; though in neither of these cases was the precise point urged here, presented or considered. However, the reasoning of those cases and the basic principle upon which they were decided control in this case. Both these cases went to the Supreme Court of the United States, and were affirmed. See *Hodge v. Muscatine County*, 196 U. S. 276 (49 L. Ed. 477); *Cook v. Marshall County*, 196 U. S. 261 (49 L. Ed. 471). We think the action of the court in dismissing plaintiffs' petition was right, and it is—*Affirmed*.

LADD, C. J., EVANS, PRESTON, SALINGER, and STEVENS, JJ., concur.

CAVERS ELEVATOR COMPANY, Appellee, v. DROGE ELEVATOR COMPANY, Appellant.

CUSTOMS AND USAGES: Contracts—Evidence—Contradiction of
1 **Contract.** Contracts may not be contradicted by evidence of a custom.

CUSTOMS AND USAGES: Contracts—Evidence—Instructions—
2 **Grain Sold but Not Delivered within Time Agreed.** Where a written contract for purchase of grain was made, subject to Omaha weights and inspection, and provided that, "if contract is not filled at maturity, buyer reserves the right to cancel or to extend or to fill here (Omaha) or elsewhere at our option, any loss resulting therefrom to be payable by seller," and where both parties were regular dealers on said market, it was admissible, for the purpose of construing said provision, to show that the general custom obtaining in the Omaha market, and the rules of the Omaha Grain Exchange, provided that, "where grain is bought to arrive Omaha terms," and is not shipped or delivered

within time of contract, it shall be considered open for both parties until filled or canceled by written notice. *Held* that, under the said rules and provisions of the contract, the purchaser continued to be bound to receive the undelivered grain at the contract price, until terminated by the stipulated notice.

Appeal from Pottawattamie District Court.—E. B. WOODRUFF, Judge.

APRIL 12, 1919.

ACTION for damages for breach of contract, in that the defendant failed to make delivery to the plaintiff of wheat sold by a written contract. Under the contract, the time of delivery of the grain was to be on or before July 31st. Three months later, the plaintiff bought on the market the amount of the shortage, and charged the same to the account of the defendant, the measure of damages thus claimed by the plaintiff being the difference between the contract price and the market price at the time of such purchase. The defendant admitted the contract, but averred that it was liable only for the difference between the contract price and the market price on July 31st. The question of measure of damages is the real controversy between the parties. The trial court found for the plaintiff, and the defendant appeals.—*Affirmed.*

Kimball, Peterson & Smith, for appellant.

Tinley, Mitchell, Pryor & Ross, and *Sutton, McKenzie, Cox & Harris*, for appellee.

EVANS, J.—The contract in suit, so far as is material for our consideration, was as follows:

“CONFIRMATION OF GRAIN PURCHASED.

“Omaha, Neb., 7-21, 1916.

“Droge Elevator Co.,

“Council Bluffs, Iowa.

“We confirm purchase from you today per phone sub-

ject to Oma. weights and Oma. inspection as follows:

Cars	Bushels	Grain	Price	F. O. B.	Time of Ship.
				Co. Bluffs	
	3,000	No. 2 Hd. Wheat	\$1.10		Ten day

"Bill to shipper's order, Council Bluffs, Iowa.

"Notify Cavers Elevator Company. Draw on us at Omaha with bill of lading attached. * * *

"Any surplus or shortage on contract will be settled on basis of market price on the day of unloading.

"If this contract is not filled at maturity we reserve the right to cancel, or to extend, or to fill here or elsewhere at our option, any loss resulting therefrom, to be payable by you. * * *

"Yours truly,

"Cavers Elevator Company,

"By Bender

"Accepted, Droge Elevator Co."

The market price of wheat in the Omaha market on July 31st was \$1.17. The market price on November 4th, being the date upon which the contract was formally canceled, and upon which the plaintiff purchased, was \$1.78½. The defendant delivered on the contract, on or before July 31st, the amount of 1,458 bushels. Some time later, it delivered 526 bushels additional. This left a shortage in delivery of 1,016 bushels. On the question of measure of damages, the general line of argument for the defendant is that the contract was breached on July 31st; that thereby the rights of the parties became fixed on that day; and that the measure of damages was the difference between the contract price and the Omaha market price on such date.

It is undoubtedly true, as a general rule, that the measure of damages in such a case is fixed as of the date of the breach. The breach having occurred, the purchaser would be at liberty to enter the market and to supply the deficiency at the market price for that day. But in the case before us,

the parties have seen fit to contract with reference to the contingency of a failure to make delivery within the specified time. The contract provides:

"If this contract is not filled at maturity, we reserve the right to cancel, or to extend, or to fill here or elsewhere at our option, any loss resulting therefrom, to be payable by you."

This clause presents a question of construction. The defendant contends that the plaintiff thereby assumed the burden of a formal election within a reasonable time as to whether it would "cancel," or "extend," or "fill." As an aid to construing this provision of the contract, evidence was introduced of the general custom obtaining in the Omaha market, both of the parties hereto being regular dealers in grain upon such market. In this connection, the rules of the Omaha Grain Exchange were put in evidence. Such rules include the following:

"Section 1. Where grain is bought to arrive, Omaha terms, and the same is not shipped or delivered within the time specified in the contract of purchase, the contract shall be considered open for the benefit of both parties thereto until filled or until canceled either:

"(a) By notice in writing from the seller to the buyer that further delivery will not be made thereunder; or

"(b) By written notice from the buyer to the seller that the contract will be canceled on a date named in such notice unless shipment or delivery be made and notice thereof received by the buyer on or before such date.

"Upon breach of any such contract of sale and cancellation in the manner herein specified, the injured party shall be paid by the party breaching the contract the difference between the contract price and the current market price on the date of the receipt of notice of such cancellation."

The defendant insists strongly that it is not permissible to introduce evidence of custom to contradict a contract

Without doubt, this is a correct legal proposition. But no evidence of custom contradictory to the contract was received in this case. Such evidence was received only for the purpose of construing terms of the contract which might otherwise be deemed ambiguous. We

think that the rules of the Exchange herein set forth were receivable as an aid to a proper construction of the quoted clause of the contract. We see no necessary inconsistency

1. CUSTOMS AND
USAGES : con-
tracts : evidence :
contradiction of
contract.

2. CUSTOMS AND
USAGES : con-
tracts : evi-
dence : instruc-
tions : grain sold
but not deliv-
ered within
time agreed.

between such rules and the contract in its entirety. On the other hand, we think that the contract, properly construed, is in harmony with such rules. Moreover, the defendant itself put this construction upon the contract, and delivered 526 bushels of grain

some days after the expiration of the time limit. The rules of the Exchange, above quoted, are entirely fair to both purchaser and seller. The general effect of them is to extend the contract after the time limit, and to keep it binding upon both parties until one notifies the other of his purpose to terminate the same. Under these rules, and under the clause of the contract above quoted, the plaintiff, as purchaser, continued bound to the defendant, as seller, to receive the undelivered grain at the contract price until the fourth day of November. If the market price had gone below the contract price, this rule would have operated in favor of the seller. In view of the rising market, its operation was in favor of the purchaser. But the market was known to both parties, every day of the period of the extension.

We reach the conclusion, therefore, that, by the terms of the contract, it continued in force after the expiration of the time limit until one party or the other terminated it by appropriate notice. This was the holding of the trial court. Some other questions are argued by appellant, but they do

not affect the question which we deem decisive. Complaint is made of the act of the trial court in failing to rule on objections, the case being tried to the court without a jury. The defendant was undoubtedly entitled to appropriate rulings in that regard, but a careful examination of the record discloses no objection upon which an erroneous ruling could have worked prejudice to the defendant. The decisive issue between the parties, as above indicated, was so extremely narrow as almost to preclude the possibility of mere error in the trial, as distinguished from an erroneous final judgment. The judgment below is, therefore,—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

M. A. COGLEY, Appellant, v. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, Appellee.

CARRIERS: Carriage of Live Stock—Evidence of Damage—Inconsistent Claims as to Damages. In an action against a railroad for damages to horses from watering them prematurely, *held* that the evidence of the shipper as to the extent of damages was of such an exaggerated, inconsistent, and unsatisfying nature that the jury was justified in disregarding it.

CARRIERS: Carriage of Live Stock—Evidence of Damage—Verdict for One Dollar Equivalent to a Finding of no Damage. In an action by a shipper against a railroad for damage to a shipment of horses by watering them prematurely after unloading, *held* that a verdict for one dollar was the equivalent of a finding by the jury that no substantial damage had been proved, and that it was substantiated by the evidence.

SALINGER, J., dissents.

CARRIERS: Carriage of Live Stock—Evidence of Damage—Withdrawal—Guess and Conjecture. An item of damage to a shipment of horses was properly withdrawn by the court, when the only evidence in support of it was a mere guess.

Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.

APRIL 12, 1919.

SUIT for damages caused to a shipment of horses. The shipment consisted of 208 horses, contained in nine cars. The shipment was billed from Billings, Montana, to Omaha, with stopover privileges at Alliance and Grand Island, Nebraska. Plaintiff's original allegation of damages was that about one half of the horses were made sick at the stockyards of the defendant at Alliance, Nebraska, because of the drinking of impure water furnished by the defendant. By amendment at the trial, this allegation was withdrawn, and a substituted allegation made that the sickness was caused by the watering of the horses prematurely, and before they were in proper condition to be watered. The jury rendered a verdict for the plaintiff of one dollar. The plaintiff moved to set aside the verdict, as being against the evidence and against the instructions of the court, in that the plaintiff, if entitled to a verdict at all, was entitled to substantial damages. The motion was overruled, and judgment entered on the verdict. The plaintiff appeals.—*Affirmed.*

Fremont Benjamin and *Verne Benjamin*, for appellant.

George S. Wright, Tinley, Mitchell, Pryor & Ross, Byron Clark, Jesse L. Roop, and J. W. Weingarten, for appellee.

EVANS, J.—I. The real point in this case is whether the record is such that the jury could, under the instructions of the court, find a verdict for the plaintiff, and yet find that no substantial damages were proved. The record is rather an unusual one in some of its features. The horses involved in the shipment were bought by the plaintiff at Billings, Montana. They had been previously

1. CARRIERS: carriage of live stock: evidence of damage: inconsistent claims as to damages.

bought and assembled there by other horse buyers, primarily for the purpose of sale to the French government for war purposes. Previous to their shipment, they had already passed through inspection at Billings, and had been rejected. The purpose of their shipment was to present them for inspection at other inspecting stations, on the theory that a horse rejected by one inspector might be accepted by the next one. They were known as "rejects." The shipment was first unloaded at Alliance, Nebraska, after 34 hours en route from Billings. Shortly after the horses were unloaded and fed and watered at Alliance, some of them became sick with colic. The original allegation of the petition, as already indicated, was that the cause of this sickness was that the drinking water furnished for the horses by the defendant was impure, and impregnated with alkali. This allegation stood until all the evidence in the case was taken. The evidence was practically conclusive that the water in question was not impure, and that it was not impregnated with alkali. Thereupon, after the close of the evidence, the plaintiff withdrew this allegation, and alleged that the cause of the sickness of the horses was that they had been improperly watered by the defendant's agents too soon after their unloading, and before they had been fed. Following this amendment, no further evidence was introduced. The allegation of the amendment was allowed to rest for its support upon the testimony of a witness for the defendant that such premature watering of horses that had been confined for 34 hours on board train would cause colic. The plaintiff and an employee had accompanied his shipment as caretakers. There was a conflict in the evidence as to whether the premature watering of the horses had been done by the defendant's agents or by the plaintiff and his employee. This issue was submitted to the jury. No exceptions were taken to any of the instructions. The verdict of the jury was the equivalent of a finding that no substantial damages were

proven. The verdict ought, therefore, to have been for defendant; but the defendant does not complain. The contention of plaintiff as appellant is that the evidence of damage was uncontradicted, and that the jury, therefore, was bound to follow it. The plaintiff himself was the only witness who testified in his behalf. He testified to an estimate of his damages amounting to over \$7,000. In arriving at this estimate, the plaintiff answered the following hypothetical question:

"Q. I will ask you what would have been the fair and reasonable market value at Grand Island, Nebraska, of the nine carloads of horses and mules which you shipped from Billings, Montana, on or about the 12th day of August, 1916, had they arrived at Grand Island, Nebraska, in the *usual and ordinary course of shipment* of such horses, between such points."

The meaning and significance of the foregoing hypothetical question can be understood only in the light of the record as it stood when the testimony was given. At that time, amendments to the petition were on file wherein it was alleged that, in the forwarding of the shipment from Alliance, there had been rough handling of the train between Alliance and Grand Island, and that such rough handling had resulted in the killing of a horse and in the throwing down of several others, to their injury. Plaintiff himself testified in support of these allegations. Plaintiff then testified to the actual value of the horses at Grand Island, Nebraska, as \$60 each. In answer to the above hypothetical question, he testified that the horses would have been worth at Grand Island \$110 each, "had they arrived at Grand Island in the *usual and ordinary course of shipment* of such horses between such points." Clearly, damages resulting from the rough handling were included in his estimate. Plaintiff's last amendment, filed after the close of the evidence, eliminated all claim for damages for rough

handling, and limited the damages claimed to those resulting from the premature watering of the horses. Strictly speaking, therefore, there was no evidence in the record of the extent of damages based upon the allegations of the last amendment to the petition. Furthermore, in the light of the whole record, the estimate of the plaintiff as to the extent of his damages was so clearly exaggerated that the jury was justified, for that reason alone, in placing no credence therein. The jury might well believe that it furnished no aid whatever in ascertaining the approximate truth. The plaintiff had alleged, in his petition and in each successive amendment, that the actual value of his horses after their sickness was \$80 each. Yet, in his testimony, he fixes such actual value at \$60 each. He had alleged, in his petition and its successive amendments, that the sum total of his damages was \$3,600, and he prayed judgment for even less; yet his testimony estimated his damages at over \$7,000. He had repeatedly averred in his pleadings that approximately one half of his horses had been rendered sick, and damaged thereby. Yet he testified that all of them had been thus sick and had been damaged. As to 76 of them, he estimated damages to the extent of \$10 per head, and as to 130, he estimated his damages at \$50 per head. In the light of the whole record, therefore, it is clear that the evidence of the plaintiff as to the extent of his damages was not worthy of great consideration, and that the jury was, therefore, justified in disregarding it.

II. In overruling the plaintiff's motion to set aside the verdict, the trial judge put the ruling, in effect, upon the ground that he deemed the plaintiff's case without merit, and that the great weight of the evidence was against him. We think the record fairly sustains the trial court in the view thus expressed. It was, therefore, a sufficient reason for the ruling. *Hubbard v. Town of Mason City*, 64 Iowa 245.

2. CARRIERS: carriage of live stock: evidence of damage: verdict for one dollar equivalent to a finding of no damage.

III. One item of damages claimed by the plaintiff pertains to a horse with an injured knee. This item was withdrawn by the court, as not having sufficient support in the evidence. Without discussing the details of the evidence, we think the holding was proper. The evidence relied on by the plaintiff in support of such item was a mere guess. Complaint is also made of the withdrawal of an item of damage for the death of a horse in the car. This item was withdrawn from the jury by Instruction 26, and the reasons for such withdrawal were stated therein. No exception was taken to the instructions. We find no error in the record. The judgment below must, therefore, be—*Affirmed*.

3. CARRIERS: carriage of live stock: evidence of damage: withdrawal: guess and conjecture.

LADD, C. J., GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). The verdict fixes the damages of plaintiff at one dollar. I think the motion of plaintiff to set aside the verdict ought to have been sustained. Had defendant, instead of plaintiff, made such motion, that, too, would have been well made. Setting the verdict aside on the motion of the court would have been proper. That such concurrent right to destroy this verdict exists, is due to the fact that the verdict is an outlaw; is not the creature of judicial consideration. If the jury believed the plaintiff, no theory of the evidence sustains that his loss is paid for by a dollar. If the plaintiff was not believed, there is no warrant for finding that defendant owed plaintiff just a dollar, and for compelling defendant to pay the costs of suit. To me, this proves that the verdict is captious, is regardless of the evidence, and neither party has had a fair trial. It may be that the majority is proceeding under the sanction of a rule prevailing in some of the states, that,

in a case like this, the allowance of purely nominal damages is, in effect, a verdict for the defendant. I have to say that, in *Ruby v. Lawson*, 182 Iowa 1156, this court declined to adopt such a rule. In the *Ruby* case, the plaintiff sued for \$10,000 damages, alleged to have been sustained by defendant's alienation and debauchment of plaintiff's wife. There was a verdict for \$100. That, in that case, was as much a mere nominal verdict as is the one dollar allowed in this case. I dissented in the *Ruby* case on the ground that the verdict should not be reviewed here as a real verdict is, because the size of the verdict demonstrated that the jury had found for defendant, rather than plaintiff, and that the verdict had no support in the evidence, and was a mere device to throw costs upon the only party from whom costs could be made. The court rejected this view, and dealt with the \$100 verdict as a finding for plaintiff. I am bound by this decision, though I dissented from it. Those who made the decision should either overrule it or follow it. Instead of doing that, they are recruiting the army of "snags" which trouble all investigations made by the profession.

R. O. GREEN et al., Appellees, v. W. CRAIN et al., Appellants.

LICENSES: Installation of Steam, Water, and Sewer Pipes—Suffi-

- 1 **ciency of Evidence to Show License.** Evidence reviewed, and held sufficient to sustain finding that the installation of steam, water, and sewer systems of a permanent and expensive nature by the owner of the third story of a building, in connection with pipes of the owner of the lot and of the first two stories of the building, had been made by mutual agreement, and with the knowledge and consent of the owner of the lot and the first two stories.

LICENSES: Installation of Steam, Water, and Sewer Pipes—Executed

- 2 **Parol License.** The installation of steam, water, and sewer systems at a heavy expense by the owner of a third story of a building, under a fully executed parol license from the owner of the lot and the first two stories of the building, constituted an ir-

revocable license, and the owner of the lot and first two stories could not move from the building any of his pipes, the removal of which would materially interfere with the efficiency of the systems belonging to the owner of the third story.

Appeal from Tama District Court.—B. F. CUMMINGS, Judge.

APRIL 12, 1919.

SUIT in equity by the owner of the third story of a building, against the defendant as owner of the first and second stories of such building, and of the lot on which the building is located, to enjoin the defendant from removing certain steam, water, and sewer pipes with which the steam, water, and sewer systems of the plaintiff are connected, such connection being had in the basement of the building. There was a decree for the plaintiffs, and the defendants appeal.—*Affirmed.*

J. H. Willett, and *Randall & Harding*, for appellants.

Thomas & Thomas, and *C. A. Pratt*, for appellees.

EVANS, J.—Plaintiffs are the trustees of a Masonic lodge, known as Hesperia Lodge. The defendants are the trustees of an Odd Fellows lodge, known as Gem Lodge. In the year 1901, the two lodges co-operated in building a three-story brick building upon a lot owned by the defendant lodge in the town of Traer. The defendant lodge completed the walls to the top of the second floor. The plaintiff lodge built the third story, including the roof. The agreement under which the two lodges co-operated was informal, and wholly in parol. Most of the persons who purported to represent the respective lodges in the transaction are dead. In order to prove the agreement, therefore, the plaintiff lodge has relied largely upon the circumstances of the erection of the building at the time, and upon the mutual conduct of the parties ever since.

Since the erection of the building, its first floor has at all times been occupied by the post office. The second

floor has been used by the defendant lodge for its lodge rooms, and the third floor by the plaintiff lodge for a like purpose. The basement of the building consisted of an excavation about six feet deep, with an entrance into it from the back of the building, and has never been used except for service pipes. In the year 1907, the defendant laid a service pipe into this basement from the steam heating main. In 1910, a sewer system was installed in the city of Traer. Shortly thereafter, and in the same year, each lodge proceeded to equip its rooms with steam heat, water, and sewer. Committees purporting to represent the lodges respectively worked in co-operation. The same plumber installed the necessary plumbing for both lodges, doing the work of the defendant in October, and that of the plaintiff in November. The work for the plaintiff consisted of a sewer pipe, carried up through the building from the basement to the plaintiff's toilet room on the third floor, together with a water line to feed it. The plaintiff also installed steam heat in its rooms, connecting in the basement with the main of the defendant. In the improvements made by it, the plaintiff made proper provisions for connections with its pipe in the basement, to be made by the defendant. The defendant later availed itself of these connections. The improvements thus made by the plaintiff involved an expense of over \$500. The stack and service pipes have been used in common by the two lodges since that date. In 1914, it became necessary to put in lead pipe for the water connections, and this was done by plaintiff and defendant in co-operation, each paying one half of the cost. In 1911, a sewer assessment was assessed against the lot upon which the building was located. The defendant lodge demanded that the plaintiff should pay one third of such sewer assessment. Such demand was acceded to by the plaintiff, and the amount demanded was paid. The valves for cutting off the steam heat for the entire building, and all the meters connected with the improvements, were situated in the basement. The plaintiff's officers had access

thereto at all times until the beginning of this suit.

The general contention of the plaintiff is that it had obtained from the defendant an irrevocable license to maintain appropriate connections with the steam, water, and sewer systems. This controversy between the parties began in 1916. At that time, the defendant proposed to improve its basement, and to fit it for renting purposes. It served a notice upon the plaintiff, purporting to revoke its license to maintain its connections in question. It also threatened to remove the pipes. The general contention on the part of the defendant is that the proof offered by the plaintiff is insufficient to show an irrevocable license; that there is no record upon the books of either lodge showing any of the transactions claimed; that the parties who purported to represent the defendant lodge were without authority; that the plaintiff was either a trespasser or a mere licensee, whose license was revocable at any time. It is also contended by the defendant that, in December, 1901, the parties reduced the agreement to writing, and that such writing merged all prior parol agreements, and that the plaintiff is in no position to claim any other rights than the rights proclaimed by such written agreement.

What renders a license irrevocable is well settled, under our cases. *Decorah Woolen Mill Co. v. Greer*, 49 Iowa 490; *Vannest v. Fleming*, 79 Iowa 638; *Ruthven v. Farmers Co-op. Cr. Co.*, 140 Iowa 570; *Robinson v. Luther*, 140 Iowa 723; *Pascal v. Hynes*, 170 Iowa 121. That the plaintiff, by building its third story above the building of the defendant, and by thereby building a roof over the entire building, acquired some kind of an irrevocable right, goes without saying. Appellant concedes that it acquired a right of support and of ingress and egress. The real question in dispute is as to what was the scope and extent of the irrevocable right so acquired. For nearly 15 years, the conduct of both parties spoke consistently. There does not appear to have been

any misunderstanding at any time between them. We see no aid for the defendant in the contract of December, 1901. This contract was entered into after the construction of the building, and covers particular subjects. It expressly recognizes the previous oral agreement under which the parties had acted, but does not purport to recite what such agreement was. Its preamble is as follows:

"That whereas the first parties by purchase became the owners of the west fifteen (15) feet of Lot Four (4) and the east fifteen (15) feet of Lot Five (5) in Block Thirteen (13), in Traer, Iowa, and whereas the parties to this contract with an oral understanding and agreement between them builded and erected thereon a three-story brick building, the first parties building the first and second stories thereof and the second parties building the third story thereof; and whereas, by the aforesaid oral understanding and agreement on completion of said third-story brick building, the first parties become the absolute owners of the first and second stories thereof, and the second parties become the absolute owners of the third story thereof."

The contract proper dealt only with the question of the use and repair of the stairway. It also conferred upon the plaintiff the revocable right to erect upon the rear end of the premises a coalhouse and water-closet. All the transactions between the parties relating to heat, water, and sewers arose after the contract in question.

In October, 1915, these two lodges joined in a contract, as first party thereto, with one Taylor as second party. By this contract, Taylor, an adjoining property owner, acquired the right to connect with the heating system through the building of the first party. Such contract contains the following in its preamble:

"Whereas, the first parties have installed in their said building a steam heating system consisting of pipes, traps, meter, radiators and other fixtures necessary thereto, which

said heating system is connected in Second Street, in the said town with the heating mains of the Traer Electric Company, and the said Gem Lodge and Hesperia Lodge own the portions of the said heating plants in their respective portions of the said building owned by them, and *own in common the main pipes fitting and connecting with the same and especially the main pipe connecting the same with the said heating system of the Traer Electric Company and the tunnel and manhole through which the said pipe is laid from the said heating main to the said building; and * * **

No useful purpose can be served by dwelling unduly upon the details of the evidence. Enough has been stated to show the general trend thereof. Upon the record, we see

no room for fair doubt that the installation of its various systems was done by the plaintiff with the knowledge and consent of the defendant, and by mutual arrangement. The improvements were expensive. They were permanent in their nature. Though the license was in parol, it was fully executed, and was so done at a large expense to the plaintiff, with the full knowledge and consent of the defendant. The trial court properly held, therefore, that the plaintiff had acquired an irrevocable license to maintain its improvements. The decree entered permitted the defendant to rearrange and move the service pipes and fixtures in the lower part of the building to such new location as suited its convenience, provided that the change should not be such as to materially interfere with the efficiency of the plaintiff's system. The decree is right, and it is, accordingly,—*Affirmed.*

1. LICENSES:
installation
of steam, water,
and sewer pipes:
sufficiency
of evidence to
show license.

2. LICENSES:
installation
of steam, water,
and sewer pipes:
executed parol
license.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

ADAM GREENLEE, Appellant, v. FRANK COFFMAN, Appellee.

APPEAL AND ERROR: Review—Presumptions—Exclusion of Question. The burden is upon the appellant, not only to show that an excluded question was proper in purpose, but that it was properly framed for such proper purpose.

LIBEL AND SLANDER: Evidence—Mental Pain—Accusation Made in Presence of Third Person. Where the accusation was made in the presence of a third person, an objection was properly sustained to a question asking the plaintiff as to what mental pain he suffered from the accusation, as the same should have been confined to what mental pain he suffered from the third person's having heard the accusation.

APPEAL AND ERROR: Review—Harmless Error—Exclusion of Evidence as to Mental Pain. The jury having found, in an action for slander, that there was no substantial injury to plaintiff's reputation, exclusion of evidence as to mental suffering was harmless.

Appeal from Keokuk District Court.—K. E. WILLCOCKSON, Judge.

APRIL 12, 1919.

ACTION for slander. The answer was a plea of justification and a plea in mitigation. There was a verdict for the plaintiff of one dollar. From judgment on the verdict, the plaintiff has appealed.—*Affirmed.*

Hamilton & Beatty, for appellant.

Wagner & Updegraff, for appellee.

EVANS, J.—The slanderous words charged against the defendant were, in substance, that the defendant said to the plaintiff, during an altercation, "You are a thief." The utterance of these slanderous words was admitted by the defendant. The defendant pleaded the truth of the statement in justification. The facts pleaded in justification were that the plaintiff had stolen certain of defendant's fence posts from his field. In mitigation, he pleaded, also, that he had

good reason to believe, and did in good faith believe, that the plaintiff had stolen his fence posts. The plaintiff admitted, as a witness, that he took the fence posts in question, but maintained that he did so under a good-faith claim of right thereto. This claim of right was based upon the alleged fact that, upon some previous time, the posts had formed the plaintiff's part of a partition fence between the lands of plaintiff and defendant respectively; that, by some mutual arrangement between the parties, this partition fence had been removed; and that, in such removal, the defendant had taken such posts from the plaintiff's part of the fence. Evidence was introduced on both sides as to the real ownership of such posts.

The words complained of were spoken by the defendant to the plaintiff himself, during an altercation which amounted to an assault on the part of one or the other, and wherein the plaintiff denounced the defendant as a "liar," and the defendant denounced him as a "thief." The altercation occurred in the presence of Moore, son-in-law of the plaintiff.

Upon the trial, the plaintiff offered to prove that he suffered mental pain because of the "accusation" made by the defendant. The evidence was not permitted. The plaintiff also requested an instruction to the jury that it should take into consideration the mental suffering "that such accusation would be likely to cause one not guilty of theft, and being accused of being a thief, and mental anguish." This instruction was refused. The one point argued by appellant is that the trial court erred in sustaining objection to certain questions put to the plaintiff as a witness, for the purpose of proving mental suffering.

I. Counsel put to plaintiff, as a witness, the following question:

"Q. After this occurrence on the 7th day of September, 1916, at the time you met Mr. Coffman there in the

- road, and you and Mr. Moore were together, and he called you a thief, you may state whether or not this *accusation* made by him caused you any mental pain and worry."
1. APPEAL AND ERROR: review: presumptions: exclusion of question.

The trial court sustained an objection to the foregoing question, as being incompetent, immaterial, and irrelevant.

That mental suffering may be shown as an element of damage in a slander case was held by us in *Davis v. Mohn*, 145 Iowa 417, and in *Mills v. Flynn*, 157 Iowa 477. In the first of the cited cases, we overruled *Prime v. Eastwood*, 45 Iowa 640, wherein the converse had been held. In *Mills v. Flynn*, supra, we said that mental suffering resulting from injury to reputation may be shown "under proper allegations." One of the specific objections made to the offered testimony in the trial court was that the petition contained no allegation of mental suffering. Whether this was a good objection or not, we do not find it necessary to consider, in view of the state of the record. The burden is upon the appellant, as such, to show that the interrogatory put to himself as a witness was not only proper in purpose, but that it was properly framed for such proper purpose.

- We may assume that the bitter quarrel between these two men caused mental suffering to each. We may assume, further, that mental suffering was caused to the plaintiff when he heard the defendant accuse him as a thief. But neither of these assumptions presents the mental suffering which would be provable by plaintiff as an enhancement of damages, because such mental suffering would have been caused to the plaintiff regardless of the presence or absence of Moore. The mental suffering provable is not that resulting from the *accusation* made to himself, but that resulting from the *publication* of the accusation, and from the injury to reputation caused
2. LIBEL AND SLANDER: evidence: mental pain: accusation made in presence of third person.

thereby. The *accusation* could have caused mental suffering, even though Moore had not been present to hear it. If Moore had not been present, there would have been no publication, and therefore no slander. There could be no recovery, therefore, for mental suffering caused merely by the *accusation*. To put it in another way, the jury could only consider mental suffering resulting to the plaintiff from the fact that Moore heard the accusation. Whether the method and the circumstances of the publication were such as to cause mental suffering to any considerable degree, would be a question for the jury, in the light of all the evidence. The facts of this case are quite illustrative of the reason for the distinction here presented. Moore was the son-in-law of the plaintiff. He protected him against an alleged assault by the defendant, and later appeared at the trial as a friendly witness for his father-in-law. This is not stated in criticism of Moore, but for the purpose of illustration only. It is readily conceivable that the alleged assault and the accusation may have caused great mental suffering, and yet that such mental suffering was not at all enhanced by the presence of the son-in-law, or by the fact that the accusation was made in his presence. It will be noted that the interrogatory under consideration quite overlooked the distinction here pointed out. The inquiry should have been confined to the mental suffering resulting from the *publication*, and from the injury to reputation caused thereby. *Terwilliger v. Wands*, 17 N. Y. 54 (72 Am. Dec. 420); *Turner v. Hearst*, 115 Cal. 394 (47 Pac. 129). The same defect appears in the requested instruction by plaintiff. Our conclusion at this point renders it unnecessary that we consider the question of pleading.

Finally, we may say that the plaintiff's case was not a very meritorious one, so far as substantial damages were concerned. We think the verdict for nominal damages gave

3. **APPEAL AND ERROR:** review: harmless error: exclusion of evidence as to mental pain.

him full justice. Even if he had testified to mental suffering resulting to him from the publication of the accusation in the presence of his son-in-law, this would have added nothing to his damages for injury to reputation.

The jury having found that the plaintiff suffered no substantial damage from injury to his reputation, this finding must have been based upon the circumstances of the publication, and upon the facts proved in mitigation. If these circumstances and mitigating facts were such as to reduce the damages for injury to reputation to a nominal sum, the jury would not be likely to allow more than a nominal sum for mental suffering resulting from such injury to reputation. The nominal character of the verdict was not the result of absence of proof. The nature of the slanderous words charged and admitted was such as to have justified substantial damages without proof. The jury must have found that no substantial injury to reputation was sustained. This finding could not have been influenced by the absence of evidence of mental suffering. From the whole record, therefore, we are impressed that the plaintiff suffered no prejudice in the final result by the absence of evidence of mental suffering. The judgment below will, therefore, be—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

THEODORE GREESON et al., Appellants, v. REASON E. GREESON et al., Appellees.

APPEAL AND ERROR: Record—Failure to File Abstract in Time—

1 **Waiver.** An appellee, by filing an amendment to appellant's abstract, thereby waives his right to later move to dismiss the appeal because of the belated filing of the abstract.

APPEAL AND ERROR: Appealable Judgment—Review. An appeal

2 from ruling on a demurrer will be dismissed for want of an ap-

pealable order, where, on the ruling sustaining the demurrer, the plaintiff did not elect to stand upon the petition, and the court did not enter a dismissal of the petition nor enter a judgment of any kind.

Appeal from Shelby District Court.—J. B. ROCKAFELLOW,
Judge.

APRIL 12, 1919.

ACTION for partition. A demurrer to the petition was sustained. From such ruling, the plaintiffs have appealed. Appellees have filed a motion to dismiss the appeal, which is well taken, and the appeal is dismissed.—*Dismissed.*

Forney & Snipe and *G. W. Cullison*, for appellants.

Thomas H. Smith, for appellees.

PRESTON, J.—The petition alleges, substantially, that Daniel Greeson died testate, February 14, 1881, seized in fee of the real estate in Shelby County, Iowa, sought to be partitioned, describing it; that he left surviving him a widow, Catherine Greeson, and children, who are named; that said deceased left a will, in the following words:

"I, Daniel Greeson, of Clay Township, Morgan County, Indiana, do make and publish this, my last will and testament.

"First. It is my will that my wife, Catherine Greeson, shall have and control all my property, both real and personal, for the maintenance of herself and minor children.

"Second. That my wife, Catherine Greeson, as executrix, shall not be required to give bond.

"In testimony hereof I have hereunto set my hand and seal this first day of February, 1881.

"[Signed] Daniel Greeson.

"Witnesses: W. C. Greeson and Wm. F. Ritchey."

The petition further alleges that said will was duly probated in Shelby County, Iowa; that defendant Kenkel claims

to have some interest in said real estate by virtue of a warranty deed from Catherine Greeson, dated November 4, 1881, and duly recorded; that the said Catherine Greeson died in 1906; that whatever interest or title said Kenkel may have in said real estate is junior and inferior to the right and title of plaintiffs, and to that of the defendants who are heirs of said Daniel Greeson; and that said Kenkel has no interest in said real estate. Other usual allegations of a partition petition are made, and the usual prayer, and that the title of plaintiffs and the defendants other than Kenkel be quieted, as against adverse claims of said Kenkel.

Defendant Kenkel demurred to the petition, on the following grounds:

1. That the facts stated in plaintiffs' petition do not entitle plaintiffs to the relief therein asked.

2. That the will of Daniel Greeson, set out in Paragraph 3 of plaintiffs' petition, gave to his wife, Catherine Greeson, a fee simple estate to all of the property of said Daniel Greeson.

3. That, by virtue of the warranty deed given by Catherine Greeson, said warranty deed being referred to in Paragraph 6 of plaintiffs' petition, the grantee therein, Bernard Kenkel, the said grantee therein, being this defendant, obtained the fee simple title to the land described in said warranty deed as of date November 4, 1881, and the plaintiffs herein and codefendants have no interest whatever in said described real estate.

On June 7, 1917, the trial court filed a written opinion and ruling upon said demurrer, as follows:

"This cause coming on for the judgment and ruling of the court upon the demurrer to the plaintiffs' petition filed by the defendants herein, the same having been fully argued and submitted, with the agreement that the same might be decided in vacation, and the court being of the opinion that Catherine Greeson, widow of the decedent, Daniel Greeson,

was, by the last will and testament of the decedent, Daniel Greeson, vested with the power of selling the real estate in question for the support of herself and minor children, and the court being of the further opinion that the deed from Catherine Greeson to Bernard Kenkel is presumed, as a matter of law, to have been executed in pursuance of the power vested in Catherine Greeson under the will of said Daniel Greeson, deceased, and that the same vested in Bernard Kenkel the fee title to the real estate set out in the plaintiffs' petition, the court reaches the conclusion of law that, as the plaintiffs' petition does not show any interest to be in the plaintiffs, or any of them, in the land in controversy, and that no cause of action is shown in the said petition in favor of the plaintiffs, or any of them, the demurrer of the defendants to the plaintiffs' petition, ought to be, and the same is hereby, sustained, to all of which the plaintiffs, at the time, duly except."

Appellees' motion to dismiss, or affirm, is upon three grounds: (1) That appellants failed to file abstract 30 days prior to the second term after the appeal was taken; (2) that the order of the trial court simply sustained the demurrer, and plaintiffs did not elect to stand on their petition, and no final judgment was rendered, from which an appeal could be taken; (3) that plaintiffs waived their right of appeal by payment of the costs in the district court.

1. The record shows that the abstract was not filed within the time required by the rules. Appellants contend that appellees' motion to dismiss comes too late, and should

not be sustained, on that ground; that appellees permitted appellants to proceed, and appellants did proceed, to print and file their abstract and argument, before appellees filed the motion to dismiss. As to this, the counsel who now appears in this court says that he did not know that the appellants' abstract and argument had been served

1. APPEAL AND
ERROR: record:
failure to file
abstract in time:
waiver.

or filed; that they were served upon another of appellees' counsel, who is not now appearing in this court, but who was the attorney of record in the district court. But appellees did file an amended abstract in August, 1918, which was before the motion to dismiss. The ruling on the demurrer was June 7, 1917, the notice of appeal was served October 5, 1917, and the motion to dismiss was not filed until October 8, 1918, which was, in March, 1919, ordered submitted with the case. This was after appellees' filings. Under our holding in the case of *Armentrout v. Baldwin*, 163 Iowa 410, and cases there cited, appellees have waived their right to have the case affirmed or dismissed on motion as to this ground.

2. It appears, from the vacation ruling before set out, that plaintiffs did not elect to stand upon their petition, nor did the court enter a dismissal of the petition, nor render judgment of any kind. Appellants argue

2. **APPEAL AND
ERROR:** appeal-
able judgment:
review.

that, having served notice of appeal, and filed their abstract and argument, they thereby elected to stand upon their petition.

Such was the situation in the cases, or some of them, to be presently cited. It might be argued as well, perhaps, that, because appellants paid all the costs in June, 1917, a few days after the ruling, and did not serve notice of appeal until about four months thereafter, they had abandoned their appeal. Appellants further contend that a ruling on a demurrer is appealable. This is true, of course, if the proper record is made. Appellants cite *Roddy v. Gazette Co.*, 163 Iowa 416, from the syllabus of which they quote that "all that need be shown to support the appeal is that the ruling was final." In the *Roddy* case, however, judgment dismissing the petition was entered, although the plaintiff did not elect to stand on the order sustaining the demurrer. The cases cited in the *Roddy* case, in regard to the sentence just quoted, are *Seippel v. Blake*, 80 Iowa 142, and *Thorpe Bros. v. Smith*, 86 Iowa 410. In the *Seippel* case.

the appeal was dismissed because the record showed that plaintiff did not elect to stand upon his demurrer, and have the fact shown of record. In the *Thorpe* case, there was neither election nor judgment of dismissal upon the sustaining of a demurrer to the petition, and the motion to dismiss in this court was sustained. In that case, counsel argued, as they do here, that the ruling on the demurrer disposed of the case; but the court said that whether it did or not depended upon the volition of the plaintiffs, and that they had the right to amend their petition. So it is here. These plaintiffs had the right to amend, and allege that they were mistaken as to some of the averments of their petition, or attempt to make a case on paper. It was further said in the *Roddy* case, at page 420, that, under previous decisions, the ruling must have disposed of the issue involved, either by the entry of final judgment, as in *Hampton v. Jones*, 58 Iowa 317, where a judgment was entered, and there was no election to stand on the ruling, or as in *Cowan v. Boone*, 48 Iowa 350, where there was an election to stand on the ruling, but no judgment. See, also, *Fairmont Cr. Co. v. Darger*, 178 Iowa 732, 734, as sustaining our conclusion. That was an appeal from an order overruling a motion for a directed verdict, and for judgment on the pleadings. One of the grounds for sustaining the motion to dismiss the appeal was that no final order was entered. Our holding at this point renders it unnecessary to determine the effect of the payment of the costs. The appeal is—*Dismissed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

IN RE ESTATE OF WILLIAM LACKIE.

LIZZIE LACKIE et al., Appellees, v. S. E. EMMERT, Executor,
Appellant.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 1 **Allowance of Interest Against Executor.** The district court has jurisdiction, upon exception to the executor's report, to make allowance of interest in favor of a legatee against the executor.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 2 **Interest on Funds.** Where a will directs that money be paid from time to time to legatees, interest may, in response to a demand made by the legatee, be charged against the executor on funds which he has in his hands, and which he retains by means of a false denial of their payment to him.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 3 **Interest on Funds—Receipt without Claim of Interest—Res Adjudicata.** Where a widow, making demand for the funds due her under a will, alleged that the executor had collected certain funds, but made no mention of interest, her acceptance of the amount ordered by the court to be paid her by the executor did not conclude her from making a claim for interest, nor act as *res adjudicata* thereon, as she was not required to combine the claim for money due with the claim for interest.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 4 **Mistakes in Settlement—Correction—Interest on Funds.** Under Section 3398, Code, 1897, mistakes in settlement of the accounts of an executor may be corrected at any time before the final settlement and discharge, and no adjudication was worked as to interest where the legatee asked for the payment of money in the hands of the executor, but asked for no interest.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 5 **Order to Hold Funds—Interest—Discretion of Court.** An order of the court directing an executor to hold in his possession, until a certain time, property of legatees, was not a direction that he was to hold it in his own bank without interest; and as long as he could have placed it in another bank that would allow interest, if his own bank would not, the court could, in its discretion, find that he should have made some income on the property, and charge him with interest thereon.

EXECUTORS AND ADMINISTRATORS: Management of Estate—

- 6 **Interest on Funds—Non-Application of Legatees for Investment.** The executor was properly charged with interest on funds, over his objection that the legatees were advised of the condition of the estate by reports, and made no application for payment or for investment of funds.

APPEAL AND ERROR: Assignment of Error—Briefs—Failure to
7 Assign Error—Abandonment of Cross-Appeal. Where, on cross-
 appeal, there is no assignment of error relied on for reversal, and
 no brief filed, a cross-appeal will be held to have been abandoned.

Appeal from Polk District Court.—HUBERT UTTERBACK,
 Judge.

APRIL 12, 1919.

THE ultimate question is whether error was committed
 in charging an executor with interest on funds in his hands
 belonging to legatees.—*Affirmed.*

Dale & Harvison, for appellant.

M. E. Van Laningham, and *J. E. Holmes*, for appellees.

SALINGER, J.—I. The order that the executor pay in-
 terest was made in a proceeding in probate, and in ruling on
 exceptions to the executor's report. And appellant contends
 that the court was without jurisdiction to
 make an allowance of interest upon any ap-
 plication in probate, and, at all events, had
 no power to make such allowance by means
 of decision upon exceptions to the report of
 an executor.

1. EXECUTORS AND
 ADMINISTRATORS: manage-
 ment of estate:
 allowance of
 interest against
 executor.

We are unable to see how *Huey v. Huey*, 26 Iowa 525,
 cited by appellant in support of this proposition, in any
 way sustains it. As to *In re Estate of Brown*, 113 Iowa 351,
 also relied upon, it may be assumed that the partial quota-
 tion from the case tends to sustain the claim of the appel-
 lant. But on an analysis, the decision in *Brown's* case coun-
 ters the point, rather than sustains it. In that case, this
 court did precisely what appellant claims the district court
 had no jurisdiction to do. For, in a probate proceeding
 arising upon exceptions, the Supreme Court ordered an al-
 lowance of interest. The opinion as a whole makes it mani-
 fest it was not intended to hold that the probate court lacks

jurisdiction to allow interest on funds in the hands of an executor, nor that it lacks jurisdiction because the claim for interest is made through exceptions to the report of the executor. We cannot sustain this assignment.

II. No one will deny that, under the conditions stated in the second proposition urged by appellant, it would be error to allow interest. Many conditions may readily be con-

ceived wherein such an allowance would be erroneous. But the question we have is

2. EXECUTORS AND
ADMINISTRATORS:
management of
estate: interest
on funds.

whether it was error to make the allowance under the facts presented by this record. Of

course, it is true that an executor is not

ordinarily liable for interest on money in his hands. See *Dorris v. Miller*, 105 Iowa 564. But in so holding, the *Dorris* case declares that, if the executor has made actual use of the funds, or delayed paying the balances in his hands, after demand, or retains the money in his hands unemployed, without any just reason or excuse therefor, and when it should be invested or paid over, he is chargeable with interest. Now, the will provides that, as to the wife, half the estate shall be paid to her "from time to time," as it shall come into the hands of the executor. At this point, it is in order to consider with the second proposition a contention made in the third proposition. That is, in effect, a claim that, where a will directs payment from time to time, this gives the executor unqualified authority to declare when the time of payment shall be. It appears that, prior to November, 1914, the executor had possession of certain notes owed the estate by one Yetter, which were due on March 1, 1915, and that Yetter paid them before maturity, and before the 5th of November, 1914. It is the fair effect of further testimony that, on that day, the widow inquired of the executor whether the Yetter loan had been paid, and that he falsely denied that it had been. We are of opinion that, though the will directs that moneys be paid to the widow from time to time,

interest may be charged the executor where he has funds in his hands and, in response to a demand therefor by the legatee, retains the money by means of a false denial that it has been paid to him.

III. William Lackie died testate on April 24, 1913. As seen, the widow made demand for funds due her under the will, and did this on November 5, 1914, and was then told that the money had not yet been collected.

3. EXECUTORS AND ADMINISTRATORS: management of estate: interest on funds: receipt without claim of interest: *res adjudicata*.

Thereafter, on December 4, 1914, she made application to the district court, alleging that, on the 22d of August, 1914, the executor had collected certain notes, to the amount of \$15,560. The prayer was that he be ordered to pay to her her share of that money due her under the provisions of the will. This application made no mention of interest, and, on the 19th of December, 1914, the court ordered the executor to pay the widow the sum of \$7,000. It is now urged upon us that this order fixed the amount then payable to the widow, and that, as she acquiesced therein, and accepted what was granted, the order is conclusive upon her, and operates as *res adjudicata* in this proceeding, and that, therefore, she cannot subsequently ask that said order be reviewed, and interest allowed her on said amount.

The first answer is that nothing which does not legitimately arise for decision is settled by a decision. The application charged the collection of \$15,560. The will entitled the widow to half of this. Allowing her \$7,000 can be explained only upon one of two theories: either that not so much as \$15,560 had been in fact collected, or that a part of what was collected was not given the widow, because it was thought necessary to retain a part for purposes of administration. The claim tendered by the widow was that she have an order to pay what was due her in any view. Whether interest was due by reason of the retention on part of the

executor is a matter between the legatee and the executor, arising upon his default or malfeasance. The right to have half of the money in his hands was given by the will. There was no compulsion to combine the two claims. That alone is a perfect answer to the claim that allowing the widow the half claimed by her, and given her by the will, operated as an adjudication that she was not entitled to

4. EXECUTORS AND ADMINISTRATORS: management of estate: mistakes in settlement: correction: interest on funds.

interest because of unlawful retention of her money on part of the executor. A second and equally conclusive answer is that, under Section 3398 of the Code, mistakes in settlement may be corrected in the probate court at any time before final settlement and discharge.

We hold, first, that, because of said statute, no adjudication was effected. We hold further that no adjudication was worked for the following reason: Since, at the time when the earlier application was made, the will entitled the widow to half of the amount collected, the fact that she did not combine with her claim for this half a claim that she be allowed interest because the executor had improperly detained that half, does not estop her to maintain her present application for an allowance of interest. One who has two enforceable rights and has one of them passed upon does not lose the right to proceed upon the second right because she failed to assert it when she presented the other right for judicial action.

IV. While it is true this executor was directed to hold in his possession the property of the six legatees until the first day of March, 1916, it does not follow that this is a direction to hold the same in his bank

5. EXECUTORS AND ADMINISTRATORS: management of estate: order to hold funds: interest: discretion of court.

until the first day of March, 1916. And the court evidently thought he was under some obligation from the time he received the money until it should have been paid out, to make some income on it. He knew pre

cisely the time when he could and would be required to pay the same out. If his bank did not want the money, other banks equally responsible might be willing to use it and pay interest. The court had some discretion about the matter, and we find nothing to justify our interfering with that discretion. See *In re Estate of Gloyd*, 93 Iowa 303; *In re Estate of Young*, 97 Iowa 218.

V. Proposition 6 is that the widow and other legatees were properly advised of the condition of the estate by reports, and that, in the absence of application

6. EXECUTORS AND ADMINISTRATORS: management of estate: interest on funds: non-application of legatees for investment.

made to the court for an order either for payment to widow or legatees, or for investment of the funds, the executor is not chargeable with interest on the funds in his hands.

We think that what has already been said disposes of this point.

VI. A cross-appeal was perfected by some of the appellees. We find no assignment of errors relied on for reversal nor brief points on the cross-appeal. Everything indicates the same has been abandoned, and we so hold.—*Affirmed on both appeals.*

7. APPEAL AND ERROR: assignment of error: briefs: failure to assign error: abandonment of cross-appeal.

LADD, C. J., EVANS and PRESTON, JJ., concur.

JESSIE B. JACOBSON, Appellee, v. LOU BYRD et al., Appellants.

DEEDS: Undue Influence—Presumptions. Evidence that an aged

- 1 and very infirm grantor executed to her daughter and son-in-law a deed, the consideration for which was an alleged indebtedness for board and lodging for 13 years, acknowledged in a contract executed at the same time as the deed, is, under a review of the record, held sufficient to make a prima-facie case of fraud and undue influence, and to cast upon the grantee the burden of proving the contrary.

DEEDS: Undue Influence—Interest Sufficient to Set Aside Convey-
2 **ance.** One who conveyed to the grantee real estate, in consideration of a promissory note and of a promise made in a will for the payment of said note, and who was also the legatee of an undivided one-half interest in said real estate, which had been reconveyed by the said grantee, *held* to have sufficient interest to have said conveyance set aside for fraud and undue influence, and to have established against said real estate her claim for the value of the note.

Appeal from Cass District Court.—O. D. WHEELER, Judge.

APRIL 12, 1919.

SUIT in equity to set aside a deed of real estate, as having been obtained by fraud and undue influence. Plaintiff also prayed that a lien be established in her favor upon such real estate, to the amount of \$500. There was a decree for the plaintiff, and the defendants appeal.—*Affirmed.*

E. M. Willard and Callahan & Callahan, for appellants.

H. M. Boorman, for appellee.

EVANS, J.—The deed under attack was executed in her lifetime by Lydia Card. The plaintiff was the daughter of Ward Card, deceased, who was the only son of Lydia Card. The defendant Lou Byrd was the only daughter of Lydia Card. The subject-matter of the deed under attack was a residence property in the city of Atlantic, worth, at the time of the trial, about \$1,600. This property had been first acquired by Ward Card, the father of the plaintiff, in 1892, at a cost of \$750. He held the legal title thereto, and occupied the same as a home for several years. In 1897, he conveyed the property by quitclaim deed to his mother, Lydia Card. The claim on behalf of the plaintiff is that this deed was executed as security for \$250 advanced by the mother to pay an incumbrance on the property. Ward Card continued in the occupancy of said property for many years following the date of such deed. He died in 1907. The evidence tends

to show that Lydia Card recognized the equity of her son in such property, and recognized the plaintiff as the successor to such equity. On August 29, 1913, Lydia conveyed the property to the plaintiff. At about the same time, she conveyed other property of less value to her daughter, Mrs. Byrd, the defendant. Mrs. Byrd, being dissatisfied with her mother's conveyance to the plaintiff, came with her mother to the home of the plaintiff, on September 8, 1913, and requested the plaintiff to convey the property back to Lydia. In that conference, some mutual understanding was arrived at, as between the grandmother and daughter and granddaughter. It is claimed for the plaintiff that such understanding was that she should convey the property back to her grandmother, and that her grandmother should keep the same, without disposing of it, as long as she lived, and that it should be disposed of by will, and that the plaintiff's equity should be recognized therein to the extent of \$500, and should be a first claim thereon, and that the residue of the estate should be divided equally between the defendant Mrs. Byrd and the plaintiff. They thereupon went together to the office of an attorney. At the office of the attorney, the plaintiff executed a deed back to her grandmother; the grandmother executed a note to the plaintiff for \$500; she also executed her will. The note was drawn payable on the date of the death of the maker. Items 2 and 5 of the will were as follows:

"Item 2. Whereas, Ward E. Card, father of Jessie Jacobson, during his lifetime paid a sum of money amounting to \$500 toward the payment of a certain property being Lot Seven (7) Block One Hundred Twenty-one (121), in the city of Atlantic, Iowa, on behalf of Lydia L. Card, and I now, hereby, will and bequeath unto the said Jessie B. Jacobson, as a special bequest, said sum of five hundred dollars (\$500.00) in addition to what is hereinafter willed unto her; that this sum of five hundred dollars is also represented

in a promissory note which she holds against me for this item.

"Item 5. All of the balance and residue of my property, both real estate, personal and mixed, wherever situated, I hereby will, devise and bequeath, share and share alike unto my daughter Lou Byrd and to my granddaughter, Jessie B. Jacobson, to be their absolute property."

At this time, the grandmother had made her home with her daughter for the preceding 11 years.

On the night of January 17, 1915, and at about one o'clock in the morning, Lydia Card, being in her last illness, and 90 years of age, executed a contract with her daughter and husband, whereby she acknowledged in-

1. **Demds : undue
influence : pre-
sumptions.**

debtedness for \$300 for board and lodging for the period of 13 years. At the same time, she executed to the same parties a deed

of the residence property which she had obtained from the plaintiff on September 8, 1913. The consideration for this deed was the indebtedness for board. This is the deed which is challenged in this action. The circumstances under which the deed under attack was executed, were sufficient to make at least a prima-facie case of fraud and undue influence, and to cast upon the defendants the burden of proving the contrary. We are clear that the prima-facie case thus made was

not overcome by the testimony on behalf of defendants. It is strongly urged for the defendants that the plaintiff had no interest in the property as such, and was, therefore, in

no position to complain of the conveyance of the same. Evidence was introduced, tending to show that at the time of the conveyance of the property by Ward Card to Lydia, an absolute sale was intended, and that Ward retained no equity in the property. It is further urged that the testimony whereby the plaintiff claims to show the contrary is all incompetent, under Code Section 4604. On this

2. **Demds : undue
influence : inter-
est sufficient to
set aside con-
veyance.**

question, we have little occasion to go back of September 8, 1913. Concededly, the plaintiff did have the full legal title to the property on that date. On such date, she conveyed the same to Lydia. The consideration for such conveyance was the promissory note and the provisions made for her in the will. She was entitled to a performance of such consideration. The trial court gave her nothing more. If it had been necessary that she should have proved that she had an equity in the property prior to August 29, 1913, when the same was conveyed to her by her grandmother, such proof is furnished by the recitals of Item 2 of the will. The conveyance of August 29th was itself a recognition of the claim then put forth by the plaintiff. As already indicated, however, it was not incumbent upon the plaintiff to go further back in her proofs, except for historical purposes, than September 8, 1913, when she parted with her title. The case involves fact questions only. The trial court found the facts with the plaintiff, and set aside the deed and ordered a disposition of the property in accordance with the terms of the will. Our examination of the record satisfies us with the correctness of the court's finding, and with the propriety of the relief extended. The decree entered below is, therefore, —*Affirmed.*

LADD, C. J., PRESTON and SALINGER, JJ., concur.

B. G. REIMER, Appellee, v. FRED SWINGLE, Appellant.

APPEAL AND ERROR: Harmless Error—Instruction Favorable to Appellant. Where the time corn was to be delivered, under a contract for sale, was a question for the jury, and both parties had testified as to an offer of compromise, an instruction that the offer of compromise was not an admission of indebtedness, and was only to be considered as bearing upon the contract with respect to delivery, was favorable to the appellant, and was harmless error, of which he cannot complain.

Appeal from Pottawattamie District Court.—THOMAS ARTHUR, Judge.

APRIL 12, 1919.

ACTION to recover from defendant a balance alleged to be due upon a verbal contract for the sale of corn. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

B. A. Goodspeed, for appellee.

PRESTON, J.—Plaintiff claimed that the contract, made February 20, 1917, was that he sold the corn at the agreed price of 90 cents per bushel, plus the rise in the market price of the corn at the time of delivery; and that this corn should be delivered not later than April 20, 1917; that the corn was delivered about April 20, 1917; and that the market price at that time was \$1.35; and he asked to recover on that basis. On the other hand, defendant claims that the contract was that he was to pay 90 cents per bushel, plus any advance in the market at the time defendant should demand delivery of the corn; that he demanded such delivery about March 20th; and that, at that time, the market price was \$1.00 per bushel: and he alleges that he tendered to plaintiff, before the trial and at the trial, the amount he claimed he owed plaintiff on that basis. It appears that one load of the corn was delivered some days before the rest, and plaintiff testifies that, when he delivered the one load of corn, defendant told him that it was worth \$1.23, at that time, and he thought it would sound all right for all of it; but plaintiff replied that he didn't think that would be treating him right, because he had been saving the corn for defendant. There is little, if any, dispute as to the market price of corn on the different dates. The only question of fact is as to what the contract was, and when the corn was

to be delivered. Under the evidence, this was a question for the jury. The only error assigned is in regard to an instruction given by the trial court. Appellant says, in argument, that, in offering his evidence in respect to the alleged tender, it was his belief that he could establish a valid tender, as he had pleaded; but the evidence disclosed that he had not made a valid tender. The defendant testified that, in a conversation a few days after the corn was delivered, plaintiff wanted \$1.35, and defendant told him he did not owe \$1.35; and that he tendered him \$1.23 per bushel for the corn, as a settlement; that he told plaintiff he didn't consider that he owed what he was going to tender, but would offer it in the form of a settlement, and would withdraw it if plaintiff did not accept it. Plaintiff testified on the same subject, and all the evidence on this subject went in without objection. In the instruction complained of, the trial court referred to this testimony, and then said, in substance:

"Under the strict rules of evidence, this testimony would not have come before you, perhaps. An offer of compromise is not an admission of indebtedness, or any other fact in the case, but this testimony came before you without objection, and is before you, and you are instructed, with reference to such testimony, that it is not to be considered by you as an admission by the defendant that he owed the plaintiff \$1.23 per bushel for the corn. It is not to be considered by you in that respect, but only to be considered by you *as bearing upon the contract between the parties with respect to delivery*, if it does throw any light upon that proposition. but it is not to be considered by you as an admission of a debt to the plaintiff in the amount of \$1.23 per bushel or any other amount."

The words in italics are the part complained of. The only cases cited by appellant are to the proposition that the instructions of the court constitute the law of the case, and that it is the duty of the jury to follow them, whether right

or wrong. It may be true, as contended by appellant, that such testimony does not throw any light upon the question of delivery. But the central thought of the instruction is that the talk or offer of settlement, at \$1.23 per bushel, was not an admission of indebtedness by defendant in the amount of \$1.23 per bushel, or any other amount, or an admission of any other fact in the case. Without such instruction, the jury might have considered such evidence as an admission. If plaintiff was here complaining, we might have a different question. It is clear to us that the instruction guarded the interests of the defendant, and was favorable to him, in that it told the jury they could not consider such evidence against the defendant. This being so, there was no prejudice to the defendant, and he has no cause for complaint. No prejudice appears, and the judgment is—*Affirmed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

WALLACE H. ARNEY, Receiver, Appellant, v. BRITAIN & COMPANY, Appellee.

CORPORATIONS: Contracts with Promoter—Fraud—Remedies.

- 1 Where a promoter made a contract of sale of a packing plant by fraudulent misrepresentations, the company to whom it was sold could, upon discovery, either (a) sue the promoter for damages on an accounting, or (b) rescind the contract and recover the consideration paid, from the promoter or from a third person receiving the same with notice of the fraud.

CORPORATIONS: Contracts with Promoter—Fraud. Fraud on the

- 2 part of a promoter of a corporation in obtaining a contract from the company for the purchase of a packing plant by misrepresentations, would render the contract voidable, and not void, and it would not be an election to rescind for the company to bring suit against a third person for the consideration, without making the promoter a party.

CORPORATIONS: Contracts with Promoter—Consideration—Accept-

- 3 **ance of Check.** Where a company purchased from a promoter a

packing plant, and, under the agreement, delivered a check for a cash payment, to be paid under the contract to the promoter, which was the same as was to be received by the selling company, and the said check was thereafter delivered to the seller under its agreement of sale to the promoter, the acceptance of the check by the seller was based upon consideration.

CORPORATIONS: Officers De Facto—Dealings with Third Persons.

- 4 Where a third person in good faith deals with a corporation through purported officers, who are acting as such openly and without challenge, such officers will be deemed *de facto* officers, and the corporation will be bound by their acts within the scope of the functions of the office.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

APRIL 14, 1919.

Suit by the plaintiff, as receiver of an insolvent corporation, against the defendant, to recover money which was the property of the plaintiff corporation, and which was wrongfully paid to and received by the defendant. The answer was, in general effect, a denial that the payment of the money in question to the defendant was wrongful. There was a decree dismissing the petition. The plaintiff appeals.—*Affirmed.*

Carney & Carney and *C. H. Van Law*, for appellant.

C. H. E. Boardman, for appellee.

EVANS, J.—The defendant corporation was the owner of a packing plant, situated at Marshalltown, Iowa. On February 25, 1915, it sold the same by written contract to one David Naylor and R. F. Hall, for a consideration of \$92,250, to be paid as follows: \$10,000 on June 15, 1915, and the balance of the purchase price on or before six months from the date of the contract. Naylor and Hall were without capital, and paid nothing on the contract at the time of its execution. They were promoters. After acquiring the

contract, they proceeded to organize a new corporation, as a purchaser of the plant in question. They came to Marshalltown, and interested many prominent business men in the enterprise. In form, at least, they organized a corporation with a capital stock of \$400,000, intending to sell the stock thereof to the citizens of Marshalltown and vicinity. This organization was had on April 22, 1915. On May 4, 1915, the directors of the new corporation, one of whom was Hall, entered into a contract with Naylor, whereby it purported to purchase the plant in question for \$170,000. It also entered into a contract to pay Naylor a commission of 12½ per cent for the sale of the stock of the new corporation. The evidence shows that many of the stockholders and directors understood from Naylor that \$170,000 was the option price for which he obtained the contract. There was much dissatisfaction on the part of proposed stockholders and directors as to the rate of commission exacted by Naylor. The earlier meetings of the directors were stormy. The personnel of the directorate changed rapidly, by successive resignations. Some evidence tends to show sinister manipulation and control of the acts of the directors by Naylor and Hall.

Under the contract between Naylor and the new corporation, \$10,000 was to be paid Naylor on June 10th. The same amount was to be paid by Naylor to the defendant corporation on June 15th. On June 14th, the directors ordered that the amount thus due Naylor should be paid, by the issue of checks payable to the defendant corporation. Two such checks, of \$8,000 and \$2,000 respectively, were issued, and duly signed by the vice-president and the treasurer, the president having resigned, and the same were delivered to Naylor, who delivered them to the defendant company, in payment of the amount due from him on his contract. These are the funds which the plaintiff seeks to recover. The argument in its behalf is that Naylor, as a promoter, sustained a fiduciary relation to the corporation which he organized;

that he obtained his contract from the new corporation by fraudulent concealment and representation; and that the defendant corporation, at the time it received the checks in question, knew of the fraud thus practiced, or at least knew such facts as charged it with knowledge of the fraud. It is also argued that the officers and directors of the company were illegally elected, and that they were without title to their respective offices as mere usurpers, and that all their acts were wholly void. It is also argued that the defendant company had knowledge of such lack of authority.

Without going into undue details of the evidence, there is much in the record tending to show gross fraud on the part of both Naylor and Hall in their dealings with the organization of the new company, and in acquiring their contracts therewith. If Naylor obtained his contract by fraudulent representations or concealment, the corporation could repudiate it, upon discovery. It could sue Naylor for damages or for an accounting; or it could rescind the contract, and recover the \$10,000 paid. In that event, it could also recover such amount paid to any third party who had wrongfully received the same, with notice of the fraud; and such is a large part of the argument for appellant. The trouble we find at this point is that the argument is at variance with the petition. The petition was not predicated upon the theory of fraud on the part of Naylor or Hall. There is no allegation that the contract of Naylor was obtained by fraud; nor any allegation that such contract with Naylor was ever rescinded or repudiated. Indeed, there was no reference in the petition either to Naylor or to Hall, or to the contract pursuant to which the checks in controversy were paid. The petition was predicated upon the theory that the officers who purported to act for the new corporation were not such *de jure*, because

1. CORPORATIONS:
contracts with
promoter:
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of illegality in their selection; and that the defendant knew of such illegality.

If, under the pleadings and the evidence, we were warranted in finding fraud on the part of Naylor in obtaining such contract, this would render the contract voidable only, and not void. It would rest in the election of the corporation to rescind it. It is urged in argument that the beginning of the suit is a sufficient act of rescission. But Naylor is not a party to the suit. If rescinded, it must be so rescinded as to Naylor. There is nothing in the petition or the evidence to warrant a finding that such rescission was had.

We turn away from the question of fraud, therefore, and proceed to consider the case upon the theory of the petition.

Were the check and the delivery thereof to the defendant corporation rendered invalid, in that the officers issuing the same were elected irregularly or illegally, and in that the defendant corporation received the same without consideration?

On the question of lack of consideration, the argument is that there were no contractual relations between the two corporations; that the plaintiff corporation owed nothing to the defendant; that the defendant, therefore, parted with nothing, and the plaintiff got nothing. The argument is not quite sound. Disregarding the question of fraud, as we must, the plaintiff corporation was

bound by a contract, good on its face for the payment of \$10,000 on the tenth day of June. It knew that it could not acquire a good title to the packing plant from Naylor until Naylor had acquired it from the defendant. It had an indirect interest, therefore, in insisting that the money paid by it to Naylor should be applied by Naylor toward the acquisition of the property. The acceptance by Naylor of these checks payable to the defendant company was an ac-

2. CORPORATIONS :
contracts with
promoter :
fraud.

3. CORPORATIONS :
contracts with
promoter : con-
sideration : ac-
ceptance of
check.

ceptance of them as payment of the amount due him under his contract. The plaintiff company was entitled to claim credit accordingly. The acceptance of these checks by the defendant company from Naylor was an acceptance of them as payment of the amount due from him to it on June 15th. As to the mere question of consideration, therefore, there was no lack.

On the question of the defect of title to office of the officers of the plaintiff corporation, we are confronted with the fact that they were *de facto* officers. Each of them was in possession of his office and exercising its

4. CORPORATIONS:
officers *de facto*:
dealings with
third persons.

functions, and no one contended with him. As to what the rights of these *de facto* officers might be as between them and the corporation, or as between them and its stockholders, or as between each other, we have no occasion to consider. The defendant corporation, which was the payee of the checks, was a third party. It is settled law that, where a third party in good faith deals with a corporation through purported officers who are acting as such openly and without challenge, they will be deemed to be such officers *de facto*, and the corporation will be deemed bound by their acts, within the scope of the functions of the office. Corporations necessarily act in all cases through officers. Clearly, it would be impracticable for third parties to deal with corporations at all, if each one must investigate the legality of the title of each corporation officer, as a condition precedent to a business transaction. The following excerpt from 2 Thompson on Corporations (2d Ed.) is a condensed statement of the law on this question:

"Section 1442. It scarcely needs judicial authority to the proposition that the corporation will be bound by any acts of *de facto* officers, where such acts would bind it if performed by officers *de jure*. The reasons for this are obvious. If the corporation does not wish to be bound by the

acts of such officers, its duty is to challenge their right to the office immediately; otherwise, it adopts their acts as its own. This principle is illustrated in a case where stockholders elected a treasurer who filled the position under a claim of right to the office, and without dispute on the part of any stockholder or member of the corporation. While thus discharging the functions of the office, he executed a note on behalf of the corporation, and, in an action on the note, the corporation attempted to defend on the ground that the person executing the note was not, in fact, the treasurer of the corporation. In holding invalid such a defense, the court said that 'we are of opinion that, under such circumstances, the corporation itself cannot be permitted to contend, in defense of an action like the present, that the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as its treasurer for so long a time, are invalid, merely because the annual meeting at which he was chosen was not called in accordance with the by-laws.'

"Section 1447. It is very well settled, and for good reasons, that the acts of *de facto* officers are not subject to collateral attack. This very common principle that runs through the entire body of the judicial system, is applied to the acts of officers *de facto* of corporations. Thus, a collateral attack was not permitted on an agreement executed by persons acting as officers of a corporation under an assumed election, but ineligible to the offices at the time of their election. Persons holding under color of an election are said to be officers *de facto*, and where they have charge of the affairs of the corporation, they are authorized to bind it in all matters legitimately devolving upon such officers."

While the petition in this case alleges that the defendant corporation "well knew" the alleged defect of title of these officers, we find no evidence of knowledge on the part of the defendant of any infirmity or defect in the organiza-

tion of the plaintiff company or in the election of its officers. We reach the conclusion that the decree entered below must be—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

C. E. BERRY, Appellee, v. GEORGE F. KRITENBRINK et al.,
Appellants.

APPEAL AND ERROR: Grounds for Review—Points First Raised
1 on Appeal. Objection, not raised in trial court, that the petition states no cause of action, will not be considered on appeal.

APPEAL AND ERROR: Grounds for Review—First Complaint as to
2 Unobjected Evidence on Appeal. Parol evidence, unobjected to, enlarging writings which are in evidence, cannot be complained of for the first time on appeal.

Appeal from Adair District Court.—LOBIN N. HAYS, Judge.

APRIL 14, 1919.

WE think the ultimate question is one of fact, and is whether the plaintiff appellee has waived his rights to the real estate in controversy—whether or not the contract sued on by appellee has been forfeited or waived. The trial court held there was no forfeiture or waiver, and defendants appeal.—*Affirmed*.

A. M. Fagan, Musmaker & Williamson, and Tinley, Mitchell, Pryor & Ross, for appellants.

Carl P. Knox, for appellee.

SALINGER, J.—I. In various ways, it is urged upon us that the petition states no cause of action, and for that reason the court erred in entering judgment and decree for

1. APPEAL AND
ERROR: grounds
for review:
points first
raised on
appeal.

plaintiff. No such question was raised in the trial court at any time, and we will not indulge in citations for the holding that appellants are not now in position to raise that point in this court.

II. There is some complaint that parol testimony was allowed, to enlarge the writings put in evidence. Be that as it may, testimony of this character was received without objection, and its reception may not here be

2. APPEAL AND
ERROR: grounds
for review:
first complaint
as to unobjected
evidence on ap-
peal.

complained of for the first time. See *Zabel v. Nyenhuis*, 83 Iowa 756, at 759.

III. The appeal finally resolves itself into passing upon a question of fact concerning which there was a substantial conflict in the evidence. The question of fact is whether Berry waived what interest he may have had in certain lands. Appellant urges that the court erred in finding that Berry, appellee, did not waive his rights to the land in controversy, because plaintiff, on the 24th of February, 1915, did waive and abandon any interest he might have in Exhibit A, or any of the deals described in the evidence. As to whether or not he waived these rights or released them, the testimony is in sharp conflict. We allow something for the advantage the trial court had in seeing and hearing the witnesses. With that to start with, our reading of the record satisfies us there is no substantial reason for disagreeing with the conclusions of fact reached below. See *Wilkie v. Sassen*, 123 Iowa 421, and *Pryne v. Pryne*, 116 Iowa 82, 83. We think the relief granted is fairly within the petition; at least, within its prayer for general, equitable relief. See *Searle v. Fairbanks, Morse & Co.*, 80 Iowa 307, 311; *Hoskins v. Rowe*, 61 Iowa 180; and *Iler v. Griswold*, 83 Iowa 442. It is a serious question whether those who have appealed have not lost all interest in the controversy, and whether they are entitled to maintain this appeal. See *Price v. Baldauf*,

90 Iowa 205, 209; *Faucher v. Grass*, 60 Iowa 505; *Moller v. Gottsch*, 107 Iowa 238. But, in view of the conclusions already announced, we find it unnecessary to determine that question.

Our conclusion works an affirmance.—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

ANNIE McNEILL BIRKS et al., Appellants, v. JAS. F. McNEILL et al., Appellees.

LIMITATION OF ACTIONS: Setting Aside Probate of Will.

- 1 tion to set aside a will is barred in five years from the time the same is duly filed for probate and notice thereof is given.

WILLS: Title Individually (?) or as Trustee(?) The contention

- 2 that a devisee took as trustee for others becomes immaterial when it appears that, if he did so take, he has fully executed the trust.

TRUSTS: Termination of Fiduciary Relation. Fiduciary relations

- 3 are presumed to terminate with the execution of the trust. So held as to the turning over of stock by an executor to the *cestui que trust*.

CORPORATIONS: Fiduciary Relation in Purchase of Stock. The

- 4 managing officer of a corporation who buys a stockholder's stock through the stockholder's duly authorized agent is under no duty to disclose to such agent the financial condition of the corporation as bearing on the value of the stock, *when the knowledge of the agent as to the value of the stock is as ample as the knowledge of the officer who is proposing to buy*.

LIMITATION OF ACTIONS: Concealing Fraud not Solely Cogniz-

- 5 able in Equity. Frauds which *must* be redressed at law, and frauds which may be redressed *either* at law or in equity, start the running of the statute of limitations when the fraud is perpetrated, irrespective of the injured party's knowledge of the fraud, except in those cases where the fraud-doer, by some affirmative and fraudulent conduct, prevents the injured party from obtaining knowledge of the fraud. But mere silence,—mere failure on the part of the fraud-doer to reveal his wrong,

when he occupies no fiduciary relation,—is not such fraudulent concealment as will toll the statute.

Appeal from Mahaska District Court.—JOHN F. TALBOTT,
Judge.

JANUARY 17, 1919.

REHEARING DENIED APRIL 14, 1919.

SUIT in equity to compel defendants to account for and pay over to plaintiffs the difference between the par value of 800 shares of stock and its actual value. Other issues were included, not necessary to state. On hearing, the petition was dismissed.—*Affirmed.*

W. H. Keating and Thomas A. Cheshire, for appellants.

Burrell & Devitt, L. E. Corlett, and William McNett, for appellees.

LADD, C. J.—Hobart W. McNeill died testate, January 27, 1900, at the city of San Jose, California, leaving surviving Elizabeth McNeill, his widow, and an only child, Annie McNeill Birks. His will, dated November 3, 1896, bequeathing all stock in the corporation known as "McNeill Brothers, Inc.," owned by himself, to W. A. McNeill, was admitted to probate, March 13, 1900. He was owner of 2,000 of the 5,000 shares of stock in this company, and owned no other property. W. A. McNeill, who was nominated executor in the will, was appointed, and qualified as such. On the same day that the will was made, decedent had addressed to W. A. McNeill the following letter:

"Oskaloosa, Iowa, November 3, 1896.

"Wilbur A. McNeill:

"I attach this letter to my last will bearing date November 3, 1896, as instructing you what to do with the proceeds, whether dividends of cash or property or final results arising from sale of my 'McNeill Bros. stock.' One half shall

go to my wife Lizzie McNeill if * * * while living, then to my daughter Annie * * * then to her children. The other half shall go to my niece E. L. Little who has been a daughter to me nearly all her life. In the event of my death you should *at once* make a will so leaving this property. Because failing to do so it with all your own property would all go to your heirs, and both my wife and Annie would be cut out. Better make no additional will or codicil yourself without the advice of a careful lawyer as to its effect on the will made by you to-day. It is a slippery business.

“Affectionately,

“H. W. McNeill.”

About three years later, another letter was transmitted to the same person:

“San Jose, Cal., 12-18-1899.

“Dear Wilbur:

“Having reference to my letter of instructions in yourself to govern you in the final disposition of my McNeill Bros. stock I would like to add to it this:

“Set aside five thousand dollars of McNeill Bros. stock for the use and benefit of each of the following named parties:

“Hobart M. Birks, Montreal.

“Hobart Phillips, Oskaloosa.

“Hobart Little, son of C. F. Little, Oskaloosa.

“Hobart Morris, Canmore.

“Hobart Hill, son of F. A. Hill, Seattle.

“Hobart Rice, son of Fred Rice, South Bend, Wash.

“Wilbur M. Little, Anthracite.

“Walter McNeill, Fairfax.

“The remaining amount of the two hundred thousand to be divided into two parts, one half going to my wife, Lizzie McNeill, and the other to my niece E. L. Little.

“Affectionately,

“H. W. McNeill.”

McNeill Brothers, Inc., appears to have been organized in 1891, but certificates of the capital stock were first issued October 16, 1893, there being then issued 3,531 shares of the par value of \$100 each. Two certificates, of 1,444 $\frac{3}{4}$ shares each, were issued to W. A. McNeill, one certificate, of 134 $\frac{1}{2}$ shares to E. L. Little, one for 97 $\frac{1}{4}$ shares to J. F. McNeill, and 409 $\frac{3}{4}$ shares to W. T. Phillips. The capital stock was increased to \$500,000, April 25, 1898. The additional certificates making up this amount were distributed to the McNeills, Phillips, and others, including 65 $\frac{1}{2}$ shares to E. L. Little, and thereafter, a certificate for 2,000 shares was issued to H. W. McNeill, February 10, 1899, upon the surrender of one certificate of 1,444 $\frac{3}{4}$ and another of 555 $\frac{1}{2}$ shares previously issued to W. A. McNeill, and the cancellation thereof. In pursuance of the letters accompanying the will, and addressed to W. A. McNeill, a certificate of 800 shares of the stock held by decedent, H. W. McNeill, was issued to his widow, Lizzie McNeill, February 15, 1900. A like certificate was issued on the same day to E. L. Little, and certificates for the remainder of the 2,000 shares of stock held by said decedent were issued either to W. A. McNeill or those entitled thereto under the letters mentioned. The McNeill Bros., Inc., was a holding company for the stock in different corporations organized to carry on the various enterprises of the three brothers, Hobart W., Wilbur A., and James F. McNeill. These companies, at the time of the death of H. W. McNeill, were the American Coal Company, located at Evans, in Mahaska County, Iowa; the Oskaloosa Livery and Transfer Company, and the Oskaloosa Electric Light Company, located at Oskaloosa, Iowa; the H. W. McNeill Company which operated a coal mine at Canmore and another at Anthracite, Canada; E. L. Little Company, which operated stores at Canmore and Anthracite; the Western Coal Company; the Pacific Coast Company; and the Bren-

ton Coal Company, at Seattle, Washington.

The day after the issuance of the certificate of stock to Lizzie McNeill, one of the plaintiffs herein, she appointed W. T. Phillips, of Oskaloosa, Iowa, proxy to vote her shares in McNeill Bros., Inc. On the back of the certificate, there was a blank assignment, without date, signed by Lizzie McNeill, witnessed by her son-in-law. Shortly before March 30, 1901, W. T. Phillips made W. A. McNeill the following proposition:

"As attorney for Mrs. Lizzie McNeill I will sell you eight hundred shares of the capital stock of McNeill Bros., being certificate 14, issued February 15, 1900, for the sum of eighty thousand (\$80,000.00) dollars cash, and for myself and associates, I will buy the American Coal Co., including all of its outstanding capital stock, and the American Supply Co., paying therefor the sum of seventy-five thousand (\$75,000.00) dollars, as follows: I will give you 580 shares of the capital stock of McNeill Bros. and \$17,000.00 cash, with the understanding that the said American Coal Co. and the American Supply Co., operating stores for supplies to coal miners, be turned over to me as of date May 1, A. D. 1901, with a clean balance sheet of that date.

"Yours truly,

"W. T. Phillips."

Subsequently, and on March 31, 1901, an option was executed in words following:

"In consideration of the sum of one dollar, in hand paid, the receipt of which is hereby acknowledged, I hereby give W. A. McNeill the exclusive option until May 1, A. D. 1901, to purchase the eight hundred (800) shares of 'McNeill Bros.' stock, as represented by Certificate No. Fourteen (14), issued February 15, A. D. 1900, and which stands in the name of Lizzie McNeill, whose attorney in fact I am, and the four hundred and nine and three quarters ($409\frac{3}{4}$) shares of 'McNeill Bros.' stock as represented by Certificate No. One (1)

issued October 16, A. D. 1893, in my name, and the one hundred and seventy and one quarter ($170\frac{1}{4}$) shares of 'McNeill Bros.' stock as represented by certificate of thirteen hundred and eighty (1,380) shares, upon the following conditions, to wit:

"The said W. A. McNeill shall, on or before May 1, A. D. 1901, tender me the entire amount of the outstanding stock of the corporation known as the American Coal Company, together with a clean balance sheet of said American Coal Company to that date, and the sum of sixty-three thousand dollars (\$63,000.00) in cash, and in the event of his so doing, I hereby bind myself, for myself, and as the attorney of the said Lizzie McNeill, to surrender to the said W. A. McNeill the said thirteen hundred and eighty (1,380) shares of McNeill Bros. stock, and failure on the part of the said W. A. McNeill to make the said tender by the 1st day of May, A. D. 1901, shall work a forfeiture of this option after said date.

"Signed this 30th day of March, A. D. 1901.

"Witness:

"P. S. It is understood and agreed that the stock of goods at Evans, Ia., known as the American Supply Company, belongs to the American Coal Company, and is to be treated as a part of the assets of the said corporation. W. T. Phillips."

W. A. McNeill exercised his option on May 1, 1901, and took over the stock described in the foregoing instrument, and transferred the property of the American Coal Company and the American Supply Company, with the \$63,000. to Phillips, who paid the plaintiff Lizzie McNeill the sum of \$80,000.

Many issues are raised in the petition filed September 8, 1914. Only one appears to remain, and that concerns the transfer of the 800 shares of stock to W. A. McNeill, at about one fifth of its value, as is alleged. Plaintiffs say that a fiduciary relation existed between W. A. McNeill, as presi-

dent of McNeill Bros., Inc., and Lizzie McNeill, a shareholder, and that the former violated his duty to make full disclosure of value before dealing with the latter, and in not doing so, was guilty of fraudulent concealment.

Without setting out the needlessly voluminous pleadings, we are of opinion that this issue, as well as that said McNeill occupied such relation because of being executor under the will of her husband, was raised.

It appears that there were three brothers, a sister, and a half-sister in the McNeill family. The youngest, Hobart W. McNeill, was a man of large business capacity, possessing a genius for promotion, especially in mining enterprises. His brothers, W. A. and James F. McNeill, were men of ordinary ability, and it is likely that they acquired riches through the sagacity and foresight of Hobart. The sister married one Little, one of whose children was E. L. Little. Hobart was married to the plaintiff Lizzie McNeill in 1869. He appears to have undertaken to practice law for several years, then developed into a telegraph operator, and later became owner and manager of coal mined in Mahaska County. After serving as assistant manager of the Chicago, Milwaukee & St. Paul Railroad Company for a time, and thereafter residing in Austin, Texas, and Long Beach, New Jersey, he returned to Oskaloosa in 1883, where he erected a dwelling, and resided until 1886. Two children were born to them, one dying in infancy, and the other, one of the plaintiffs in this suit, Annie McNeill Birks, was born in 1873. In 1884 or 1885, E. L. Little, his niece, became the stenographer or secretary of H. W. McNeill. He had previously paid her expenses for two years at a boarding school, and for a course at a business college. She accompanied him to Chicago and Newark, New Jersey, where he was engaged in some business enterprises, and in 1886, to Seattle, Washington, where, save for a short time at Anthracite, Canada, he resided until his death, and she continued as his secretary.

The daughter attended school at Boston, Massachusetts, during five years, her mother accompanying her. They passed the summers at Oskaloosa, except that of 1889 or 1890, when they visited H. W. McNeill at Seattle. In 1896, he purchased 35 acres of land at the tip of a peninsula extending into Lake Washington, and constructed thereon a large dwelling house and gardens suitable to the situation, at an expense of \$30,000, called the place Colonsay, and took title in the name of E. L. Little. Mrs. McNeill visited him there for some two or three weeks, in 1897 or 1898. He had not been in good health, though continuing to transact business, since 1888, and was seriously ill during the nine months preceding his death. Mrs. McNeill went to Seattle, during this last period, to see her husband, and remained at a hotel for a couple of weeks, in attempting to do so. W. A. McNeill met her at the train, and subsequently, with the assurance that her husband was so feeble that a visit by her would be injurious to his health. The attending physician testified that, at the instance of W. A. McNeill and E. L. Little, he confirmed this statement to her, and, after several fruitless efforts to see her husband, she returned to Montreal without doing so. Mrs. Williams, nee E. L. Little, denied having been a party to this transaction.

Mrs. McNeill, with her daughter, had continued to reside at Oskaloosa until the marriage of the latter to John Henry Birks, in 1894, and thereafter resided with the daughter at Montreal. She seems to have been with her husband about three months, altogether, in Seattle. The home, known as Park Place, at Oskaloosa, was in her name, and of the value of \$10,000. Some time in 1898 or 1899, decedent invited his daughter, with her son, to visit him; but, when about to go, she received a telegram, stating that the house had been closed. Both Mrs. McNeill and her daughter testified that the relations between H. W. McNeill and his wife, and also between him and his daughter, were agreeable at

all times, and that he occasionally visited them at Montreal. He had contributed \$15,000 toward procuring the daughter a home, her husband's father doing likewise, and at one time, he tendered her a check for \$50,000, which she refused, saying that he could invest it better. That he entertained an affectionate regard for his daughter and grandson, the record leaves no doubt. It is equally conclusive that he was somewhat estranged from Mrs. McNeill. She had been in ill health, about 25 years, and suffered a stroke of apoplexy in 1892. They seemed to have been content to live apart, for a long period prior to his death. The efficiency of E. L. Little in assisting this uncle in the transaction of his business is fully proven, as is the fact that she took care of him during his long illness. Whether she was paid a salary of \$250 per month for such services, or, as she testified, received no regular salary, is not very material, save as bearing on his apparent liberality in bestowing on her Colonsay and 200 shares of stock in McNeill Bros., Inc., and, after his death, an amount of stock equal to that left his wife, and through her, to the daughter. She explained that decedent had told her that:

"If I had remained at home I would have been married and would have had a home of my own, which was true, and that he felt that he should do that for me because I had been with him a good many years."

He had also given her his diamond ring, shortly before his death. The circumstance that his daughter had married into a family of great wealth probably was accorded some consideration in disposing of his estate. Such are the facts, and we may now dispose of the issues.

I. The daughter of H. W. McNeill was not remembered in his will or letters, save in the suggestion that the portion left to his wife would ultimately pass to her and her heirs.

The will was admitted to probate on March 13, 1900, and the estate fully settled December 16, 1901. This was conclusive as to the execution of the will, until set aside. Section 3296 of the Code. Any action to set aside the will was barred in five years from the time it was filed, so that any claim she may have was completely barred by the statute of limitations. *Willard v. Wright*, 81 Iowa 714; *Kelly v. Kelly*, 158 Iowa 56. We are not sure that Annie McNeill Birks makes any definite claim in the petition, and we pass on this as the only one under which she might demand a share in the property devised to W. A. McNeill. It follows that, as to her, the petition was rightly dismissed.

II. Shortly after the funeral of H. W. McNeill, W. A. McNeill went to the house of W. T. Phillips, where the widow and daughter were staying, and there read the will and what he termed the codicil, to those present. The record leaves no doubt that what he read in connection with the will was the letter heretofore set out, directing what he should do with the stock, and that this was the paper designated by him as the codicil. Counsel for appellant argued that the will, in connection with the letters, constituted him a trustee, and that the title to the stock would not pass to W. A. McNeill under the will. Conceding, without deciding this, it is to be said that the trust, if such there was, has been fully and completely executed. If he took title as trustee, then it was to transfer the stock, as in the letter directed; and the evidence is undisputed that he caused to be issued a certificate of the 800 shares of stock to Mrs. McNeill, February 15, 1900, nearly a month before the will was admitted to probate, and issued a certificate of a like amount of stock to E. L. Little on the same day, and also either caused to be issued to himself, as trustee for the eight minors who had been named by the decedent, certificates of

1. LIMITATION OF ACTIONS: setting aside probate of will.

2. WILLS: title individually (?) or as trustee (?)

stock, or directly to the minors, at that time. It is quite immaterial to the determination of this case whether he so did voluntarily, to meet the wishes of his brother as expressed in the letter, or as trustee, with the duty of so doing imposed upon him. The trust, if any existed, was fulfilled, and no duty remained to be performed by the alleged trustee.

III. W. A. McNeill qualified as executor March 14, 1900; and, as to any property he acquired as executor, and which belonged to or to which Mrs. McNeill would become entitled, he was undoubtedly to be regarded

3. TRUSTS: termination of fiduciary relation.

as trustee, and she, a *cestui que trust*. But all that she could be held to have been entitled to, i. e., the 800 shares of stock, passed to her, and after that, he then ceased to be trustee. Though the courts will scrutinize the transactions between an administrator and those entitled to the property of the decedent closely, even after the property has been turned over to those entitled thereto, in the absence of any additional showing, the relation of the executor or administrator to such property is not to be regarded as that of trustee. In the absence of circumstances showing the contrary, the fiduciary relationship ceased with the delivery of the property, and the executor or administrator is no longer a trustee with respect thereto. After the issuance of these certificates, the executor and Mrs. McNeill had no dealings whatever, and there is no ground for saying that, when W. A. McNeill purchased her shares of stock, a year later, he occupied a fiduciary relationship because of his being the executor of the estate.

IV. Negotiations for the purchase of the 800 shares of stock of Mrs. McNeill began with the proposition of W. T. Phillips as her agent or attorney. The contract giving

W. A. McNeill an option to purchase was

4. CORPORATIONS: fiduciary relation in purchase of stock.

dated March 30, 1901, and it extended to May 1st of that year. McNeill elected, on the last day, to make the purchase, and it

appears to have been consummated eight days later, by the assignment of the certificate of stock and its cancellation. McNeill, at that time, was president of the corporation, and Mrs. McNeill, a stockholder; and it is contended that he, as director and president of the corporation, owed her, as a shareholder, the duty of making a full disclosure of the financial condition of the corporation, as bearing upon the value of her shares of stock, before purchasing same of her; and that this he failed to do, as was his duty; and that, therefore, he should be held to account for the difference between the amount paid for these shares of stock and what they were actually worth at the time. In other words, it is contended that the doctrine of *Dawson v. National Life Ins. Co.*, 176 Iowa 362, should be applied.

The trouble with this contention is that Mrs. McNeill acted through W. T. Phillips as her agent, as appears to be conceded in argument, and, of course, his knowledge with respect to the transaction would be imputed to her. He had been a director of McNeill Bros., Inc., from the date of its organization, and then held 580 shares of its stock. On February 27, 1900, he was elected secretary and manager, and continued such until he resigned because of the transfer or cancellation of such stock in acquiring the American Coal Company in May, 1901. He testified that he "left the employ of McNeill Bros., January 24, 1900." James F. McNeill fixed the date as April 30, 1901. Phillips probably referred to work in the office of McNeill Bros., Inc., as he became manager of the American Coal Company at about the date mentioned by him. He had been associated with the brothers in one capacity or another for nearly 30 years. He was aware that McNeill Bros., Inc., was merely a holding company, and knew of all the companies the stock in which was held by McNeill Bros., Inc., and testified that he knew the value of the properties owned by the respective corporations. The books were open to his inspection

quite as freely as to the president of the corporation; and certainly, as to him, the doctrine of the *Dawson* case has no application. He either knew or had quite as good an opportunity for ascertaining the values of these several properties as did the president, and cannot be said to have occupied the position of a mere shareholder. We are not saying that he actually knew what the several properties were worth. He seems to have placed much reliance upon the reports coming in to McNeill Bros., Inc., and its books, and testified therefrom in connection with his inspection of the several properties. It is doubtful whether any of the officers fully realized their respective values, and it is doubtful whether W. A. McNeill was then any better informed than was W. T. Phillips, the agent of the plaintiff, concerning what the stock of this company was worth. Undoubtedly, as subsequent events disclosed, the shares transferred by Mrs. McNeill were of much greater value than was paid for them. According to the testimony of James F. McNeill, who was treasurer of the company during the 9½ years prior to the selling of the stock, the dividends averaged less than 6 per cent per annum. From the time of its organization until 1910, 19 years, these were a little less than 15 per cent per annum. W. A. McNeill was not active in the negotiations. The proposition was made by Phillips, and it was Phillips who gave an option to McNeill if he desired to purchase; and for all that appears, McNeill proceeded on the theory that he was dealing with a director of the company, acting for himself and as agent for Mrs. McNeill. Between these no fiduciary relation existed; and, as Mrs. McNeill dealt through this director, we are inclined to the view that she is in no better situation, and cannot be heard to complain of the omission of W. A. McNeill to advise Phillips concerning the condition of the company. What our conclusion might have been had Phillips acted without authority, we have no occasion to suggest.

If, however, a fiduciary relation were found to exist because of the relation of president and directors of McNeill Bros., Inc., any claim for damages was barred by the statute of limitations.

V. The defendants pleaded that action was barred by Paragraph 6 of Section 3447 of the Code, declaring that suit "for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery

5. LIMITATION OF
ACTIONS: con-
cealing fraud
not solely cog-
nizable in
equity.

* * * [must be brought] within five years" after the cause of action accrued. Code Section 3448 provides that:

"In actions for relief on the ground of fraud or mistake, and those for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved."

The fraud contemplated in this section has uniformly been held to be that "heretofore solely cognizable in a court of chancery." *Phoenix Ins. Co. v. Dankwardt*, 47 Iowa 432. If the action is at law, or the remedy is concurrent, the section has no application. *McGinnis v. Hunt*, 47 Iowa 668; *Carrier v. Chicago, R. I. & P. R. Co.*, 79 Iowa 80; *McKay v. McCarthy*, 146 Iowa 546. If, however, the party against whom the cause of action exists, by fraud or fraudulent concealment prevents such other from obtaining knowledge thereof, the statute will commence to run from the time the right of action is discovered, or might, in the exercise of reasonable diligence, be discovered. *District Twp. of Boomer v. French*, 40 Iowa 601; *Faust v. Hosford*, 119 Iowa 97; *Caffee v. Berkley*, 141 Iowa 344. The shares of stock were transferred to W. A. McNeill or to the company, and canceled prior to May 8, 1901. Phillips, as agent of Mrs. McNeill, and probably she, as well, was aware that McNeill Bros., Inc., was a holding corporation,—merely holding the stock of other corporations,—and that it was engaged in

no business except through other companies. Thereafter, the different corporations were operated as before, at least until disposed of, books were kept thereby, and reports made to McNeill Bros., Inc., remittances or deposits made by the several companies with the holding company, and moneys drawn therefrom. The books and papers, throughout all the years following the sale of the stock, were accessible. No claim of the perpetration of fraud by W. A. McNeill prior to his death, on November 6, 1913, was made. No relations, business or social, between him and the widow of H. W. McNeill or the daughter occurred after the sale of the stock. In fact, no effort whatever to conceal or cover up the transactions appears to have been made, and there is no showing whatever of any concealment of the alleged cause of action during over 13 years which elapsed between the sale of the stock and the beginning of this suit. It is argued, however, that, under the ruling of the last cited cases, W. A. McNeill fraudulently concealed the cause of action until about the time this suit was begun. If this was done, it was by silence throughout this long period. But his relation of quasi trustee toward the shareholder ceased with the transaction, and he was under no more obligation to confess the wrong, if one were perpetrated, than any other wrongdoer. The omission to disclose the facts while the trust relation existed was of the essence of the fraud alleged to have been perpetrated. This duty to disclose was not a continuing one, and to say that McNeill's silence amounted to fraudulent concealment would wipe out the limitation, by ruling that the vital element of the alleged fraud tolled the statute, and rendered it possible to maintain an action at any time during the silence of the wrongdoer, though that were the wrong necessarily in connection with the sale of the stock making up the cause of action.

In the cases last above cited, the agent had committed a fraud on his principal, and, of course, his silence as to what

he had done was a continuing breach of the duty of disclosing to his principal what he had done. Here, the relationship of the parties ended with the transaction. The breach of any duty owed to the shareholder was complete, and no obligation or liability rested on the president, other than that of restoring the difference in the value of the stock and the amount paid therefor. The cause was maintainable in law or equity, and we are of opinion that there was no fraudulent concealment tolling the statute under Section 3448 of the Code, and that the cause of action is barred by the statute of limitations.—*Affirmed.*

EVANS, GAYNOR, SALINGER, and STEVENS, J.J., concur.

LIZZIE DEWITT, Appellee, v. HANS LARSON, Appellant.

NEW TRIAL: Grounds—Newly Discovered Evidence—Discretion.

- 1 Ordinarily, the granting of a new trial for newly discovered evidence is largely a matter of discretion with the trial court.

NEW TRIAL: Grounds—Newly Discovered Evidence—Insufficient

- 2 **Showing.** The trial court is within its discretion in refusing a new trial for newly discovered evidence when the movant fails to negative negligence in sooner securing such evidence.

Appeal from Clay District Court.—D. F. COYLE, Judge.

APRIL 14, 1919.

Action at law to recover damages on account of an alleged assault. There was a trial to a jury, and a verdict for plaintiff. Thereafter, defendant moved for a new trial on the ground of newly discovered evidence. Motion denied, and from this order, defendant appeals.—*Affirmed.*

Cornwall & Cornwall and *Heald & Cook*, for appellant.

Buck & Kirkpatrick, for appellee.

WEAVER, J.—The sole question argued by appellant is raised by his assignment of error upon the trial court's denial of the motion for a new trial. Counsel concede that

the granting of a new trial on such grounds is ordinarily very largely a matter of discretion with the trial court, but contend that their showing in this instance is so clearly meritorious that the court could not deny their application without an abuse of discretion.

To an understanding of the essential force and effect of the motion, a brief statement of the case is necessary. The defendant, a widower, is the owner of a farm, on which he

employed the plaintiff's husband as a laborer. Plaintiff, with her husband, lived in the defendant's house, and boarded him. She alleges, and her testimony is to the effect, that, on July 5, 1916, while she was alone in the house, and her husband employed on a distant part of the farm, the defendant, who had been mowing weeds in the highway in front of the premises, entered the house, and made a violent and persistent assault upon her person, in an attempt to have sexual intercourse with her by force and against her will; that, while such assault and effort were still in progress, her husband, with another person, drove their team and wagon into the dooryard; and at the sound of their approach, defendant desisted from his attempt, and released her. She claims to have informed her husband at once of what had occurred, and on the following morning they refused to remain longer in defendant's service, and moved away from his house. The defendant, in pleading and as a witness, denied the truth of the charge.

According to plaintiff, the assault was committed soon after five o'clock in the afternoon, or somewhere between five and six. That the husband had been at work in the field during the day, and until about the hour mentioned; that

defendant had been cutting weeds in the road; and that plaintiff had been alone in her housework, are matters which are shown without dispute. The defendant swears, however, that he at no time and in no manner assaulted plaintiff, and avers that, when plaintiff's husband and his companion, one Skeels, came home that evening, he (defendant) was still at work in the road, and that they drove past him on their way into the premises. In this respect, he is disputed by both DeWitt and Skeels, who say that, when they drove into the yard, the team with which defendant had been mowing the road was standing there or in the barn, not yet unharnessed, and that, while they were engaged in putting out their team, defendant came out of the house.

Except the persons above named, no other witness was produced or examined on either side who claims to have seen the defendant or to have had any knowledge where he was, during the hour from five to six o'clock on that afternoon. In support of the motion for new trial, several affidavits were filed, stating, in substance, that two of the affiants, Nels Anderson and Freda Anderson, drove past the defendant's place, shortly after five o'clock on the afternoon in question, and, as they passed the house, they saw two men (presumably DeWitt and Skeels) driving into the yard, and at the same time, or immediately thereafter, they (affiants) also passed the defendant, mowing weeds in the road. While the motion was still pending, defendant filed other affidavits by James Spencer and his son, each to the effect that the affiants drove along the same road, about the hour of 5:45 P. M. of that day, and met DeWitt and Skeels as they were driving toward home, and within a short distance from defendant's house; and immediately afterward, they passed defendant himself, mowing along the road.

That this evidence would have been admissible if offered on the trial, as tending to support the defendant's denial of the plaintiff's story, is, of course, apparent, and, had the

trial court sustained the motion based thereon, we think the ruling would have been sustainable; but we are satisfied that the court was still within the bounds of its discretion in denying it. While defendant makes affidavit that he did not know of this evidence until too late to make use of it on the trial, there are some features of this denial which are not wholly satisfactory. For example, it seems hardly credible that these four different persons, one of whom was defendant's own son-in-law, should have passed by in his immediate presence and upon the same road where he was at work, without his seeing them, and if he did see them, or any of them, the importance of having their testimony must have been apparent to him from the outset. This action was begun within five days after the alleged assault, and the petition stating the alleged facts was promptly filed, and issue was joined thereon in time for the first term of court. Appellant nowhere states expressly, in testimony or in affidavit, that he did not see these persons who are now said to have passed him in the road at a time when it was of the highest importance to him to prove, if he could, that he was not in the house where the assault is alleged to have been made. If he did see them (and, as we have said, it seems hardly possible that he could have failed to see them, if the alleged newly discovered testimony is true), his failure to make it known to his counsel, or to find and subpoena the witnesses, all of whom appear to have been residents of the vicinity, tends very strongly to show at least lack of attention and diligence on his part.

In a certain sense, too, the proposed new evidence is, to a degree, cumulative only; though the writer of this opinion thinks that the merely cumulative character of newly discovered evidence should not always be a decisive consideration against a motion for a new trial, and especially in cases where the moving party is charged with a serious offense, and has been, without fault on his part, compelled to

go to trial, depending for his defense solely on his own uncorroborated testimony. It is enough, however, in the case now before us, to say that the showing of new and material evidence for the defense which could not with reasonable diligence have been produced on the trial is not sufficiently clear or convincing to sustain the defendant's exceptions, and the ruling appealed from is, therefore,—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

JAMES GARREN, Appellee, v. OTTUMWA GAS COMPANY, Appellant.

MASTER AND SERVANT: *Hidden and Lurking Dangers.* The "safe-place-to-work" rule is violated by the failure of the master to warn his servant of a lurking and hidden danger, *which is not ordinarily incident to the carrying on of the work*, of which danger the master had knowledge, and of which danger the servant did not have knowledge.

PRINCIPLE APPLIED: A metal boiler or "tar head," 3 feet in diameter and 10 feet high, in which tar was melted, rested on a cement foundation, and extended upward through the room and into the room above. The top of the boiler was bell-shaped, into which a lid was fastened by simply calking it. A steam pipe, connected with a distant boiler, entered the top of the tar head. A faucet, through which tar was drawn, was located at the bottom of the boiler. When steam was turned in at the top to melt the tar, danger of explosion existed, unless a vent valve, also located at the top, was opened. An employee, who had never before worked around the boiler, and who had no knowledge of its construction, except what he could see while working in the lower room, was directed to draw tar therefrom. Without the knowledge of the employee, steam was turned into the boiler by the superintendent of the works, without opening the safety vent. The servant had no warning of the danger of explosion. The boiler exploded, and the employee was injured.

Held, the master violated his duty in not warning the servant.

TRIAL: *Excessive Verdict*—\$5,000. Verdict of \$5,000 for personal 2 injuries sustained, as nonexcessive.

Appeal from Wapello District Court.—C. W. VERMILION,
Judge.

JANUARY 17, 1919.

REHEARING DENIED APRIL 14, 1919.

ACTION for damages for alleged negligence. There was a verdict and judgment for plaintiff, and the defendant appeals.—*Affirmed.*

McNett & McNett, for appellant.

L. L. Duke and W. S. Asbury, for appellee.

PRESTON, J.—1. Plaintiff alleges, substantially, that, on November 17, 1913, he was an employee of defendant's, engaged as a laborer in digging ditches and doing work outside of defendant's plant; that, in the manufacture of gas, defendant used a metallic boiler, or tar receptacle, about 10 feet long and 3 feet in diameter, sitting upon end upon a cement foundation about 3 feet high; that the top on said boiler or tar tank was merely a lid, calked around the edges, with no rivets to hold the same on, and that said tar head was not securely fastened to the foundation; that a few inches from the top of said boiler was a steam inlet, and near the bottom on the side was a faucet outlet in said boiler, for the purpose of letting tar out of it; that said steam inlet came from a large steam boiler, carrying a high pressure; and that steam was so conveyed to the tar boiler for the purpose of warming the tar to such a degree that the tar would run out of the lower inlet or faucet; that, about said date, plaintiff was directed by his foreman to take a wheelbarrow and catch tar that was to be run out of said tar boiler; and that he obeyed said instructions; that plaintiff had never before worked around said tar boiler, and did not, at the time, know that it was connected with the large

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hidden and
lurking dangers.

steam boiler, nor did he know of the nature of the construction of the tar boiler; that he placed a wheelbarrow under the faucet in said tar boiler; that one Weisengerber, the superintendent over said gas plant, ordered that more steam be turned into said tar boiler; and that, a few minutes after said order, an explosion occurred, which blew the top off the tar boiler, the entire tar boiler falling off its foundation, causing the steam and hot tar from said boiler to come in contact with plaintiff's face and body and into his eyes; that, as a result thereof, plaintiff's eyes have been affected in such a way that he has, ever since said explosion, been compelled to wear glasses; that his eyes continually water and annoy him; that the lights hurt him; that the nerves in his left eye and back of his head continually give him pain; that he cannot sleep, from the effect upon his nervous system; and that said injuries to his eyes are permanent.

The grounds of negligence alleged are: (1) That defendant did not furnish plaintiff a reasonably safe place to work, in that the top of said tar head was insecurely fastened, and said tar head insecurely fastened to the foundation; (2) in connecting said tar boiler with such a large steam pressure boiler; (3) in ordering plaintiff to work in a dangerous place without warning plaintiff of the danger, when it knew that plaintiff was not acquainted with the part of the plant where he was ordered to go; (4) in turning on, or ordering to be turned on, such a high pressure of steam upon such a small tar boiler without warning plaintiff of the danger; (5) that defendant did not warn plaintiff of the danger arising from the fact that a vent pipe in the top of the tar head was closed at the time he was ordered to take tar therefrom; (6) in failing to open said vent in said tar head before said explosion.

Defendant answered in general denial, and expressly denied there was any negligence connected with the construction, kind, or condition of said tar head or boiler, or

that there was any defect therein, or that the alleged explosion and damage were caused or contributed to thereby; in a like manner denies that there was any negligence in connecting said tar head with the steam boiler; denies that plaintiff was ordered into a dangerous place, or that his injury, if any, was caused or contributed to thereby; denies that the explosion and damage occurred by reason of any alleged negligence connected with or pertaining to the kind, character, or condition of defendant's machinery or equipment, as alleged; says further that whatever negligence, if any, caused said explosion was that of a fellow servant of plaintiff's, the said Weisengerber, for whose acts or negligence, if any, defendant is not responsible.

There was a motion for a directed verdict for defendant at the close of all the evidence, which was overruled.

The trial court instructed, among other things:

"4. There is no sufficient evidence to warrant a finding that there was any negligence in the construction of the tar head, or the manner in which it was set, or in the manner in which the top was fastened on, or in the connection or manner of its connection to the steam boiler, and hence, all such charges of negligence are withdrawn from your consideration.

"5. While it is the duty and obligation of a master to furnish a servant with a safe place to work, and with safe appliances, yet, where an accident happens from carelessness in their use, or the failure to use them on the part of a servant, whereby injuries are received by a fellow servant in the same common employment, such carelessness or negligence is not chargeable to the master, no difference what may be the grade or authority of the servant.

"6. And the mere failure, if any, on the part of an employee of the defendant, engaged with plaintiff in the common enterprise of removing the tar from said tar head, to open the steam vent pipe on said tar head, would be the

act of a fellow servant, for which the defendant would not be liable, and hence that charge of negligence is withdrawn from your consideration.

"7. The burden of proof in this case is upon the plaintiff, and before he can recover, he must establish by the greater weight or preponderance of the evidence each and all of the following propositions:

"First. That the defendant was guilty of negligence in ordering plaintiff to work in a dangerous place, and in failing to warn him of the danger arising from the fact that the vent pipe of the tar head was closed.

"Second. That such negligence was the proximate cause of the injury to plaintiff.

"Third. That the plaintiff was not himself guilty of any negligence that in any manner contributed to his injury.

"8. There is a duty on the part of a master to exercise ordinary care to provide his servants a reasonably safe place in which to work, but that principle is not applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. But if the master had knowledge of, or by the exercise of ordinary care on his part he ought to have known of, an unusual, new, and latent danger, not incident to the ordinary manner of doing the work, and which the master knows, or by the exercise of ordinary care ought to know, the employee is ignorant of, and does not appreciate, then it is his duty to warn the employee thereof.

"9. If defendant's superintendent, in charge of the operation of said gas plant and said tar head, knew, or by the exercise of ordinary care and diligence on his part ought to have known, that steam was turned into said tar head, while the steam vent thereon remained closed, and that thereby there arose the danger that said tar head might explode or burst, and that such danger was a new, unusual,

and latent danger, and one not incident to the ordinary operation of said tar head, and knew that plaintiff was working in a place of danger from such cause, and was aware, or in the exercise of ordinary care ought to have been aware, that plaintiff was ignorant of and did not appreciate such danger, then it was his duty to warn plaintiff thereof; and if he failed to do so, this would be negligence on defendant's part.

"10. If you find, by the greater weight or preponderance of the evidence, that the plaintiff was directed by the defendant's superintendent to work about the tar head in question, by wheeling the tar away therefrom, and that the fact that he was so engaged was known to the person or persons in charge of the operation of said plant, and that the steam was turned into said tar head without opening the steam vent, and thereby the plaintiff was subjected to an unusual danger, and one not ordinarily incident to the work in which he was engaged, and of which he was ignorant, and that such facts were known to the person or persons in charge of and directing the operation of said gas plant and said tar head, or by the exercise of ordinary care and diligence ought to have been so known by them, or one of them, and such person or persons gave plaintiff no warning of such danger, this would be negligence chargeable to the defendant company. But if you fail to so find, you need go no further, but should return your verdict for the defendant.

"13. If you find the defendant guilty of negligence in failing to warn the plaintiff of danger arising from a failure to open said steam vent, and that such negligence was the proximate cause of the injury to plaintiff, and that the plaintiff was free from contributory negligence, then your verdict should be for the plaintiff; but if you fail to so find, your verdict should be for the defendant."

The defendant offered instructions, some of which were

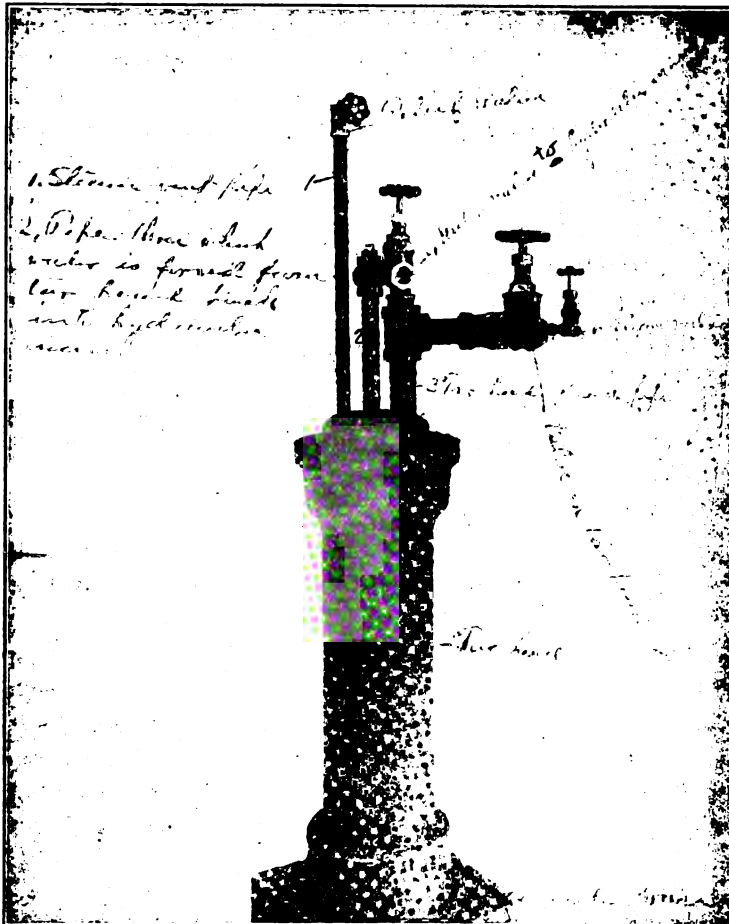
embodied in the instructions given by the court; but on the question of warning, defendant's offered instructions, which were refused, were to the effect that such charge of negligence is not supported by the evidence, and withdrawing that ground, and another as follows:

"6. The plaintiff, in his amendment to his petition, and as a ground of negligence, alleges: 'That the defendant was negligent in not furnishing the plaintiff a safe place in which to work, in that it did not warn the plaintiff of the danger of the fact that a vent pipe in the top of the tar head, or tar receptacle, was closed at the time he was ordered to take tar from said tar head.' You are instructed that the failure to open, if such is the fact, the vent pipe at the top of the tar head, was the act or omission of a fellow servant of the plaintiff, for whose act or omission or negligence the plaintiff is not entitled to recover."

A cut of the tar head and its parts is here set out, in order that there may be a better understanding of the evidence, and to save more particular descriptions thereof.

The issue as to negligence is narrowed,—and, as we understand it, it is so conceded by counsel for appellant, and by counsel for appellee, so far as defendant's appeal is concerned,—to the question as to whether defendant was negligent in ordering plaintiff to work in a dangerous place, and in failing to warn him of the danger arising from the fact that the vent pipe of the tar head was closed.

The record is quite voluminous, and we shall attempt to confine the evidence, as much as may be, to that issue. There is evidence that, on the date in question, plaintiff was directed to remove some tar from the tar head, which was located in and was a part of the gasworks. He had theretofore been employed on outside work, in the capacity of digging ditches and performing manual labor outside the plant; he had never at any time performed the work of removing this tar, and had no knowledge of how such work



should be performed, or the danger attached to it; he did not know the construction of the tar head, and did not know that it was connected with a steam plant, and liable to explode. He was directed to do the work of carrying away the tar from the tar head by Mr. Tunwall, who was one of defendant's superintendents, and with power to employ and discharge help. Tunwall was under Weisengerber, who had

like authority as to employment and discharge of men; they were in charge of the work, and were present on the second floor, where the benches and top of the tar head were, and within a few feet from plaintiff, at the time the explosion occurred. Plaintiff was then at work at the outlet valve at the bottom of the tar head where it rested upon its foundation. There is evidence that one or the other of these men either turned on the steam or directed it to be done. Tunwall testifies that he did not do so, and that he did not see who turned it on. Appellant concedes that, though the proof is not entirely positive, yet, taking the evidence all together, it was sufficient to justify the jury in finding that Weisenberger did turn on the steam into the tar head, and failed to open the steam vent, which resulted in the explosion. Appellee contends that they were both vice-principals. Weisenberger did none of the manual labor, but directed others what to do and when to do it, and directed Tunwall, as well as the others. There is evidence that the steam pipe leading into the tar head and the relief valve were situated at a point above the second floor, and not subject to observation from the point where plaintiff was standing with his wheelbarrow, preparatory to doing the work which he had been directed to do. The top of the tar head was bell-shaped, for a plug to sit in. The steam was conveyed to the tar head for the purpose of warming the tar so that it would run out of the lower inlet. Though there is no direct evidence on the point, appellee argues that the purpose of turning the steam on without opening the vent pipe was to more quickly heat the tar, so that it would run. Plaintiff had never done any of this tar work before; he was scooping the tar out of the box into the wheelbarrow and hauling it out, and had hauled two barrow loads, and had been at that work about an hour before the explosion. Plaintiff had never been on the second floor and examined the part of the tar head and its attachments which were above the second floor; did not

know that the steam was connected with the tar head. It appears that Tunwall and Weisengerber were in a position where they could easily have determined whether or not the vent was open. Tunwall says he presumed that it was open, but that it was no part of his duty to see that it was; he made no effort to find out whether it was open. He says that Weisengerber was at the head of this and was supposed to take care of that, and that no one, so far as he knew, made any effort to find out whether it was open. Weisengerber was not a witness. Tunwall testifies that he knows of no one except Weisengerber who could have turned the steam on, or who opened or failed to open the vent. Another witness testifies that Tunwall, Weisengerber, and his assistant went upstairs together, and were there at the time of the explosion, and that the steam commenced coming into the tar head after they went upstairs. There is testimony that, about fifteen minutes before the explosion, Weisengerber wanted to know of Tunwall if the steam was melting the tar, and he said it did not seem as though it was melting very fast. He said, "Well, we will put on a little more steam," and Tunwall said: "No, sir, I think it has enough steam. We don't need any more in there. That is all it will stand." It is conceded by appellant in argument that, without dispute, the evidence shows that the cause of the explosion was the turning of steam into the tar head without at the same time opening the vent pipe, and that the steam pressure forced off the top of the tar head, tipping it over. No warning was given plaintiff that the steam was to be turned into the tar head in the manner in which it was turned in.. Appellee's contention is that the explosion was a terrific one. It appears that, after the explosion, the tar head leaned on its foundation over against the wall; one pipe was blown over to the coal car from which they had been shoveling coal, close to 24 feet; this pipe was a 6-inch pipe, 4 to 6 feet long; the 6-inch valve attached to shut the tar

off from the hydraulic main was blown to the top of the roof, and stuck there. The roof was 20 feet or more above the tar head. Immediately after the explosion the room was filled with steam. The steam boiler was 125 or 150 horse power, 16 feet long, by 6 feet, encased in brick. It ordinarily carries a pressure of about 100 pounds. The machinery in the plant was operated by means of this boiler. The tar head was broken loose from the steam pipe. The tar head was also held in place by a 6-inch pipe that came out of the hydraulic main and fastened on the tar head, and a 2-inch water pipe, and a 3-quarter-inch steam pipe. The tar head broke loose from both of those. Tar was scattered all over the floor, according to some of the testimony, and scattered on the wall. Tar was sprinkled all over plaintiff's clothes, both his hands and face. There was lots of steam in the room immediately after the explosion, and before the steam was cut off. Other workmen were working in the building, one man working with plaintiff at the same work, until a minute or two before the explosion. The stoker was working about 25 feet distant; others were working on the second floor. Such, in a general way, is a brief statement of the evidence bearing upon the questions presented.

As said, the controlling feature in the case, so far as any right of recovery is concerned, is whether, under the evidence, any duty rested upon the defendant to warn the plaintiff. This question was submitted to the jury, under the instructions before set out. The trial court seems to have taken the view, and so instructed, that, so far as the other grounds of negligence alleged were concerned, and the mere act of turning on the steam without opening the vent, such acts were the acts of a fellow servant; but that, because of the latent danger not incident to the ordinary manner of doing the work, known to defendant, and unknown to plaintiff, should the jury so find, then there was a duty resting upon the defendant to warn, and such duty was masterial

and nondelegable. It is not so clear, from a reading of the instructions, that the court intended to instruct that, as to the duty to warn, Weisengerber was a fellow servant, but rather, it refers to him as the defendant's superintendent in charge of the plant and tar head. Appellee contends that, under the circumstances, there was a duty resting upon the defendant to warn plaintiff, and that, therefore, it is not material whether Weisengerber and Tunwall were fellow servants or vice-principals. It is doubtless true that the tar head, operated as it was, with the steam turned on and the vent closed, might have been operated for a longer or shorter time without exploding, or it might not have exploded at all. As we read the evidence, it does not show that an explosion would necessarily follow. An explosion was more likely if the vent was closed, with the steam turned on. Operated in that manner, it was more dangerous. The jury was justified in finding that this fact was known, or should have been known, to the defendant, and that plaintiff did not have such knowledge. It seems to us quite clear that the tar head, operated in that manner, made the place an unsafe one for plaintiff to work. Appellant argues that, had plaintiff been warned that the steam was about to be turned on without opening the vent, and that there would be danger from confinement of the steam, and that an explosion might take place, it would have had the effect only of causing plaintiff to run out of the building, to escape possible and threatened danger; or, had he stayed at work after the warning, and been hurt, he would have been guilty of contributory negligence. This seems to be the theory of the high explosive cases: that, where a powder blast or the like is about to be exploded, and where it is known that an explosion will take place, the warning in such case gives employees an opportunity to get out of the way. Such cases are not precisely in point perhaps, but are somewhat analogous. The place in which plaintiff was working did not become unsafe during

the progress of the work, nor was he helping to create the unsafe conditions, in the sense that a workman would in digging under a bank of earth, or a coal miner of an entry being driven, and the like, so that the place became dangerous during the progress of the work, either necessarily or from the manner in which the work is done. The reference by the court to this matter was in connection with the proposition in regard to an unsafe, new, and latent danger, not incident to the ordinary manner of doing the work. That part of the instruction in regard to danger from the progress of the work may not, as before indicated, be strictly applicable to the evidence, but it was favorable to the defendant, and, therefore, not prejudicial. Appellant cites and relies upon *Galloway v. J. W. Turner Imp. Co.*, 148 Iowa 93; *Helgeson v. E. B. Higley Co.*, 148 Iowa 587; *Scherer v. Alfalfa Meal Co.*, 159 Iowa 683; *Fredericks v. Fort Dodge B. & T. Co.*, 151 Iowa 637; and cases from other jurisdictions, to the proposition that the doctrine of warning is not applicable to the instant case, and that the charge of negligence, based upon the failure to warn, should not have been submitted to the jury, and that the doctrine of warning should not have been submitted. Appellant also argues that the facts which warranted the application of the doctrine of warning in the case of *Hendrickson v. United States Gypsum Co.*, 133 Iowa 89, and like cases, where high explosives are used, and where the duty to warn is held to be material, are so essentially dissimilar to and unlike the facts of the instant case as not to make the doctrine of the *Hendrickson* case applicable to the case at bar (citing again the four cases last cited, and *Peterson v. Chicago, R. I. & P. R. Co.*, 149 Iowa 496, and *Manton v. H. L. Stevens & Co.*, 170 Iowa 495). Counsel quotes quite extensively, from the *Galloway* case, which discusses and distinguishes the *Hendrickson* case. Counsel, in argument, select and italicize certain parts of the discussion in the opinion in the *Galloway* case, and thus

seek to apply the principles laid down therein to the instant case. We think the *Galloway* case may be readily distinguished, because of its facts, from the instant case. Some of the distinctions will be noticed. First, it was said in the *Galloway* case that:

"The underlying thought of the opinion in that [*Hendrickson*] case was that the method of use of high explosives about that mine rendered the whole place unsafe, and that it left no means to the workmen to protect themselves while remaining in their place of work, and that, therefore, the master had no right to convert the place of the workmen into a place of danger, by such use of high explosives in blasting, except as he assumed the duty precedent, to give notice of the proposed explosion, so that the workmen could withdraw from the place of danger so created."

The opinion continues that, in such a case, the use of high explosives is conditioned upon the previous notice or warning for the purpose of enabling the workmen to withdraw. In the instant case, no means were left to plaintiff to protect himself while remaining in his place of work; and defendant, in the instant case, concedes, as before stated, that the only thing plaintiff could have done, had he been warned, would have been to withdraw. There is this similarity, too, between the instant case and the *Hendrickson* case, that the whole place was made unsafe, at least to those working in the vicinity where plaintiff was working. The *Hendrickson* case is, of course, stronger in its facts than the instant case; for there high explosives were used, and it was the purpose to explode a charge. It was said in the *Galloway* case, at page 101, that defendant owed plaintiff the duty of warning against such dangers as were unknown to him, and were known, or should be known, to the master. It was further said in the *Galloway* case that plaintiff was experienced in his work, having been engaged in it for nearly four years, and that his place of work was in a ditch, be-

hind the machinery; that the place presented no inherent danger, even when the machinery was in operation; that the starting of the machinery did not require the plaintiff to leave his place or his work, as a means of safety; that his injury resulted, not because of any particular danger inherent in his place of work, but because, at the time the machinery started, he stood with one foot in or over the bucket of the machine,—it was simply one of those details of method of doing his work which he himself adopted, and, by all of the authorities, such details are beyond the foresight and control of the master; that, because of these facts, the plaintiff's place of work was not unsafe, within the meaning of the law; that the master did not owe the plaintiff the duty of warning against the danger of putting his foot in the bucket; that this was as obvious to the plaintiff as it could be to the master, and a possibility that Galloway's fellow servant, Webster, might negligently start the machine without a signal was as manifest to the plaintiff as it could be to the master; and that it was also a changing detail of the progress of the work. Summing up the matter, the court said that, under the evidence, the master had furnished a safe place to work, and had furnished proper machinery appliances and experienced and competent fellow servants, and had promulgated suitable methods and rules of operation. In the instant case, there was inherent danger when the machinery was in operation, in the manner in which it was operated; plaintiff's position and work were not one of those details of method adopted by himself; plaintiff was inexperienced in the work he was engaged in at the time he was injured; and the danger of operating the machinery with the steam turned on and the vent closed was not as obvious to him as to the defendant; nor do we think it can be said that it was a changing detail of the progressing work. Other distinguishing facts between the *Galloway* and the instant case might be given, but with what has been

said, it is sufficient to say that the principles therein stated do not apply. In the instant case, plaintiff's danger did not arise solely from turning the steam on with the vent closed, but also from the operation of the tar head in that manner without informing him of the danger. In the *Scherer* case, plaintiff was injured by the starting of a feed cutter, without warning to him, while his hand was exposed to danger from the revolving knife, and it was held that the case was ruled by the *Galloway*, *Helgeson*, and *Peterson* cases. In the *Scherer* case, plaintiff was examining an ensilage cutter, and a fellow servant, without signal, set the motor in motion that operated the cutter, causing plaintiff's injury. The case discusses the *Helgeson* case, where the plaintiff was under like, but no greater, duty to give warning, and it was said that it was not a case where defendant furnished an unsafe place to work. The place became unsafe only when an employee, with proper instructions, failed to give warning; and the place did not then become unsafe to everyone in the building, but only to one who was about to use the elevator, in which respect it was pointed out that there was a difference in such a case, from mining cases, where high explosives were used, which makes the place unsafe to all. There was but little discussion of that case, other than to quote from the *Galloway* and other cases, and the statement that the case was ruled by those cases. In the *Fredericks* case, at page 642, the principle was recognized that it was plainly the duty of the master to warn his employees of new and latent dangers, and that this duty cannot be delegated to another, in such a manner as to relieve the master from the results of nonperformance (citing *Schminkey v. T. M. Sinclair & Co.*, 137 Iowa 130, 133). The *Fredericks* case also quotes from *Hardy v. Chicago, R. I. & P. R. Co.*, 149 Iowa 41, 45, 46, saying that the effect of the order was to require plaintiff to work in a situation exposed to a peril not theretofore encountered, nor, in so far as ap-

pears, contemplated. Not every direction with reference to the progress of the work, even when given by a superior servant, is to be regarded as coming from the master, as appears from the authorities relied upon by appellant; but where the effect of the peremptory order of a person in complete control is to place the employee in a place of great peril in which to perform his duties, the decisions are conclusive that the principal will be held responsible for the act as non-delegable (citing a number of cases). The *Fredericks* case was decided and reversed on the ground that the defendant had assigned a man to the duty of warning those shoveling in the pit from any danger from falling or protruding pieces of clay, and the holding was (Mr. Justice Weaver dissenting) that what the person who was assigned to warn the others did, was connected with, and quite as essential to carry on the work, as was that of shoveling. The court said that, because all were engaged in the common enterprise of removing the clay, there was no difference in principle between that case and other cases holding that one who is working in a gravel pit or in a trench, assumes the risk of the falling of material which is loosened and comes down as the result of the ordinary operation of excavating, and that it was not the duty of the employer, having half a dozen men at work in a clay pit, to continue his supervision over them, with reference to the ordinary operation of bringing down and loading the clay. So it might be said of the instant case, in so far as it involved the ordinary operation of plaintiff, in drawing off and hauling away the tar. The cases cited by appellant, before referred to, are, in some respects, exceptional cases, and because of their facts, are distinguishable from the instant case. Appellee's proposition is that a failure of the employer to warn an employee of latent dangers known by the employer, or dangers that would have been known by the employer by the exercise of ordinary care, and which are not obvious and not known by the employee,

renders the master liable to a servant who has not been warned. In support of this proposition, they cite *Vohs v. A. E. Shorthill & Co.*, 130 Iowa 538; *Klaffke v. Bettendorf Axle Co.*, 125 Iowa 223; *Meier v. Way, Johnson, Lee & Co.*, 136 Iowa 302; *Long v. Johnson County Tel. Co.*, 134 Iowa 336; *Collingwood v. Illinois & I. F. Co.*, 125 Iowa 537; *Murray v. Chicago, R. I. & P. R. Co.*, 152 Iowa 732; *Spencer v. Uppdike Co.*, 158 Iowa 31; *Kerker v. Bettendorf M. W. Co.*, 140 Iowa 209; *Hamm v. Bettendorf Axle Co.*, 147 Iowa 681, 690; *Aga v. Harbach*, 140 Iowa 606, 611; *Anderson v. Pittsburgh Coal Co.*, 108 Minn. 455 (26 L. R. A. [N. S.] 624, Note 633); *Christian v. City of Ames*, 167 Iowa 468; *Beresford v. American Coal Co.*, 124 Iowa 34. See, also, *Hitchcock v. Arctic Creamery Co.*, 170 Iowa 352, 376.

We shall not review these cases. Some of them are cases where there was a failure to warn an inexperienced servant, and perhaps some where the employee was immature. Some of the cases seem to be quite in point: among them, the *Hitchcock*, *Klaffke*, and *Hamm* cases, and perhaps some of the others. The instructions in the instant case were in harmony therewith, and we are of the opinion that there was no error in regard thereto, or in overruling the motion to direct a verdict, and for new trial based thereon.

2. Appellant contends that plaintiff's injuries were not as serious as he claimed, and that he was malingering. Some of defendant's witnesses so testified, but they qualified

their testimony somewhat, upon cross-examination. There were a number of witnesses, both medical and lay, testifying both pro and con upon this subject. If the jury believed the plaintiff's witnesses, as they had a right to do, they were justified in finding that the plaintiff was seriously and permanently injured in his eyes, or one of them in particular, the sight of which was substantially destroyed. The eyes are watery and inflamed, and are affected by light. No

2. TRIAL: excessive verdict: \$5,000.

useful purpose would be served in setting out the evidence. The jury returned a verdict for \$8,750. The motion for new trial was sustained unless plaintiff would remit all above \$5,000. The remittitur was filed, and judgment rendered for the last-named amount. Appellant contends that the judgment is still excessive; but we are not disposed to interfere.

3. Plaintiff has appealed from the action of the trial court in withdrawing from the jury certain of the allegations of negligence, but states that he waives his appeal if there is an affirmance of the case on defendant's appeal. No error appearing, the judgment is—*Affirmed*.

WEAVER, EVANS, GAYNOR, and STEVENS, JJ., concur.

HARRY HAMILTON, Appellant, v. JOHN YOUNG, Appellee.

HIGHWAYS: Law of Road—Automobiles—Duty of Driver to Turn to Right—Negligence. It is the duty of an automobile driver, in meeting with another automobile, to turn to the right, if he can, and his failure in this respect is negligence.

Appeal from Cedar District Court.—JOHN T. MORRIS, Judge.

APRIL 14, 1919.

ACTION for damages caused by an automobile collision. Judgment was entered for the defendant for costs, upon a directed verdict in his favor. Plaintiff appeals.—*Reversed*.

C. J. Lynch, for appellant.

J. C. France, for appellee.

STEVENS, J.—This is an action for damages to plaintiff's automobile, caused by a collision with defendant's automobile. The accident occurred about 5 o'clock P. M., September 16, 1916, on an east and west highway, near and a

short distance east of its intersection with a north and south highway. According to the testimony of plaintiff, he approached the east and west highway from the north, at a speed of about 25 miles per hour, until immediately before turning the corner to go east, when he reduced his speed to 10 miles per hour. Defendant was proceeding west on the east and west highway, and was approaching the intersection near which the collision occurred. The view of the highways was obstructed by a field of corn, so that neither party saw the other, until plaintiff's car reached the east and west highway. Plaintiff testified that, when he first saw defendant, he was 40 or 50 feet east of the corner, traveling about 25 miles per hour; whereas defendant testified that he was traveling about 15 miles per hour, and that, when he first saw plaintiff's car, it was coming around the corner about 30 feet away. The beaten path from the north and south road into the east and west highway is apparently too close to the corner to permit cars to pass. The center of the intersection consists of a grass plot, and plaintiff claims that there is a mound, about two feet high, and numerous gopher mounds in that vicinity, making it impracticable, if not dangerous, for cars to travel around the center of the intersection. It is also conceded that the travel from the east is close to the corner, and that cars do not pass around the center of the intersection, as required by Section 1571-m18 of the Code Supplement, 1913. Other testimony was offered, tending to show that it was impracticable for cars to go around the center of the intersection.

There is considerable dispute in the evidence as to what occurred immediately before the collision. According to plaintiff's testimony, the front end of his car was about 26 feet east of the corner, and all of it, except the left hind wheel, outside and south of the traveled portion of the highway, at the time of the collision; whereas defendant claims that the collision occurred near the center thereof. Testi-

mony was also offered, tending to show that the traveled portion of the highway extended 25 or 30 feet north of the left side of plaintiff's car at the place of the accident. Defendant claims, however, that the rear end of plaintiff's car was not more than 2 feet east of the east line of the north and south highway. It is also conceded that, when within a few feet of plaintiff's car, defendant's car was turned toward the southwest, some of the witnesses testifying, for a distance of from 4 to 4½ feet. The left front wheel of defendant's car struck plaintiff's car, and there was some evidence tending to show that the front door thereof collided with the left lamp of defendant's car.

The principal question presented on this appeal is whether, viewed in its most favorable light, the issue of defendant's alleged negligence should have been submitted to the jury. The law prescribing the rights and duties of both plaintiff and defendant in the use of the highway is too familiar and well understood to require discussion. It was clearly the duty of the defendant to turn to the right if he could have done so—failure to do which would amount to negligence. Whether, had he done so, the collision would have been avoided, was a question of fact for the jury. Instead of turning to the right, he turned to the left. The jury could have found, from the evidence, that plaintiff crossed the entire width of the traveled portion of the highway to the south, and had proceeded at least 10 feet east, at the time of the collision. It is true that a very short time elapsed after the parties came into view of each other, before the collision occurred, but we think there was sufficient evidence of negligence upon the part of the defendant to require the submission of that question to the jury. Plaintiff followed the usual traveled portion of the highway, in passing the corner from the north and south into the east and west highway, and plaintiff's testimony that it was impracticable for cars to travel around the center of the intersec-

tion was, to some extent, corroborated by the testimony of other witnesses. On the merits of the controversy we express no opinion, and hold only that the court erred in sustaining defendant's motion for a directed verdict. On the question of defendant's negligence, reasonable minds, searching for the truth, might differ. Other questions argued relate to the admission of certain testimony offered by defendant, and objected to by plaintiff; but, in view of a possible retrial, where the same may not again arise, nothing can be gained by a discussion of these matters.

After a careful examination of the record, we are convinced that defendant's motion for a directed verdict should have been overruled, and for this reason, the judgment of the court below is—*Reversed*.

LADD, C. J., GAYNOR and PRESTON, JJ., concur.

OMAN G. HARTMAN et al., Appellees, v. FRATERNAL BANKERS
RESERVE SOCIETY, Appellant.

INSURANCE: Fraternal Benefit Associations—Collection of Premi-

- 1 **ums—Deposits in Bank.** The power of the secretary of a local fraternal lodge to collect premiums for life insurance carries with it the power to make reasonable arrangements as to the method of receiving such premiums, and a payment to a clerk authorized by him would be a payment to him, and he could arrange with the bank that payments could be made to him there by a deposit to his credit.

INSURANCE: Fraternal Benefit Associations—Collection of Premi-

- 2 **ums—Unreasonable Requirements.** Where the secretary of a fraternal lodge arranged with a bank that, as to premiums paid there to his credit by an insured, the bank should enter such payment on a receipt slip, placed in the pocket of a book furnished to the insured, and the tender of the premium was refused by the bank, wholly on the ground of failure to produce the book, which had been mislaid, the tender of the premium as made was good.

INSURANCE: Fraternal Benefit Associations—Collection of Premiums—Payment to Bank—Waiver of Rule to Produce Book. Where the secretary of a fraternal lodge had arranged that payments of premiums on insurance could be made by deposits of the same to his credit, upon production of a book for entries therein, and the bank refused a payment on the ground that the book, which had been mislaid, was not presented, the secretary's direction to receive the same waived the requirements of the production of the book for the evidencing of the payment.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

APRIL 14, 1919.

ACTION brought by the husband and daughter, beneficiaries of the insured, to recover on a benefit certificate issued by defendant on the life of the insured. Plaintiffs had judgment as prayed, and defendant appeals.—*Affirmed.*

Shull, Gill, Sammis & Stilwell, for appellant.

George W. Kephart, and *Kass Bros.*, for appellees.

SALINGER, J.—I. There is a considerable controversy over whether Ashley, the secretary of defendant's local lodge, had power to accept a premium from one who was suspended, knowing that the assured was then ill, and whether he had power, by acceptance of premium under those conditions, to work a reinstatement, and over whether Ashley had power to waive a default on part of the insured, and should be held to have done so. These questions are not for consideration until it be determined whether the insured was in default and needed reinstatement. If it may be held that insured effectively tendered all that was due, and in due time, then, whether sick or well at that time, she was never in default, never became suspended, and the question then becomes, not what the secretary, Ashley, had no power to do, but whether he had powers which effectuated that the tender in question was duly made, and in due time. Unquestionably, he had the power to receive the payment of

dues and assessments made in due time. In other words, a payment to him in time of all that was due the defendant would make the defendant liable, even if Ashley received the payment at a time when he knew the insured was sick. It remains to consider what the record shows without dispute as to tender made.

Ashley arranged with a bank that payment by those who were not in default might be made to him by depositing the same in that bank. Unquestionably, the power to collect such premiums carries with it the

1. **INSURANCE:**
fraternal benefit
associations:
collection of
premiums: de-
posits in bank.

power to make reasonable arrangements as to the mere method of receiving such payments. He could hire a clerk to receive and record such payments, and payment to the clerk would be payment to him. He could arrange with the bank that payments to him should be there deposited to his credit. The assured offered all that was due, and offered it in time, and made that offer to the bank designated by Ashley. The tender was declined. Ashley was communicated

with by telephone, he was told that the tender was declined, and told the bank to receive it. The only conflict is whether, in this telephone message, he was or was not advised that, when the last of two tenders was made, the assured had become ill. But that

is immaterial, if the tender was good. An insured who pays his premiums in time cannot be defeated because he is then or thereafter becomes sick and dies. What, then, is the avoidance? After the arrangement of paying at this bank had been in operation, Ashley arranged with the bank that thereafter, as to payments made to the bank rather than to Ashley personally, the bank should enter such payment on a receipt slip placed in a pocket of a little book furnished to the insured. When the tender in question was made, the book in question had been mislaid by the assured. The ten-

2. **INSURANCE:**
fraternal benefit
associations:
collection of
premiums: un-
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quirements.

der was refused wholly on the ground of the nonproduction of this book. If there had been an advance agreement that the assured should be bound by subsequently enacted by-laws, and the defendant had enacted a by-law that all payments should be ineffectual unless they were entered on a slip found in the pocket of such a book, such a by-law would be condemned for being unreasonable. Suppose Ashley had declared he would give no receipts for assessments and dues except upon a special blank printed for him in London, and the sum due was offered him on the last day for payment. Could the policy be avoided because, on that day, he was out of these blanks, and would be unable to get them for a week thereafter? Suppose Ashley had directed this bank to receive no premiums unless paid in by the insured in person. If the assured was lying in bed with two broken legs, could her certificate be avoided because she sent the money due by a messenger? Could payment of the certificate be avoided because of a failure to observe a requirement that proofs of loss must be made on yellow paper of a prescribed quality? Suppose the bank had taken the money tendered, and acknowledged its receipt on a piece of letter paper, would the certificate be avoided by that fact, where the insured was unable to produce the book and the receipts in the pocket thereof? So to hold would be to put what is merely the evidence of a fact above the fact itself. In *Midland Linseed Co. v. American L. F. Co.*, 183 Iowa 1046, there was an attempt to charge a carrier with conversion, because it had delivered a shipment without production of the bill of lading; and this, though it obtained the bill after the delivery had been made. We held that the production of the bill of lading was no more than evidence that the carrier was authorized to deliver, and that delivery before receiving evidence of such authority would not make the carrier guilty of conversion. In principle, it seems to us that this pronouncement governs this case.

But suppose the bank had no original authority to receive the money unless this book was produced. Appellant does not contend that Ashley transgressed his powers by directing the bank to give receipts in blanks placed in this book. He had permitted the bank to receive payments without the production of this book and its receipt blanks. Even as he could prescribe this method, he could abrogate it. Whatever else, then, may fail, when Ashley was advised that the insured was unable to produce the book, and that the bank was declining to receive payment for that reason, his direction that the bank receive the payment certainly waived this requirement of Ashley's as to the method of evidencing payments made at the bank.

In plain English, defendant wishes us to reverse the trial court for allowing a recovery on this certificate, although full payment was offered in due time, because a particular style of evidencing the receipt of this money could not be followed, on account of the fact that the book was lost by the insured.

We are profoundly impressed there is little room here for either argument or citation. We hold there was a sufficient tender made in due time, and that the certificate never lapsed. As said, this obviates any necessity for considering any of the other matters urged in the briefs. We are of opinion that the judgment of the district court must be—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

HAWARDEN SAND & GRAVEL COMPANY, Appellee, v. CHICAGO
& NORTHWESTERN RAILWAY COMPANY, Appellant.

CARRIERS: Carriage of Goods—Furnishing of Equipment—Special Contracts—Cooperage of Cars. Where there were no provisions for coopering of cars in the tariff schedule filed by a carrier relating to intrastate shipments, and said schedule did provide that "suitable boards will be furnished at all loading stations for use in coopering cars," a shipper could not recover for labor performed and nails furnished which were reasonably necessary to put cars in condition to transport sand and gravel; for, while it is the duty of the carrier to furnish suitable cars, under Section 2116, Code Supp., 1913, the statute does not make the carrier liable for such matters, and it is the duty of the shipper, in such a case, to refuse to accept the cars; and any allowance to the shipper, outside of that for lumber, would be an unjust discrimination, prohibited by Section 2128, Code, 1897.

Appeal from Sioux District Court.—WILLIAM HUTCHINSON,
Judge.

APRIL 14, 1919.

ACTION at law to recover an amount claimed to be due plaintiff for coopering cars furnished by the defendant to the plaintiff for the purpose of hauling sand and gravel. The cause was tried to the court, and judgment entered for the plaintiff. Defendant appeals. Opinion states the facts.—*Reversed.*

Van Oosterhout & Kolyn, James C. Davis, and George E. Hise, for appellant.

Clarence A. Plank, for appellee.

GAYNOR, J.—This action is brought to recover a certain sum, with interest. The plaintiff bases a right to recover on the fact which the evidence discloses, that it ordered certain cars from the defendant for use in transporting sand and gravel; that the cars furnished, when received by the plaintiff, required coopering, to make them perfectly fit for the purpose of transporting the character of sand that the plaintiff had for transportation; that, to put them in that con-

dition, plaintiff was compelled to do, and did do, a certain amount of coopering. It appears that, in coopering, the plaintiff used lumber furnished by defendant, but did the labor of repairing and furnished the nails. The action is brought to recover for the labor done and the nails furnished and used. The question here, then, is whether the plaintiff is entitled to recover for the labor performed and nails furnished, when the work was reasonably necessary to put the cars in condition to haul, without waste, the kind of commodity which the plaintiff had for transportation. It is conceded that the sand was loaded in these cars and transported to points wholly within the state of Iowa. It is also conceded that the defendant is a common carrier, and, during the year 1916, was engaged in both interstate and intrastate commerce; that the cars furnished were indiscriminately used by the defendant, both in interstate and intrastate commerce; and that the coopering for which suit is brought was done during the year 1916. The number of cars furnished, used, and coopered is not disputed, and it is conceded that the charges made are reasonable. The cars were furnished and used between the 27th day of May, 1916, and the 11th day of November, 1916. No claim is made for lumber used in coopering the cars. The lumber was furnished by the defendant at the loading station, and was used by the plaintiff in the work of coopering. It is apparent, therefore, that the only question presented for our consideration is whether the company is liable to the plaintiff for the labor performed and the nails furnished in coopering,—that is, in making these cars sand tight. Statements were furnished by the plaintiff to the defendant monthly, and refused by the defendant, on the ground that it could not allow the plaintiff for this coopering, because such work was not provided for in its tariff schedules; that its tariff schedules provided for furnishing lumber only; and that it could not, therefore, rightly allow plaintiff for labor or coopering, or for nails used in coopering.

It was conceded, and, for the purposes of this case, we assume it to be a fact, that certain exhibits, numbered 3, 3-a, 3-b, 4, 5, 5-a, 5-b, 5-c, and 5-d, and Exhibits Nos. 6, 6-a, 6-b, 6-c, and 6-5 are the approved classifications, rules, and regulations promulgated by the defendant company, published, filed with, and approved by, the Interstate Commerce Commission and the Iowa State Railway Commission; and that the same were legally in force and effect during the year 1916, and at all times complained of in the suit in controversy. These schedules fix the tariff rates to be charged, together with classifications, rules, and regulations published by the defendant company and in force during all the time plaintiff claims to have done the coopering.

There is no provision in the tariff so published for the coopering of cars by the company. It does, however, provide that it shall furnish lumber to its shippers for repairing and coopering cars. The tariff schedule reads:

"Suitable boards will be furnished at all loading stations for use in coopering cars."

These tariff regulations are binding on the company, and after being published, all shippers must take notice, and are presumed to have notice, of them. Therefore, we have the published schedule of rates fixed by the company and approved by the commissioners. The only duty which the defendant company assumed to any of its shippers in the published schedules is to furnish the lumber for coopering. That coopering may be necessary, and sometimes is necessary, we may assume. The cars used by the plaintiff were, at the time they were furnished, in condition for the transportation of ordinary commodities, and when not in condition for that purpose, were placed on defendant's repair track and repaired, before delivery to the plaintiff; but the repairs made upon them did not render them sufficiently tight and close to hold the character of sand shipped by plaintiff, without coopering. The evidence showed that the

work done by the plaintiff in coopering was reasonably necessary to make the cars so that they would hold sand and gravel such as the plaintiff shipped. The coopering consisted in nailing strips or boards over the holes or cracks in the cars. It does not appear where those holes or cracks were, or their size. The company furnishes lumber free to the shipper, so that he may cooper the cars whenever it appears to the shipper that the condition of the cars is not, by reason of slight defects, safe for the transportation of his particular commodity.

These are practically all the facts appearing in the record which are necessary to a determination of the real question before us.

To recapitulate: It will be noted that the plaintiff seeks reimbursement from the carrier for labor and material supplied by him in coopering, or making tight against leakage, cars to be loaded with sand in bulk, shipped from the loading point to destinations in Iowa. The entire shipment was intrastate. Plaintiff does not claim that the tariffs of the carrier lawfully applicable to intrastate traffic, provided that the carrier would reimburse the shipper for amounts invested in coopering cars. Plaintiff relies entirely for recovery upon Section 2116 of the Code of 1897, which provides:

"Every railway corporation shall, when within its power to do so, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch," etc.

It is the claim of the plaintiff that the cars were not suitable for the transportation of plaintiff's sand, and that, therefore, defendant failed in its statutory duty in the furnishing of cars, and that this failure justified the plaintiff in coopering the cars at defendant's expense, so as to make

them suitable for the transportation of the freight which it intended to transport upon the cars.

Before much of the legislation fixing the rights, duties, and obligations of railway companies to shippers and to the public generally, and before the creation of the Iowa Railway Commission and the Interstate Commerce Commission, it was found that railway companies were in the habit of discriminating between shippers and between localities, and these evils of discrimination worked great prejudice to the public. It was, therefore, thought advisable to compel the railway companies to publish terms and conditions under which shipments would be made; so they were required to classify freight and fix rates and regulations, and publish and file the same with the Railway Commission, so that all might be treated alike. The classifications and rates thus fixed are made binding upon the company in its dealing with all shippers. After making the classification and fixing the rates, they are not permitted to discriminate by giving one shipper or one locality an advantage over another. The classifications and rates must be uniform and general, and binding in the territory covered by the classification and rates so fixed and published. It was made a crime for a company to discriminate, or to grant privileges or immunities to one that were not granted to all, by the classification and rates fixed. The classification, rates, and regulations so fixed were presumed to be reasonable; and the courts, in dealing with shippers and carriers, were bound by the regulations so published. If these regulations are thought to be unreasonable or unjust or discriminatory, application must be made to the commission, and the regulations must be by it reviewed, and if found unjust, the company may be forced to do that which is right in the judgment of the commissioners, and to fix rates, classifications, or regulations which are fair and just and reasonable, and not discriminatory. The purpose of the act regulating commerce, while

seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism; and this purpose was accomplished by requiring the publication of tariffs, and by prohibiting departure from such tariffs, and prohibiting rebates, preferences, and all other forms of undue discrimination. These statutes are remedial, and are to be interpreted so as to accomplish the great public purpose which they are enacted to serve. By them there is a prohibition created against either directly or indirectly charging more or less than the published rates, and this prohibition is made applicable to every method of dealing by a carrier by which the forbidden result can be brought about. Any method adopted by which discrimination against shippers can be effected is condemned, and in *Armour Packing Co. v. United States*, 209 U. S. 56, it was said:

"The Elkins Act proceeded upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

This authority we cite for the purpose of showing that the railroad company is bound by its published tariffs; that it cannot, directly or indirectly, grant concessions or favors to any shipper that are not included in its published rates as concessions and favors to all, and for the further reason that any express contract made by a shipper to secure to itself an advantage over other shippers is absolutely void. It follows that, if the contract cannot be expressly made, the law will not imply such a contract and enforce it. The rates,

classifications, and regulations fixed and published by the company are binding upon the company and the shippers, as long as they remain unchallenged. They are presumed to be fair and reasonable. If they are thought unfair or unreasonable, or discriminatory, the law provides a method for their correction, and that is by application to the Interstate Commerce Commission, if affecting interstate commerce, or to the Railroad Commission of Iowa, if affecting intrastate commerce. No railroad company can grant to a shipper, and no shipper can demand of the railroad company, more than in its published rates it has declared a purpose to grant to all. This rule is absolutely essential to secure uniformity, and to avoid unjust discriminations. As bearing upon this point, see *Armour v. United States*, supra; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319; *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43.

The tariff schedule submitted to us here, which, it is claimed, governs the rights of the parties in this suit, makes no provision requiring the company to coooper any of the cars furnished to a shipper and accepted by it. All it agrees to do is to furnish the lumber for cooopering. This, then, is the rule announced by the company to all shippers, and it limits the duty of the company and the rights of the shipper. The company is not only not bound to do more than its published schedule requires it to do, but it is prohibited from granting to any shipper a concession that it has not disclosed its purpose to grant to all, nor can any shipper enforce a claim for more than the published schedule grants to all. He is presumed to have accepted the services of the defendant upon the terms provided in the published tariff schedule, and any contract to do other or differently than is provided in that schedule is void as being discriminatory, and against the purpose and policy of the law. See *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155; *Chicago, R. I. & P. R.*

Co. v. Cramer, 232 U. S. 490; *Kansas City So. R. Co. v. Carl*, 227 U. S. 639; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173; *Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662.

But it is contended by the plaintiff that the defendant failed to perform a *statutory duty*; that its statutory duty is to furnish *suitable* cars for the transportation of plaintiff's commodity; and that the cars were not suitable for that purpose. Whether these cars were suitable for the shipment of the particular commodity which plaintiff desired to ship in the cars, was a matter open to the plaintiff upon inspection. It received the cars for the purpose for which it desired to use them. It might have refused the cars, if they did not meet its needs. When it accepted the cars, it accepted them as complying with the requirements of the statute, knowing—because it is presumed to know the tariff schedule—that the company had only agreed to furnish the lumber for coopering, in the event the cars needed coopering. Before the plaintiff used the cars, it discovered that they needed coopering. It took the lumber, which defendant furnished for that purpose, and proceeded to do the coopering or repairing. It accepted the cars, knowing that they needed coopering, and it accepted them under the terms of the published tariff rate, knowing that they needed coopering, and that the defendant had only agreed to furnish the lumber for that purpose.

The schedules introduced in evidence were those relating to interstate commerce. It was stipulated that these rules and regulations were published by the defendant company, and filed with and approved by both the Interstate Commerce Commission and the Iowa State Railway Commission, and that the same were legally in force and effect during all of the year 1916. These shipments, however, were intrastate. The rule regulating interstate traffic may be regarded as applicable to Iowa intrastate traffic, either by pub-

lication, under Section 2128 of the Code, or by virtue of Rule 36 of the Iowa Classification No. 15, which requires the application to Iowa intrastate traffic, of carriers' rules, regulations, and classifications, as the same are published by the carriers in Circular No. 1 of Western Trunk Lines, when making lower rates than the board's schedule of reasonable maximum rates and classifications of freights, or when of advantage to the shipper. The board's schedule and classification, in and of itself, makes no provision as to cooping cars, so that even a provision for furnishing lumber is of advantage to the shipper. In Circular No. I-1 and I-m of Western Trunk Lines, in effect during 1916, it was provided that suitable boards would be furnished for cooping cars at loading stations. It appears that the schedule stipulated as being in force during the year 1916 was filed with the Iowa Railway Commission. It is not shown that any other rates were filed or published. The stipulation in the case—and we take it as a fact—is that intrastate shipments, that is, shipments in Iowa, are governed by the rules concerning which the stipulation is made, and which, it appears, are filed with the Iowa Railway Commission. ✓

Section 2128 provides:

“When any such common carrier shall have established and published its rates, fares and charges, it shall not charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this chapter shall file with the board of railroad commissioners copies of its schedules of rates, fares and charges established and published, and shall promptly notify said board of all changes made in the same.” ✓

We recognize, as a rule governing the rights of these

parties, that it was the duty of this carrier to furnish cars suitable to transport in safety all traffic which they held themselves out to carry. This is not only a statutory duty, but a common-law duty. Its duty is to furnish cars reasonably safe for carrying the commodity which it advertises itself to carry. If the car furnished requires much repairing, if its door posts are shattered or broken, or if it has holes or cracks through which the commodity would sift in transit, the shipper may refuse to accept it as complying with the requirements of the law governing the duty of a carrier. If the cars furnished are not sufficient for the purpose, it is the duty of the carrier promptly to furnish suitable cars on demand. The shipper is not bound to receive and load cars upon which he must expend labor and material to make them suitable to transport his commodity. Before carriers were placed under the jurisdiction of the Commerce Commission, and before they were required to publish rates and classifications of freights, and rules and regulations, and the terms on which they would deal with all shippers, repairing was charged to the carrier, and great difficulty and confusion arose in adjusting the claims of shippers against carriers for these repairs. It was then thought advisable, and the commissioners so held, that a maximum rate should be fixed per car to be paid the shipper for repairs. This maximum rate included all the expense incurred in cooping and repairing, and the material furnished in doing the work, and they were required to state the maximum amount that they would allow a shipper for this work, and that maximum rate governed and applied to all shippers, and was uniform and not discriminatory; and it was said that, upon fixing the maximum rates, it should declare distinctly and clearly in its schedule just what would be furnished at the expense of the carrier. So it was held that a carrier, in fixing its schedule of rates, should fix the maximum amount that it would allow, or what it would do in

the way of furnishing material for repairing or cooeping. If it furnished loose boards at one point, and at another point sectional doors, lath, paper, or burlap, it was guilty of unlawful discrimination.

We find in this case that, under the tariff schedule which it is agreed was in force during 1916, defendant had bound itself to furnish only lumber to its shippers in cooeping cars. To allow this plaintiff more than the defendant had agreed in its schedule to allow all shippers, would necessarily be discrimination in favor of this plaintiff, and not tolerable under the law, or the policy upon which the law rests. The company having furnished the lumber which, under its schedule, it had agreed to furnish, it had performed its full duty. When this shipper received the cars for the purpose of transportation, and found it necessary to repair or cooep them to meet the requirements of transportation of its particular commodity, it could have refused to accept them. If it accepted and retained them as they were, it could avail itself of the lumber which, under the tariff schedule, the defendant had furnished, and if more was required, bear the burden of it. Otherwise, there would be an unjust discrimination in this: The company would be furnishing more to plaintiff than it had agreed in its tariff schedule to grant to all carriers.

We think the court was wrong in holding the defendant liable for the labor done and nails used by this plaintiff in cooeping the cars, and the cause is, therefore,—*Reversed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

L. H. JONES, Administrator, Appellant, v. CITY OF SIOUX CITY, Appellee.

EVIDENCE: Allegation of Governmental Capacity. A municipality

1 which pleads that its officers, at the time in question, were acting in a governmental capacity, has the burden to so prove.

MUNICIPAL CORPORATIONS: Non-Governmental Acts. The act
2 of an employee of the city, while in the course of his employment, in conveying policemen to their beats, in an automobile owned by the city, is not, *in and of itself*, a governmental act. It follows that the city is liable in such case for the proximate negligence of the employee.

EVIDENCE: Issue on Capacity in Which Employee Acted. On the
3 issue whether an employee of a city was engaged in a ministerial or a governmental capacity, while employing a city-owned automobile to convey policemen to their beats, evidence is admissible that, at prior non-remote times, the said employee had employed said car in a ministerial capacity for the city.

MUNICIPAL CORPORATIONS: Ministerial and Governmental Neg-
4 **ligence.** A city which is proximately negligent in an act which is clearly non-governmental is none the less liable because such negligence became proximate while the city was doing a governmental act.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

JANUARY 17, 1919.

REHEARING DENIED APRIL 14, 1919.

ACTION for damages for the death of plaintiff's intestate. The action was brought against the city and against Ray Callander, an employee of the defendant city, who was driving the automobile at the time. No evidence was introduced on behalf of the defendant city, and, at the conclusion of the plaintiff's evidence, the trial court sustained a motion to direct a verdict in favor of the city. Callander defaulted, and the case was submitted to the jury as to him, and a verdict for \$13,000 returned. The plaintiff appeals from the ruling of the court, and the judgment rendered against him for costs. The opinion shows the facts more in detail.—*Reversed.*

Evans & Evans, for appellant.

Schmidt & Pike, for appellee.

PRESTON, J.—Deceased was struck by an automobile belonging to the city, and driven by its employee, Callander. The petition alleges substantially that the city was negligent, for that the car was being driven at a high, reckless, and negligent rate of speed; that the pavement of the street, at the place where the accident occurred, was in a rough and uneven condition; and that such defective condition of the street was a concurring proximate cause of the injury; and that the collision would not have happened if the street had not been in such defective condition; that the city kept Ray Callander, its employee, as driver of said car, well knowing that he was a careless and reckless driver; that the street was not properly lighted. We do not understand appellant to now rely in this court upon the last two grounds. It may be that the fact that the street was poorly lighted at the point in controversy would have a bearing upon the other grounds of alleged negligence, in operating the car at a high rate of speed over defective paving.

The answer of defendant city denies these allegations, alleges contributory negligence, and, in a second division, pleads affirmatively that, at the time of the collision, the motor car driven by Callander was the police car of said city; that said Callander and the occupants of said car were members of the police department, and were on duty as employees of said department at the time of the collision; that said officers were then acting under orders of their superior police officer at headquarters, and were answering a police call; that said city was acting in a governmental capacity, and performing a governmental duty, as an agent of the state, in enforcing police regulations in said city and state, and is not liable for the acts or alleged wrongs set out in plaintiff's petition. Plaintiff's reply denies that the auto-

mobile was answering a police call, and denies that the city was at that time acting in a governmental capacity, or performing a governmental duty.

The injury occurred on Fourth Street, which runs east and west, and is between Jackson and Nebraska Streets, running north and south. Jackson Street is to the east. There is an alley between these streets. Plaintiff's father has a store on the south side of Fourth Street, and a little east of the alley. There are street car tracks on Fourth Street. The collision occurred about 11 o'clock at night, May 18, 1916. Deceased, an experienced driver, was driving her father's Franklin car, her father in the back seat. Deceased turned into Fourth Street from Jackson, going west on the north side of Fourth Street, and proceeded west until she reached the alley intersection, or perhaps a little west of the alley, when she turned south, intending to head the car east at her father's store, on the south side of Fourth Street, and east of the alley. When she turned south, she went until she reached the south rail of the south street car track. At that time, her father noticed the city automobile coming from the west on Fourth Street, about a block distant, and he told his daughter to stop the car, which she did at once. When her car stopped, the right front wheel was just over the south track, and her car was facing east and south. When she turned south, she was driving at a speed of about 6 or 8 miles an hour. When she went to turn, the street seemed clear; but, as said, the city car was noticed about a block west. The city car was approaching at 45 miles an hour, and did not slow down. It came down the center of the street, and turned to the south, in attempting to pass the Jones car. The city car struck the Jones car on the right-hand side, and the front end of the Jones car was knocked around northeast. Deceased was knocked from the car and instantly killed. The street was poorly lighted, and dark. A witness testifies that the city car gave no signal or

warning that he heard. The pavement on Fourth Street, at the place and immediate locality where the collision occurred, was, at that time, and a long time before, in a rough and uneven condition; the cobblestones next to the street car tracks are higher than the rest of the pavement, and some of them are missing; holes are worn, 3 to 4 inches deep, in places. There was room for the city car to pass between the Jones car and the sidewalk to the south; the distance was 12 or 15 feet from the front end of the Jones car to the south curb of Fourth Street. Appellant contends—and the matter will be referred to later—that, since there was room enough for the city car to have passed the other, and the driver tried to do so, and would have done so had it not been for the defective condition of the street, but, when he attempted to turn across the high cobblestones and the ruts, he momentarily lost control of his car, it was for the jury to say whether there was concurrent negligence on the part of the city, because of the defective condition for which the city would be liable, even though it is not liable for the other causes; and that the trial court overlooked this allegation of the petition. It was shown that the city car was owned and operated by the city, and was driven by Callander, who was an employee of the city. Callander was not a policeman, and was employed to drive this car. It is admitted in the pleadings that Callander was driving the car for the city. It is contended by appellant that the evidence shows that, at the time of the collision, Callander and the city automobile were upon a ministerial mission, and not a governmental one. There is no evidence that the police officers in the city car were answering a police call, as alleged in the answer. The evidence on this subject was drawn out on cross-examination of plaintiff's witnesses. This evidence was put in after defendant had made its motion to direct a verdict, the court indicating that the motion was well taken, and that the burden was on plaintiff to show that the car

was not being used for governmental purposes. The court permitted plaintiff to introduce further testimony, and the motion to direct was then renewed. Briefly, the evidence at this point is that there were uniformed policemen in the city car; on the rear of the car was marked "Police." One of the occupants testified that, at the time of the collision, he was on his way to his beat in the eastern part of the city; that he had answered roll call previously to this; and that he was on duty at the time of the collision. The city car was a six-cylinder, seven-passenger Buick. The record does not show any instance when this car was used as a police car at any other time. The plaintiff offered to prove that, prior to the accident, the city car had been used for ministerial purposes, such as taking members of the council out to inspect work connected with the city, at different times; and that, about May 18, 1916, the day of the accident, Callander took members of the council out to inspect property; and that, in the spring of 1916, Callander took the car in question and delivered the primary ballots to the various voting places in the city, and at other times, took a probation officer and a health officer on trips in regard to the duties of their office. The court ruled the evidence out, on the ground that the material question was, what use the car was being put to at the time of the accident. The motion to direct a verdict was sustained generally, and was on the ground that there was no evidence of negligence as alleged—no negligence in the performance of any duty for the city; that the evidence fails to show that the occupants of the city car were acting in the performance of any duty for the city; that the evidence fails to show affirmatively that any duty alleged to be violated by the city was connected with a private or corporate duty, as distinguished from a governmental duty, or that the alleged negligent person was, at the time of the collision, a servant of the city, or that the act in connection with which the alleged tort was committed, was

within the corporate powers of the city, or that the alleged offending officer or servant was acting within the scope of his authority, or that the city was guilty of any negligence in connection with said act; that deceased was not free from contributory negligence; that the father of deceased was negligent, which was imputable to deceased, and he was not free from contributory negligence; that the car which killed deceased was the police car of the city, occupied by police officers; and that the only deduction which could be drawn from the evidence would be that said officers were acting for the city in the performance of police duties, and in a governmental capacity. The questions so raised are not all argued; but manifestly, some of them are not well taken.

The errors relied upon by appellant are covered, in the main, by the statement that they relate to the court's requiring plaintiff to introduce evidence to show that the city automobile was upon a police mission, this being an affirmative defense pleaded by the defendant; requiring plaintiff to show that Callander was acting for the city, and in the scope of his employment, because the defendant's pleading concedes that, and because no such issue was tendered by the pleadings, the controversy being as to whether or not he was acting in a governmental capacity; and excluding offered evidence to the effect that the automobile and Callander were employed at other times in a ministerial capacity; that, even though the automobile was upon a police mission, there was a question for the jury as to negligence of the city in allowing the pavement to become out of repair, and that this was a concurring proximate cause of the injury. Some of these matters relate to the procedure, and are not likely to occur on retrial. For instance, we do not understand that the court required plaintiff to put in evidence on the question as to governmental functions, and in regard to the scope of the employment of Callander, but rather permitted

plaintiff to do so. At any rate, the evidence was introduced, and, we think, shows that Callander was acting within the scope of his employment.

1. In view of a new trial, we think it proper to say that the burden of proof was upon the defendant to first introduce evidence to establish the affirmative defense pleaded by it, that the automobile and the driver,

1. **EVIDENCE: allegation of governmental capacity.** Callander, were engaged in a governmental act; especially is this so, since defendant pleads this matter affirmatively. Appellant

cites, among other cases, *Mansfield v. Mallory*, 140 Iowa 206; *Wingate v. Johnson*, 126 Iowa 154, 157; *Hoffman v. Independent School Dist.*, 96 Iowa 319. We are of the opinion that these cases sustain the proposition. In any event, the evidence introduced by plaintiff made a prima-facie case.

2. Coming now to one of the vital questions in the case, appellant contends that a city is liable for its negligence when it acts in a ministerial or corporate capacity, and that the evidence introduced tended to prove that

2. **MUNICIPAL CORPORATIONS: non-governmental acts.** defendant city was so acting at the time of the accident in question, and that the driver,

Callander, was employed at said time, and prior thereto, in a ministerial capacity; and that, therefore, the case should have been submitted to the jury on this issue. Appellee does not dispute this proposition, but claims that the evidence shows that the act complained of was governmental. The city contends that a city acting in a governmental capacity is the agent of the state in enforcing police regulations, and is not liable for any wrongs committed by its agents or officers in relation thereto, either directly or indirectly, citing *Saunders v. City of Fort Madison*, 111 Iowa 102; *Calwell v. City of Boone*, 51 Iowa 687; *Ogg v. City of Lansing*, 35 Iowa 495; *Vanhorn v. City of Des Moines*, 63 Iowa 447; *Looney v. City of Sioux City*, 163 Iowa

604 (51 L. R. A. [N. S.] 546); *Gillespie v. City of Lincoln*, 35 Neb. 34 (52 N. W. 811).

We shall not attempt to review all these cases. The question for determination is whether the facts in the instant case bring the case within plaintiff's cases or defendant's. There can be no question that police officers, in the performance of their duties in making arrests and the like, or firemen, in the performance of their duties as such, and health officers, are not regarded as the agents or servants of the city, but their duties are rather of a public nature, and as to such acts, the city is not liable. A fireman, hastening to a fire then raging, and doing similar acts, is clearly engaged in a duty of a public nature; so, too, in the case at bar, had the city automobile, with the policemen in it, been hastening to answer a riot call, or doing some act of that nature, it would be equally clear that this would have been an act of a public nature. It is doubtless true that other acts so connected with an act similar to those indicated as to be a part of it, would likewise be of a public nature. A case that goes, perhaps, as far as any, is *Gillespie v. City of Lincoln*, *supra*. There, a person was struck and killed by a ladder truck belonging to the fire department of the city, through the negligence of the driver thereof, a member of said department, while driving along one of the streets for the purpose of exercising a team of horses belonging to the department; but in that case, the holding was partly because of the Nebraska statute, which was held to be, in a sense, mandatory. And it was there conceded by the plaintiff that the exercising of the team was a proper thing to do, and lies in the way of a proper discharge of the functions of the department. The court, taking this for granted, said that the driver of the team was properly exercising the functions of the fire department, and within the line of duty of the driver. On the other hand, as laid down in the cases, a city is not exempt from liability for every act of a police-

man, simply because he is such. Thus, in *Shinnick v. City of Marshalltown*, 137 Iowa 72, one of defendant's police officers, at the direction of the mayor, placed a rope across one of the principal streets for the purpose of stopping travel. It was held that the city was liable, but on the ground, it is true, that this constituted a nuisance, and the city was bound to keep its streets free from nuisances. In *Twist v. City of Rochester*, 37 App. Div. 307 (55 N. Y. Supp. 850), affirmed without opinion in 165 N. Y. 619 (59 N. E. 1131), it was held that a city could not escape liability for the defective construction of its patrol line used by the police department of the city, on the ground that the department was created by law for the discharge of a public duty. The court based its decision upon the fact that the patrol line was the result of a business arrangement on the business side of the municipality, and it was in no sense in furtherance of a public duty. When the line was made, the city could use it for any legitimate purpose connected with its police, or otherwise, without changing the character of the thing from a private, pecuniary matter, to a public one. So, in the instant case, the city automobile could be used for any purpose connected with its police, or, as con-

3. EVIDENCE: issue on capacity in which employee acted. tended by appellant was the fact, it could be used for other purposes than police duty.

It would be quite material, of course, how the automobile was being operated and used at the time in question. We may observe, in passing, that, though this is true, we think it was competent, under the circumstances of this case, to show, as was attempted by plaintiff, that the car in question had been driven by Callander under his employment in a ministerial or corporate duty at other times not too remote from the transaction in question, and this is especially so since the city sought to have the inference drawn that, because the word "Police" appeared on the automobile, it was, in fact, used exclusively for police purposes.

It is equally well settled by the authorities that a city is liable for its negligence when it acts in a ministerial or corporate capacity. We shall not repeat the testimony bearing upon this subject. It seems to us that, in order that the city may escape liability, the negligence complained of must bear some just and true relationship to the enforcement of law. If this automobile was being driven rapidly to quell a riot, or to protect the lives or property of citizens, then the speed of the car would bear a true relationship to the enforcement of law. 28 Cyc. 1299. If it be conceded, for the sake of argument, that the sole mission of the car in question and its driver was to haul policemen to their beats, could it be said that the city was acting in a governmental capacity? We think not. It could not reasonably be said that it is necessary for policemen to be hauled to their beats at the rate of 45 miles an hour, through the streets of a city. If it is a part of a city's policy to haul policemen to their beats in the outlying districts of the city, this is something which suits the convenience or economy of the city, and is an act which it does as a part of its general business, and does not relate to the enforcement of law. Such matters partake of the general or corporate business of the city. The act of a policeman in sweeping out police headquarters, or of a fireman in burnishing the brass on his engine, would, in a sense, be connected with other duties which might be governmental; but it seems to us that this would be too remote, and carry this rule too far. It should be borne in mind, too, that Callander, the driver, was not a policeman himself, but was driving the car for the purposes for which he was employed; and he is the person who is charged with negligence, and not the policemen. It does not appear that any of the policemen in the car had anything to do with the operation of the car, nor is recovery sought because of their negligence. It is conceded in argument that Callander was negligent. The writer concedes that the point presented is fairly debatable.

but the evidence is somewhat meager, and, as before indicated, was drawn out on cross-examination of plaintiff's witnesses.

3. Appellant contends that, even though the act in question was governmental, the concurrent negligence in permitting the defective condition of the street should have been submitted to the jury. Under the evidence heretofore referred to, we think the court should have submitted to the jury the issue as to the defective condition of the street. The duty of the city with reference to its streets is a corporate duty. *Gould v. Schermer*, 101 Iowa 582; *Lehman v. Minneapolis & St. L. R. Co.*, 153 Iowa 118, 125; *Langhammer v. City of Manchester*, 99 Iowa 295; *Walrod v. Webster County*, 110 Iowa 349; *Sewing v. Harrison County*, 156 Iowa 229, 232; *McGee v. Jones County*, 161 Iowa 296, 303; *Burk v. Creamery Pkg. Mfg. Co.*, 126 Iowa 730, 734.

For the reasons given, the judgment of the district court is reversed, and the cause is remanded for further proceedings in harmony with the opinion.—*Reversed*.

WEAVER, GAYNOR, and STEVENS, JJ., concur.

OMAHA BEVERAGE COMPANY, Appellant, v. TEMP BREW COMPANY, Appellee.

TRIAL: Reception of Evidence—Admission without Objection. A party may not sit by and allow evidence to be received without objection and thereafter have it stricken on motion.

TRIAL: Reception of Evidence—Objection after Answer—Necessity of Motion to Strike—Non-Reversible Error. An answer given to a question before an objection was sustained thereto, where no motion was made to strike the same, remained in the record, and no reversible error was presented as to the ruling in sustaining the objection to the question.

EVIDENCE: Opinion Evidence—Market Value. A witness who
3 was a dealer in cereal beverages, and had inspected 80 half barrels of a cereal beverage, was qualified to testify as to the reasonable market value of the said beverage.

SALES: Breach of Seller—Damages—Loss—Profits Allowed. Where
4 the seller of a cereal beverage, manufactured under a secret process, knew that the buyer could not obtain it elsewhere, and was purchasing it as a wholesaler, and for the purpose of filling orders from retailers, on a breach of the contract for same the purchaser was not only entitled to damages by reason of the difference between the market value and the contract price, but also to loss of profits which he would have realized if the cereal beverage had been delivered as agreed; and testimony as to the buyer's having orders for the entire carload of the beverage at a certain price was admissible as tending to prove the profits lost.

SALES: Breach of Seller—Damages—Reduction of Damages—Profit
5 **on Other Goods Used for Filling Orders.** Testimony as to whether there was any profit on soft drinks furnished to the buyer's customers in place of a cereal beverage purchased, was admissible as bearing on the question of reduction of damages on a breach of the sale by the seller.

SALES: Breach of Seller—Damages—Evidence—Seller's Knowledge
6 **—Purpose of Purchase.** Testimony that the agent of the seller knew the nature of the business in which the purchaser was engaged, and the purpose for which he was purchasing a carload of cereal beverage, and statements by an agent that prompt shipment would be made, were admissible as bearing on the measure of damages, and as showing the knowledge of the seller of the purpose for which the goods were being purchased.

EVIDENCE: Reception of Evidence—Correction of Testimony on Re-
7 **buttal.** It is competent for a witness to correct his testimony, even though done in rebuttal.

APPEAL AND ERROR: Right of Review—Overruling Motion for
8 **Directed Verdict—Waiver.** The introduction of further evidence after the overruling of a motion for the direction of a verdict, without a renewal of the motion at the close of the evidence, waives the ruling on the motion.

TRIAL: Instructions—Requests Otherwise Covered. There is no
9 error in refusing requested instructions when, so far as correct, they were included in the ones given by the court.

SALES: Breach of Seller—Delay in Inspection by Buyer—No Un-
10 **reasonable Delay.** There was no unreasonable delay in inspect-
ing goods delivered, where the buyer was required to pay for
the goods before delivery, and, having several customers from
whom orders had been taken, he delivered to them the goods
so ordered, and made an inspection when the goods were opened
for sale at retail.

SALES: Breach of Seller—Failure of Buyer to Use Care after De-
11 **livery.** The buyer's right to recover for a breach of sale, where
a cereal beverage was not of the quality of the sample, or was
spilled in transit by the seller's negligence, would not be de-
feated by the buyer's negligence to properly care for the same
after its arrival.

TRIAL: Instructions—Non-Applicability of Evidence. Where, un-
12 **der the evidence,** the time required for fermentation of a cereal
beverage might exceed eight hours, an instruction was properly
refused that, if the jury found that the cereal beverage had been
in a condition of fermentation, there could be no presumption
based thereon that it had been in such condition for more than
eight hours.

APPEAL AND ERROR: Assignments of Error—Insufficiency. The
13 **sufficiency of the evidence to sustain a verdict not being chal-**
lenged by an assignment of error bearing upon the same, an as-
signment that the "court erred in overruling defendant's mo-
tion for a new trial, for the reason that each ground for a new
trial set out therein was a good, sufficient, and legal ground upon
which said motion should have been sustained," was insufficient.

Appeal from Des Moines Municipal Court.—ESKIL C. CARL-
son, Judge.

APRIL 14, 1919.

ACTION to recover an alleged balance owed to plaintiff.
The defendant pleaded a counterclaim. Trial resulted in a
verdict for the defendant and judgment thereon. Plaintiff
appeals.—*Affirmed.*

Domback, Granger & Engleman, for appellant.

Miller & Wallingford, for appellee.

LADD, C. J.—Plaintiff is a corporation engaged in the manufacture of soft drinks, one of which is a beverage known as Oma, said to be something like beer, though without alcohol.

On June 8, 1917, plaintiff submitted samples of this liquid to the defendant, a corporation engaged in wholesaling soft drinks in the city of Des Moines, and procured of defendant an order for a carload of this product, being 145 half barrels of light Oma and 5 half barrels of dark Oma, at the rate of \$2.75 per half barrel. The carload was shipped, and arrived in Des Moines, June 12th. It was accompanied by a bill of lading, to which was attached a sight draft for \$413.75, and, of course, defendant was compelled to pay the sight draft before taking possession, in addition to freight charges. This action was brought to recover the purchase price of the carload of Oma, and the value of the half barrels in which it was shipped which had not been returned, less the amount of this sight draft. Subsequently, the half barrels were, by stipulation, returned to plaintiff, and the sole controversy arises on the counterclaim of the defendant. Therein, the defendant admitted the purchase and delivery of the Oma, as recited, alleged that it was unable to test or inspect the same before accepting, owing to the sight draft's being attached to the bill of lading; that, prior to receiving the Oma, it had sold said Oma at \$4.25 per half barrel, and agreed to deliver it to retailers thereof in the city of Des Moines; that it so did to many of its customers, when the same was found by them to be worthless, unwholesome, nonpalatable, spoiled, and unsalable, and was returned; that 75 half barrels of the light Oma and 5 half barrels of the dark Oma were in such condition that defendant was compelled to destroy the same; that the purchase price thereof was \$206.25, and its portion of the freight \$26.52, making the cost of said worthless beverage to the defendant \$247.77. The defendant further alleged that it had con-

tracted to sell to retailers the 80 half barrels at \$4.25 a half barrel, or a total sum of \$340, making a profit thereon of \$92.23; and it prayed for judgment for the cost to it, plus such profit, or \$340. By way of reply, the plaintiff averred that the purchase of the carload of Oma was made on samples submitted to defendant, and that the same, when shipped, was of a grade and quality equal to the samples; that the defendant, when the carload arrived, failed and neglected to inspect and test the same before resale thereof; that such failure was due solely to its fault and neglect, and because of such omission, defendant waived all objection to the inferior grade and poor quality of said Oma; that, in purchasing same, defendant agreed to resell the drink within 14 days after the sale, which defendant failed to do. It is further alleged that, had it been sold within said time, the quality would have been palatable and merchantable, and that any inferiority in quality was owing to its retention from sale longer than 14 days.

I. Each of eight witnesses had testified to being engaged in keeping a place where soft drinks were kept for sale, to having ordered Oma from the defendant, and that said liquid was roily, sour, nasty, and unpalatable, and had a bad smell, described by some as "musty and bad," and by one as having a "rotten, kind of skunky smell."

1. TRIAL: reception of evidence: admission without objection.

This evidence went in without objection.

Later, counsel for plaintiff moved that the testimony of these witnesses relative to a resale of the Oma, and also the fact that contracts had been made, be stricken from the record; "for the reason that it is incompetent, immaterial, and irrelevant, and does not determine the proper measure of damages, in so far as it is offered to prove a measure of damages," and for that a party may not sit by and allow evidence to be received without objection, and thereafter have it stricken on motion.

II. Adelman, president of the defendant company, was asked:

“What was the selling price of Oma on the market in Des Moines at that time? What were you getting for Oma? A. Nine dollars per barrel.”

2. TRIAL: reception of evidence: objection after answer: necessity of motion to strike: non-reversible error.

Plaintiff's counsel moved then and objected as incompetent, immaterial, and irrelevant, and not tending to establish the proper measure of damages. After some parley, the objection was sustained. Even though the subject was to be taken up after dinner, this ruling was not changed. Moreover, as the objection was interposed after the answer had been given, and there was no motion to strike the same, the answer remained in the record. There was no reviewable error.

III. Adelman was asked for his opinion, based on inspection and his knowledge of cereal beverages, as to the reasonable market value at Des Moines, on or about June 14, 1917, of the 80 half barrels of Oma. An

3. EVIDENCE: opinion evidence: market value.

objection as incompetent, immaterial, and irrelevant, and no proper foundation laid, nor showing of the extent of witness' inspection, was overruled, and rightly so. The witness had testified to being a dealer in cereal beverages, and to an inspection of the Oma supplied the several customers from whom he had received orders; and this sufficiently qualified him to testify. Its actual value was material, as bearing on the measure of damages, regardless of whether such measure were as contended by one or the other of the parties.

The witness also testified that he had taken orders for the entire carload of Oma at \$4.25 per half barrel. This was admissible, as tending to prove the profits lost because of the

Oma's not having been of the quality of the sample submitted. One of the controversies in the trial was whether the measure of damages was the difference between the contract price and the actual value, or this plus the profits lost by the purchaser in consequence of the commodity's not being such as the contract exacted. The seller was the manufacturer of the liquid known as Oma, and this was by a secret process. In taking defendant's order, it not only knew that the commodity was not obtainable elsewhere, but that defendant was purchasing as a wholesaler, and for the specific purpose of filling orders from retailers, and that its only purpose in ordering the liquid was that of disposing thereof to retailers at a profit. Sales had been made to retailers in advance, so that the profits to be reaped were not uncertain or speculative. If other soft drinks were supplied retailers in its stead, this was done without profit. The case is ruled by *Portable Elev. Mfg. Co. v. Bradley, Merriam & Smith*, 158 Iowa 19. See, also, *Hichhorn v. Bradley*, 117 Iowa 130; *Rule v. McGregor*, 117 Iowa 419. The law is well settled that, under the circumstances disclosed in this case, in event of a breach of the contract of sale, the purchaser is entitled to recover, not only the difference between the contract price and the market value of the commodity sold, but also for the loss of profits, if any, which the purchaser would have acquired, had the goods been as agreed. Omission of such loss would have failed to compensate for the injury suffered. The law contemplates full compensation for all damages ascertainable with reasonable certainty; and, as the profits which would have been acquired, but for plaintiff's breach of the contract, were definitely proven, there is no reason for denying recovery thereof.

IV. Objection to a question asked Adelman as to whether there was any profit on soft drinks furnished customers instead of Oma was overruled, and rightly so. Had

- any profit been derived therefrom, it must have been considered as a reduction of any damages resulting in consequence of loss of profits on the Oma, and this evidence obviated any such offset.
5. SALES: breach of seller: damages: reduction of damages: profit on other goods used for filling orders.

The same witness was allowed to testify, over objection, in substance that the agent of plaintiff knew the nature of the business in which defendant was engaged, and for what purpose he was purchasing the carload of Oma. What we have said concerning the

- measure of damages sufficiently indicates the admissibility of such testimony.
6. SALES: breach of seller: damages: evidence: seller's knowledge: purpose of purchase.

The witness was asked if he said anything to plaintiff's agent about the necessity of prompt shipment because of having orders for the goods. Objection thereto as incompetent, irrelevant, and immaterial was overruled, and, as we think, rightly. True, there was no issue concerning the delay in shipment, but the answer disclosed that the witness had said to plaintiff's agent that the goods were required immediately, for that customers had given their orders, and were waiting for the goods to arrive. This was material, as disclosing the knowledge of plaintiff of the purpose for which the goods were being purchased.

V. Adelman had first testified that the goods arrived on June 14th. Subsequently, the plaintiff's agent swore that its sight draft, attached to the bill of lading, was paid on June 12th. Thereafter, and in rebuttal,

- Adelman was asked when the car was emptied and the contents taken to the warehouse and customers, and, over objection,
7. EVIDENCE: reception of evidence: correction of testimony on rebuttal.

answered, "On June 12th." This was objected to as not proper examination in rebuttal, and the objection rightly overruled. It was competent for the witness to correct his testimony, even though this were done in the course of the introduction of evidence in rebuttal.

VI. At the conclusion of the evidence introduced in support of the counterclaim, the plaintiff moved that the jury be directed to return a verdict in its favor. The motion was overruled. Error is assigned in this ruling, and exhaustively argued. Subsequently, the defendant's evidence was introduced, and also evidence in rebuttal. The introduction of further evidence waived the ruling on the motion, and as the plaintiff did not renew such motion at the close of the evidence, it is not in a situation to question the ruling as then made.

8. APPEAL AND ERROR: right of review: overruling motion for directed verdict: waiver.

VII. Counsel for plaintiff requested that several instructions be given. All were refused. The ruling of the court is to be approved, on the ground that each, in so far as correctly stating the law, was included in those given. Thus, Instruction A, requested, was fully covered by the third instruction given. As contended, the duty of plaintiff was said in the latter "to be to take ample and sufficient precaution to properly protect such goods while in transit." That it was its duty is not questioned, but it is argued that it was only required to exercise reasonable care in so doing; and such is the law, and the jury was so told, later on, by saying that, if the liquid conformed to sample, and was "properly prepared for shipment by icing reasonably sufficient to carry to destination, even though said goods might have deteriorated or become different thereafter, the defendant will not be entitled to any recovery on his counterclaim." There was no controversy as to preparation, save as to the icing; and to have exercised reasonable care, plaintiff must have prepared for shipment "by icing reasonably sufficient to carry to destination," and so icing necessarily was consequent of exercising reasonable care. Though not accurately worded, the instruction conveyed the thought intended; for the manner of icing, together with the condition of the Oma

9. TRIAL: instructions: requests otherwise covered.

and the car upon arrival at Des Moines, was the only basis on which to determine whether plaintiff had exercised ordinary care. There was no reversible error in refusing the requested instruction.

VIII. The carload of Oma reached Des Moines, June 12th, and some of the half barrels were delivered to customers therefrom, and the rest placed in a cold storage plant. A day or two later, Adelman exam-

ined that delivered to customers, and found it in the condition described by them, and was compelled to take it back. Appellant requested, in Instruction B, that, "if the defendant, in the exercise of reasonable care, could have inspected the shipment prior to resale and delivery to its customers, though it did not make such inspection, then such delivery and resale to customers was an unconditional acceptance of the Oma by the defendant, and your verdict should be for plaintiff."

Undoubtedly, sales by samples imply a warranty that the goods shall be of like quality and character as the samples, and contemplates an inspection by the purchaser, and this must be done within a reasonable time, and prior to the acceptance of the goods purchased. An acceptance implies, not only the physical act of receiving the goods, but also the intention of retaining them. Here, to the bill of lading was attached a draft, and the plaintiff was required to pay this before obtaining possession of the carload shipped. Possibly it might have examined the goods by breaking open the half barrels before unloading, but it would hardly seem that this would be required, and, as the plaintiff had several customers from whom orders had been taken, these were supplied with the half barrels, and they were opened by them, and were conclusively shown not to have been of the character or quality of the sample on which the carload was ordered. As these half barrels were delivered to the customers from the

10. SALES: breach
of seller: de-
lay in inspec-
tion by buyer:
no unreason-
able delay.

car, and immediately inspected by opening for sale at retail, we are of opinion that there was no unreasonable delay in inspecting the goods delivered, and for that reason, the court did not err in refusing to instruct the jury as requested. *Rhynas v. Keck*, 179 Iowa 422; *M. & M. Co. v. Hood Rubber Co.*, 226 Mass. 181 (115 N. E. 234); *Mueller v. Simon* (Tex.) 183 S. W. 63.

It is said in 2 Mechem on Sales, Section 1377:

"The buyer's right of inspection includes a reasonable time within which to make it, and imposes upon him the duty to make it within that time after the goods have been received or tendered for acceptance; what is reasonable being here, as in other cases, a question of fact, dependent upon the circumstances of each case, the situation of the goods, the nature of the business, and the customs of the trade."

Instruction D was asked, stating, in substance, that it was the duty of defendant to exercise reasonable care in cooling the car and icing the shipment after its arrival in Des Moines, and that the burden of proof

11. **SALBS**: breach of seller's failure of buyer to use care after delivery.

was upon it to show that such care was exercised, and that, unless so proven by preponderance of evidence, the verdict should be for plaintiff. The only bearing on the care bestowed by defendant on the car and its contents after arriving at Des Moines was as to the quality of the Oma when loaded in the car at Omaha, Nebraska, and the manner of plaintiff's icing the same. Though the defendant neglected to properly care for the car or its contents after its arrival in Des Moines, if the Oma, when loaded at Omaha, Nebraska, was not of the quality of the sample, or was spoiled in transit because of plaintiff's neglect in not preparing the same for shipment, the defendant must have recovered, and the instruction requested was erroneous in stating otherwise. For this reason, there was no error in its refusal.

In Instruction G, requested and refused, counsel for

plaintiff requested that the jury be told that, if the Oma was found to be unpalatable and unmerchantable, with an obnoxious odor, not clear in color, no presumption could be based thereon that it had been in such condition for a period exceeding eight hours, and that "the earlier existence of such condition more than eight hours prior thereto must be established by defendant by preponderance of the evidence."

12. TRIAL: instructions: non-applicability of evidence.

The only evidence bearing on the length of time required for fermentation was that of the president of the plaintiff company, who testified that:

"Oma will get rily after it has been allowed to be in a warm room for at least from eight to ten hours. It will ferment according to the different temperatures, sometimes 24 hours; but if it is warm, say 46, it would only be a matter of 6 or 8 hours. * * * Oma in casks, exposed to atmospheric surroundings, will last, in a warm room in June, probably from 6 to 10 hours."

This was not saying that a longer period might be required for fermentation under different conditions. Indeed, it is fairly to be inferred from the answer that, under different conditions, more or less time would be required; and there was no room for an instruction which stated that, in any event, the time required did not exceed eight hours. For this reason, the instruction was rightly refused.

Other instructions requested are disposed of by what has been said.

The sufficiency of the evidence to sustain the verdict is challenged in the argument, but not by any assignment of error or brief point, save that the seventeenth assignment of error recites that the "court erred in overruling appellant's motion for a new trial, for the reason that each ground for a new trial set out therein was a good, sufficient, and legal ground upon which said motion

13. APPEAL AND ERROR: assignments of error: insufficiency.

should have been sustained." This was not sufficient as an assignment of error, and there was no brief point or proposition therein, nor any argument. We may say, however, that the verdict is amply supported by the evidence adduced, and the judgment is—*Affirmed*.

GAYNOR, PRESTON, and STEVENS, JJ., concur.

THOMAS WEATHERILL et al., Appellees, v. WM. P. WEAVER et al., Appellants.

LANDLORD AND TENANT: Rent—Option of Share Crop. A tenant who has an option to pay share rent on the happening of a named contingency must exercise his election within a reasonable time after the happening of the contingency, or right to exercise the election will be waived, and especially so where his conduct is inconsistent with the exercise of such election.

Appeal from Shelby District Court.—O. D. WHEELER, Judge.

APRIL 14, 1919.

ACTION to recover the sum of \$400, claimed to be due under the provisions of a written lease. There was a directed verdict for the plaintiffs, and defendants appeal.—*Affirmed*.

Roy Havens and *G. W. Cullison*, for appellants.

Edward S. White, for appellees.

PRESTON, J.—Plaintiffs leased 80 acres of land to the defendants. The lease, the execution of which is admitted, provides that defendants were to pay plaintiffs the annual cash rent of \$400, to be paid on the 15th of February, 1916, and contains this further provision:

"It is agreed that if the crop is damaged through no fault of second party (defendants) to the extent of one third, each party will take one half each, of what is raised,

in full settlement of this lease, share of first party to be delivered to market as they may direct."

Defendants alleged that the crop was damaged without their fault, to the extent of one third, and alleged their offer and continued willingness to deliver one half the crop, under the provisions of the lease, and denied their liability for the cash rent provided for in the lease, in the event the crop was not damaged. For reply, plaintiffs allege that defendants did not plant, cultivate, or care for the crop; that they planted much of it late, and plowed much of it but once; and that, if a part of said crop did not make such yield that one half thereof amounted to a fair and reasonable rent, as contemplated by the lease, it was due to the fault and neglect of defendants; that defendants have failed to bring themselves within the terms of the clause in said lease now relied on; and further, that defendants have never offered to deliver one half of what was grown on the leased premises, and have placed it beyond their power to deliver such share of said crop, and are now unable to deliver such share. It appears that defendants did not occupy the premises for the full year under the lease, ending February, 1916, but left the place late in December, 1915, or early in January, 1916. The defendants planted about 45 or 50 acres of the leased land in corn, and they contend, and they introduced evidence tending to show, that they cared for it in a good, farmlike manner, but that, owing to the weather conditions, the crop never fully matured, and was damaged by the wet and cold summer and early frost, more than one third. The plaintiffs deny that the corn crop was properly farmed by the defendants, and their evidence tends to establish that fact. The land planted in corn was laid off in 4 fields, one containing 7 acres, another 12, another 4, and another 25. It is claimed that the corn produced in this last field was more than was produced in the other 3 fields, but this is only defendants' estimate. The undisputed evidence is that only this field

was husked. . It is undisputed that, in October, after a frost, defendants turned 25 or 30 head of cattle into two fields, and 25 or 30 hogs into the third. Defendants say that, before this, they first husked through the fields with a wagon, to ascertain the yield, and their estimate is that it approximated 150 bushels in the 7 and 12 acres and 45 to 55 in the 4 acres. The 25-acre field was husked and cribbed, and yielded approximately 300 bushels, by wagon measure. A day or two before the levy of the landlord's writ of attachment was served, one of the defendants offered to deliver this corn to plaintiffs, in payment of the rent. This was about February 15, 1916, and that was the only offer made to deliver rent corn. One of the defendants testifies that the first time plaintiffs were told that their share of the corn had been cribbed was about February 15th. Prior to said date, there were negotiations between the parties, in an effort to compromise. They seemed to contemplate that defendants would be liable for the \$400 cash rent unless a compromise was reached. In such negotiations, plaintiffs offered to take stock and other property, if they could agree on the basis of \$300 cash rent. No agreement of settlement was reached, and the attachment was sued out. As bearing upon the question of the attempted tender of an estimated average of the corn produced, after about half of the area planted to corn had been wholly fed out by defendants, it should be stated that defendants used some 27 or 28 acres of pasture, during the season from spring until fall, in which they pastured 50 or 60 head of stock. There was no separate rent provided for this in the lease.

In ruling on the motion to direct a verdict, the trial court did not pass upon the question as to whether defendants had farmed the land properly, or whether the crop was damaged to the extent of one third, and we think the determination of this appeal turns upon other grounds. The lease is somewhat peculiar. The provision relied upon by

appellants was written in, in pencil, in a printed lease. Under the lease, the rent was primarily payable in cash, with an alternative provision that, under certain conditions, each party would take one half of what was raised, plaintiffs' share to be delivered to the market, as directed. We think this provision was for the benefit of the tenants, the defendants; the plaintiffs, the landlords, could not insist on this provision. Had the crop been damaged to the extent of one third, and plaintiffs had gone to defendants, and suggested that they be given one half of the crop in place of the \$400, defendants would have had the right to say that, because of the higher price of corn, had such been the fact, they would keep the corn, and pay the \$400. The tenant, then, had the right, sometime during the year, to determine whether he would pay the cash rent or a share of the corn. He knew, long before the frost, that, because of the wet weather, as he claimed, there would be a small crop. The defendants did not comply with their lease, in regard to the delivery of the corn, and the first time this was mentioned was about the middle of February. Nor did defendants, until about that time, indicate that they desired plaintiffs to take one half the crop. At that time, it was beyond their power to deliver one half the crop. We think it was the duty of defendants to have made their election, or to have indicated what they desired to do, within a reasonable time after they knew that situation. The crop was not divided, nor pretended to be divided. Until that time, plaintiffs did not know that defendants desired them to take a share of the corn. Plaintiffs had no way to determine in February whether one third of the crop had failed, or to determine what one half of the crop would be, nor could defendants do so. The plaintiffs did not agree in the lease to take the tenants' estimate of the crop, or that defendants should ignore the lease as to delivery, turn their stock into the corn, and then say to plaintiffs that they must take what was left.

We think this was hardly fair dealing by the defendants. It was within the power of the defendants, at the proper time, to have obviated the difficulty. Furthermore, long before this, the defendants had turned their stock into the corn; and we think that, by this and their other conduct, they elected not to avail themselves of the provision in the lease which they now rely on. The evidence in regard to these matters is not in dispute. A case somewhat analogous is *Dassance v. Cold*, 101 Iowa 610.

We are of opinion that the trial court ruled correctly, and the judgment is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

OLIVETTE E. CARR, Appellee, v. C. W. CARR, Appellant, et al.

TRUSTS: Enforcement—Right of Donor to Enforce—Equity. The

- 1 donor of a trust has such interest therein as entitles him to maintain a suit in equity to compel the carrying out of the terms thereof.

INJUNCTION: Temporary Injunction—Grounds for Continuing—

- 2 Probable Injury. The right to have a temporary injunction continued until a hearing can be had on the merits of the petition depends upon whether petitioner has a probable right to the relief sought and will suffer probable injury to such right if the writ be dissolved.

DIVORCE: Alimony—Modification of Decree—Fraud or Mistake.

- 3 Alimony is allowed in lieu of dower and prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree.

DIVORCE: Alimony—Agreements—Decree Settles All Property

- 4 Rights. Stipulations and agreements between the parties to a divorce suit will, where proper and just, be carried out in the decree awarding alimony; and ordinarily, a decree of divorce settles all property rights and interests of the parties in each other's property.

DIVORCE: Alimony—Modification of Decree—Grounds — Extrava-
5 **gant and Improvident Habits of Life.** Where a husband seeks to modify a divorce decree based upon a property settlement, and does not allege that he was induced to enter into the stipulation for the property settlement by mistake or inadvertence, nor that the decree did not express the real intentions of the parties at the time it was filed, he being under no further duty of supporting the wife, he cannot, on the ground that she has extravagant and improvident habits, enjoin a trustee of the property from conveying to her the said property, to which she has become entitled under the terms of the agreement.

PLEADING: Issues, Proof, and Variance—Sufficiency of Allegations
6 **—Injunction against Trustee.** While one may, under a prayer for general relief, have any relief in equity to which the allegations of his petition entitle him, the Supreme Court will not reverse an order dissolving a temporary writ restraining a trustee from delivery of property to one entitled thereto under stipulation, simply because the allegations of a cross-petition praying for the modification of a decree in a divorce case respecting alimony happen to contain the necessary averments for the appointment of a guardian, where the same was neither suggested nor asked therein, and the specific relief asked is inconsistent with the application for the appointment of a guardian.

Appeal from Crawford District Court.—M. E. HUTCHISON,
Judge.

APRIL 15, 1919.

SUIT in equity for the modification of a decree. The facts are fully stated in the opinion. There was a decree in favor of plaintiff, and defendant cross-petitioner appeals.—*Affirmed.*

Salinger & Welch and *F. H. Cooney*, for appellant.

Sims & Kuehnle and *L. W. Powers*, for appellees.

STEVENS, J.—I. On the 29th day of January, 1913, a decree was entered in the district court of Crawford County, divorcing plaintiff and cross-petitioner, and awarding the former alimony in accordance with a stipulation and agree-

ment of the parties. The stipulation and decree required defendant to convey the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 21 and the NW $\frac{1}{4}$ of Section 28, Township 83, Range 40, consisting of 240 acres, to a trustee, to be held, controlled, and managed by him for the use and benefit of plaintiff, for a period of five years, with authority to sell the same at not less than \$100 per acre. The decree further required defendant to convey to plaintiff the homestead in Denison, Iowa, valued at \$3,500, also to pay certain indebtedness owed by her, and to execute and deliver to her a note for \$500 and pay the costs of the divorce proceedings, including a specified amount for attorney fees. As affording a better understanding of the provisions of the decree material to this controversy, we quote the following paragraphs thereof:

"It is further adjudged and decreed that the defendant make and deliver to J. P. Conner, as trustee for the plaintiff, a deed conveying the 240 acres of land above described, said deed to be made at once, and to be a general warranty deed; and an abstract of title is to be furnished, showing clear and unincumbered title in the defendant, the same to be furnished forthwith.

"It is further decreed that said land is to be conveyed to the said J. P. Conner, as trustee, for the use and benefit of the plaintiff, and he is to hold the same in his name as trustee for a period of five years. The income from the land during the full five years after March 1, 1913, is to be paid over to the plaintiff for her own exclusive use. * * *

"It is further decreed that, after the expiration of five years after the date of the decree of divorce to be rendered herein, the said trustee, upon demand, shall convey the above-described real estate to the plaintiff, conveying all the title and interest held by such trustee.

"It is further ordered and decreed that if, before the expiration of the five-year limit, an opportunity shall arise for selling the property to advantage, and at not less than

\$100 per acre, that the same may be sold, and the proceeds held by the trustee for the benefit of the plaintiff, the same to be invested in mortgages secured by real estate."

All of the provisions of the decree required to be performed by him were carried out by the defendant and cross-petitioner herein.

On January 20, 1918, defendant filed a cross-petition in the divorce suit, alleging that the purpose of the trusteeship created by the stipulation of the parties and the original decree of the court was to restrict the expenditures of plaintiff to the income arising from the 240 acres of land, and to protect her against her own extravagance, or the designs of persons who might desire to take advantage of her inexperience in business affairs; that she has since sold the residence in Denison, and received about \$6,000 in rentals from the farm, and \$4,000 from the trustee for the 40-acre tract conveyed by her to him; that plaintiff has dissipated all of the money thus received, in useless and extravagant expenditures. The cross-petition prays that plaintiff's deed conveying the 40-acre tract to the trustee be canceled and set aside, and that the trustee be required to account for the rents derived from said land and all funds coming into his hands by virtue of the trust; that the divorce decree be modified so as to provide that plaintiff have only a life tenancy in the 240-acre tract; and that the title thereto be vested in her heirs at law, with a provision in the decree that the court retain jurisdiction to make future orders, if necessary, for the proper support and maintenance of plaintiff; and that the trustee be restrained, until the further order of the court, from conveying the land to plaintiff, or otherwise alienating or incumbering the same, until the final disposition of the cause on the merits.

A temporary writ was ordered, and issued as prayed, restraining the trustee from conveying or incumbering the property. On February 4th, counsel for plaintiff filed a mo-

tion to strike the cross-petition and to dissolve the injunction, upon the grounds that the court was without jurisdiction to entertain and hear the cross-petition; that cross-petitioner had no such interest in the subject-matter of the suit as entitled him to maintain the same; that the original decree is final and conclusive; that there is no allegation of any change in the circumstances or conditions of the parties to the decree requiring a modification thereof; that the petition therefor was filed too late; and that the facts stated in the cross-petition show affirmatively that cross-petitioner is not entitled to any relief whatever. The court held that cross-petitioner could maintain a suit to compel the carrying out of the terms of the decree, but sustained plaintiff's motion to dissolve the temporary injunction, upon the ground that cross-petitioner's relation to plaintiff's property was not different from that of a stranger, and that he did not have a right to a modification of the decree. It is from this order that cross-petitioner appeals.

Appellant bases his right to a modification of the decree upon the grounds: (a) That he is the donor thereof, and entitled to have the trust carried out in accordance with its terms and the real purpose for which it was created; and (b) that, if the averments of the petition do not entitle him to the specific relief prayed, they do state good grounds for the appointment of a guardian of the property of plaintiff, and that, in either event, the temporary writ should not have been dissolved.

It is not denied by counsel for appellee that the donor of a trust has such interest therein as to entitle him to maintain a suit in equity to compel the carrying out of the terms thereof. But the effect of the temporary writ was to restrain the trustee from carrying out the terms of the trust, according to the stipulation of the parties and the specific terms of the original decree, and not to prevent a violation thereof.

1. TRUSTS: enforcement: right of donor to enforce: equity.

It is alleged in the petition that, unless restrained from doing so, the trustee will, upon demand of plaintiff, which she is about to make, convey the remaining 200 acres of the tract to her, and thereby defeat the purpose of this suit. What appellant seeks is to preserve the status by injunction until a hearing can be had upon the merits of his petition, in order that the decree, as modified, if a modification shall finally be awarded, may be effectually carried out; so that the question whether the temporary injunction should have been continued until a trial could be had upon the merits depends for its answer upon whether cross-petitioner has a probable right to the relief sought, and will suffer probable injury to such right if the writ be dissolved. *Wehrman v. Moore*, 177 Iowa 542.

The order complained of was entered more than five years after the date of the original decree, and long after the legal duty of appellant to contribute to the support or maintenance of plaintiff had terminated. All of his interest in the property passed by the deed to the trustee, for the use and benefit of plaintiff, and the decree quiets title in her against him. Section 4091 of the Code provides that the district court may modify a decree for one or more of the following reasons:

"1. For mistake, neglect or omission of the clerk, or irregularity in obtaining the same;"

"2. For fraud practiced in obtaining the same;

"3. For erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record;

"4. For the death of one of the parties before the rendition of the judgment or making of the order, if no substitute has been made of the proper representative before the rendition of the judgment or order;

"5. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

"6. For error in the judgment or order shown by a minor within twelve months after arriving at majority."

Appellant's prayer for relief is manifestly not based upon any of the grounds above stated, but upon the claim that plaintiff is inexperienced in business, improvident, and likely to dissipate and squander the property, if she obtains control thereof; and that appellant, as donor of the trust, is entitled to have the property preserved and applied to the use for which the trust was, in fact, created,—that is, to provide proper support and maintenance for plaintiff.

Alimony is allowed in lieu of dower and the prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree. *Spain v. Spain*, 177 Iowa 249; *Roberts v. Playle*, 150 Iowa 279; *Blythe v. Blythe*, 25 Iowa 266. It is true that stipulations and agreements between parties to a divorce suit for the settlement of property rights will, if proper and just, be carried out by a decree awarding alimony. Ordinarily, a decree of divorce settles all the property rights and interests of the parties in the property of each other. *Patton v. Loughridge*, 49 Iowa 218; *Baird v. Connell*, 121 Iowa 278.

It should be observed that appellant does not allege, in his cross-petition, that he was induced to enter into the stipulation for the property settlement by mistake or inadvertence, nor that the decree fails in terms to express the real intention of the parties at the time same was filed. It may be that plaintiff has not profited as she should by her business experience, and that she retains her alleged extravagant and improvident

3. DIVORCE: alimony: modification of decree: fraud or mistake.

4. DIVORCE: alimony: agreements: decree settles all property rights.

5. DIVORCE: alimony: modification of decree: grounds: extravagant and improvident habits of wife.

habits; but no liability or duty is imposed upon cross-petitioner for her support or otherwise on account thereof. Five years having elapsed since the date of the original decree, plaintiff is entitled, by the plain terms thereof, to demand and receive a conveyance from the trustee of the land in question, and to use and manage the same as she sees fit.

II. We come now to consider the contention of counsel that the petition states grounds for the appointment of a guardian, and that the temporary writ should not have been dissolved, for this reason. The cross-

6. PLEADING:
issues, proof,
and variance:
sufficiency of
allegations: In-
junction
against trustee.

petition does not, however, in terms ask for the appointment of a guardian, and manifestly was not filed for the purpose of obtaining the appointment thereof. Proceed-

ings under Section 3220 of the Code for the appointment of a guardian are tried as ordinary actions, and, upon presentation of a duly verified petition therefor, the judge is authorized to appoint a temporary guardian to take charge of the property of the defendant, pending final hearing on the petition, which would probably accomplish the purpose of a temporary writ, in a case of this character.

It is urged, however, in this connection that, if the petition was docketed on the wrong side, plaintiff's remedy is by motion to transfer; but the petition neither suggests nor asks the appointment of a guardian, and the filing of such a motion would be quite unlikely. If cross-petitioner desires the appointment of a guardian to take charge of plaintiff's property, he should proceed in the regular way for that purpose. Of course, plaintiff may, under the prayer for general equitable relief, have any relief in equity to which the allegations of his petition entitle him; but the court will not reverse an order dissolving a temporary writ, simply because the allegations of a cross-petition praying the modification of a decree in a divorce case respecting alimony happen to contain the necessary averments for the appointment of a

guardian, when same is neither suggested nor asked therein. The specific relief prayed is inconsistent with an application for the appointment of a guardian, and, aside from the allegations of the cross-petition that plaintiff has dissipated the income from the land, and other sums coming into her possession since the decree was entered in the divorce case, and that she will speedily squander the land or the proceeds derived from the sale thereof if turned over to her, there is nothing therein to even suggest the matter of guardianship. The above allegations were deemed necessary to the specific relief prayed. After a careful examination of the record, we reach the conclusion that the temporary writ was properly dissolved, and the order and judgment of the court below are, therefore,—*Affirmed*.

LADD, C. J., EVANS and GAYNOR, JJ., concur.

THEODORE GOETTSCH, Appellee, v. FRED WESEMAN et al., Appellants.

SPECIFIC PERFORMANCE: Contracts Enforcible—Exchange of

- 1 **Lands—Conditions—Waiver of Performance.** In an action for specific performance of a contract for exchange of lands, the burden is on the plaintiff to show that, before the action was commenced, he had performed or attempted to perform all conditions to be performed by him; and if he has failed, then the burden is upon him to plead and prove that the defendant waived performance of such conditions.

SPECIFIC PERFORMANCE: Exchange of Lands—Conditions—Ma-

- 2 **turity of Mortgage.** Plaintiff, having agreed to exchange land on which a mortgage was not to mature until the spring of 1920, could not offer to perform with a mortgage maturing a year earlier on said lands, and enforce specific performance against defendant.

Appeal from Clinton District Court.—A. J. HOUSE, Judge.

APRIL 15, 1919.

ACTION to enforce the specific performance of an agreement to exchange lands. The opinion states the facts. Decree for the plaintiff in the trial court. Defendant appeals.—*Reversed*.

Pascal & Pascal, for appellants.

Wolfe & Wolfe and *Wm. Hoersch*, for appellee.

GAYNOR, J.—This action is brought to enforce the specific performance of a certain written contract for the exchange of lands. The contract was made on the 29th day of January, 1917, and, among other things, provided that the contract should be consummated on the 1st of March, 1917, and that, on that date, deeds should be executed and delivered by each to the other for the lands covered by the contract, and that each should provide, for the use of the other, within 30 days from the making of the contract, proper abstracts of title to the property agreed to be conveyed, showing good and sufficient title to the same in the grantors. It was further stipulated in the contract that the defendant should take plaintiff's land, subject to mortgages now thereon for the principal sum of \$17,500, with interest from and after March 1, 1917, at the rate of 6 per cent per annum, said mortgages becoming due and payable during the spring of 1920.

It appears that, at the time the contract was made, plaintiff was not the owner of the land which he agreed to convey, and had only an executory contract for its purchase, and that he had no title to said land on the 1st of March, 1917, at which time, by the terms of the contract, the deal was to be closed.

The evidence satisfies us that, on the 1st of March, 1917, the defendant appeared at the office of plaintiff's attorney, with deeds and abstracts to the land which he agreed to convey, and with all other papers provided for in the contract

to be delivered by him, and that no objections were made to the same.

The deal was not then consummated, for the reason only that plaintiff had not yet acquired title to the land which he had agreed to convey. The defendant was then for the first time informed that plaintiff did not have title. No agreement to extend the time for performance seems to have been made. Nothing further was done between the parties, touching the subject-matter of the contract. It appears, however, that, after the 1st of March, defendant requested plaintiff to perform, and asked him to meet him at a certain place, on a certain day, for the purpose of consummating the contract; but plaintiff failed to appear, because he was still unable to perform. No request was made by plaintiff for delay. Defendant did not notify plaintiff that he elected not to consummate the contract, until after plaintiff had perfected his title. Plaintiff secured his deed on the 9th day of March, 1917, but it was not recorded until the 12th of April following. It appears that subsequently, and on a certain Sunday, the plaintiff's agents appeared at defendant's home, and announced that they were ready to consummate the deal, and defendant then, for the first time, told them that he would proceed no further in the consummation of the deal. Thereupon, plaintiff brought this action, on the 24th day of May, 1917, asking that defendant be required to specifically perform his contract. It will be noted that, before this action was begun, plaintiff never delivered or tendered to the defendant the abstract called for by the contract, nor did he tender the defendant a deed. In fact, no deed was ever executed until after the trial was begun. The trial was begun on the 9th day of November, 1917. The deed to the land which plaintiff agreed to convey was not executed until the 19th of November, 1917, and then, and during the trial, was, for the first time, tendered to the defendant. The deed was in the ordinary form of warranty deed, and conveyed

the land which plaintiff agreed to convey, subject to a mortgage of \$17,500, with interest from March 1, 1917.

It will be further noted that the contract provided that the land would be subject to a mortgage for \$17,500, due in the spring of 1920. At the time the contract between the plaintiff and defendant was made, there was a mortgage upon the land for \$10,000, payable March 5, 1920, with 6 per cent interest per annum, payable annually. After the contract was made, the party from whom plaintiff contemplated purchasing the land, and with whom he had a contract to purchase, executed and placed on record a mortgage upon the land, on the 9th day of March, 1917, for \$4,000, payable March 10, 1919, and on the same day executed another mortgage for \$3,500, payable on March 9, 1919; and these are the mortgages referred to in the deed.

Although there is some rambling evidence given by the agents who sought to negotiate this deal for the plaintiff, that the defendant waived the furnishing of abstracts, it is so unsatisfactory and so contradictory that it has but little probative force. In fact, we consider it as having no probative force. The contract called for abstracts to be furnished 30 days from the making of the contract. Defendant had all his abstracts ready when he appeared at the office of plaintiff's attorney on the 1st of March, to close the deal. Plaintiff had neither title to the land nor deed nor abstract, and the day passed without closing the deal. Defendant had no opportunity to examine the abstract, or to determine from an examination whether the title was such as was called for by his contract, before this suit was begun or afterwards. The abstract was not there even at the trial. The testimony is that it was somewhere between Boston and the place of trial. At the conclusion of the testimony, it was stipulated, however, that, upon its arrival, it might be passed into the hands of the judge. It is not shown that the

defendant ever saw it, even then. The fact that the abstract shows that these mortgages were executed after the contract which is sought to be enforced was made, and that \$7,500 of these mortgages matured a year earlier than was stipulated in the contract, was not called to the attention of the defendant, nor does this record show that it was known to the defendant. It does not, therefore, stand well with plaintiff to say that the objection that the incumbrance upon the property was not as stipulated in the contract has been waived by this defendant because he did not urge that objection upon the trial. We might assume, for the purposes of this case, but for no other, that the defendant waived the performance of the contract at the time stipulated in the contract, but we find no evidence upon which to base a claim that defendant waived his right to the abstract. He was entitled to it before he could be required to perform. Further, we find nothing in this record that shows that defendant ever waived the provision of the contract that the mortgages should mature in 1920, or that he elected to accept the land with a large portion of the mortgage maturing a year earlier.

It must be borne in mind that the plaintiff brings this action, and the burden is on him to show that he had performed all the conditions on his part to be performed, or had tendered performance of all the conditions to be performed, before the action was commenced. It must be borne in mind further that, if he has failed in this, then the burden is on him to plead and prove that the defendant waived a performance. This he has not done. Counsel seems to proceed on the theory that the burden was on the defendant to show that he had not waived a strict performance of the contract. That he might waive a failure to strictly perform, see *Webb v. Hancher*, 127 Iowa 269; *Stevenson v. Polk*, 71 Iowa 278; *Armstrong*

1. SPECIFIC PERFORMANCE: contracts enforceable: exchange of lands: conditions: waiver of performance.

v. Breen, 101 Iowa 9; *Plummer v. Kennington*, 149 Iowa 419; *Lillienthal v. Bierkamp*, 133 Iowa 42. But the question still remains: Has the plaintiff shown that defendant waived any of the provisions of the contract which the plaintiff was required to perform? The maturity of the mortgage was a material part of the contract, and defendant cannot be required to accept title to land with an incumbrance maturing at any other time than that stipulated in the contract.

The legal question involved in this case has been considered by this court many times. Nothing would be gained by reviewing the authorities.

We reverse this case for the reason that the plaintiff has failed to show that he has performed the contract on his part, or that defendant has waived performance. The record discloses that the plaintiff failed to deliver or tender to the defendant an abstract of title such as is called for by his contract. On this point, we have to say that some of the witnesses who represent the plaintiff, and who are agents of the plaintiff, and who are interested in pressing this cause because of commissions that they will receive if the plaintiff prevails, have undertaken to say that they told the defendant where the abstract was, and that it was there subject to his examination. One witness, being asked where the abstract was, said it was in Beber's office. Beber lived in Fulton, Illinois, and was a land agent. We will assume that his office was where he lived, nothing further appearing. Defendant was not bound to go to Fulton, Illinois, to examine this abstract. It was plaintiff's duty to furnish it to the defendant, or to one authorized to receive it for him. The contract created a duty, and a duty rested on the plaintiff to furnish him the abstract more than 30 days before the first of March. At least, defendant was entitled to a reasonable time to examine the abstract after it was furnished, to determine whether it complied with the

contract, before he could be called upon to perform. The last testimony touching this abstract was that it had been in the hands of some loan agent in Boston, had been sent for, and, at the time of the trial, was somewhere between Boston and the place of trial. It was stipulated that, if it arrived, it might be handed to the judge. This was after the cause had been tried and submitted.

Secondly, we reverse this case for the reason that it affirmatively appears that a portion of the incumbrance upon the land, which the contract stipulated should mature in the spring of 1920, matured a year earlier. De-

2. SPECIFIC PERFORMANCE: exchange of lands: conditions: maturity of mortgage.

fendant cannot be required to take land incumbered other than as his contract required him to take it. Plaintiff has, therefore, not put himself in a position to insist upon the specific performance of the contract as originally made, and he does not offer to perform it as originally made, but under changed conditions. These two facts do not appear to have been considered by the trial court in disposing of the case. They were possibly overlooked. It appears from the statement of the judge that the cause was not argued to him. The overlooking of these facts, we think, led the judge to an erroneous conclusion, and an erroneous judgment and decree. The decree is, therefore,—*Reversed*.

LADD, C. J., EVANS and STEVENS, JJ., concur.

IN RE ESTATE OF ANNA HULME, Deceased.

COSTS: Witness Fees—Taxation—Absence of Subpoena. In the absence of a clear showing in support of the claim, courts will not allow fees for attendance or mileage of witnesses who are neither subpoenaed, sworn, nor examined on the trial.

COSTS: Witness Fees—Taxation—Mileage Outside State. The allowance of mileage fees to witness for more than 70 miles is

discretionary with the court, but any allowance must be confined to the necessary and proper travel of witness in the state, as allowance without the state would give to the statute extra-territorial effect.

Appeal from Winnebago District Court.—C. H. KELLEY,
Judge.

APRIL 15, 1919.

APPEAL from an order of the district court for the taxation of costs. The facts are stated in the opinion.—*Modified and remanded.*

Jensen & Jensen, for appellant.

Thompson, Loth & Sifford, for appellee.

WEAVER, J.—The executor of the will of Anna Hulme, deceased, having made final report of his trust, exceptions thereto were taken by the appellee, Alice Reimers, one of the beneficiaries of the estate. At the trial of the issues so raised, the appellee produced a witness, William J. Reimers, who testified in support of the exceptions taken to the executor's report. This witness was a resident of the state of Idaho, and came from his home to Forest City in this state, a distance of 934 miles, without subpoena, but at the request of the appellee, for the purpose of giving testimony upon the hearing. The exceptions to the report were sustained, and the executor ordered to make accounting for property to the amount of \$2,000 or more in excess of his original showing. In assessing the costs, the clerk first taxed to the executor in favor of said witness for 5 days' attendance and 70 miles' travel. Thereupon, appellee moved for a retaxation of such portion of the costs, and that the witness be allowed full mileage from his home to the place of trial, instead of 70 miles, as entered by the clerk. This application was sustained, and the mileage was re-assessed on the basis of the entire distance traveled; and the executor appeals.

Counsel argue in support of the appeal: First, that, as the witness came to the place of trial voluntarily, without subpoena, he is not entitled to any allowance of mileage; second, that, as our statute limits the compulsory attendance of a witness upon subpoena to 70 miles, such distance should be the maximum limit of taxable mileage.

This question, in some of its aspects, has had the attention of the court on several occasions. It seems to be settled, and such is the reasonable effect of the statute, that the right to have fees taxed for the attendance

1. Costs: witness
fees: taxation:
absence of sub-
poena.

and mileage of witnesses does not necessarily depend upon service of subpoena.

The principal office of a subpoena is to compel the appearance of witnesses who are within reach of such process and would not otherwise attend the trial; but, if they appear voluntarily, at the request of the party desiring their testimony, and submit themselves to examination without compulsion, there can be no good reason for denying them the usual compensation simply because they waived their right to refuse to attend without the service of subpoena. As said by us in *Duree v. Chicago, M. & St. P. R. Co.*, 118 Iowa 640, 644, if the witness attend voluntarily, the service of subpoena "would be superfluous, and of benefit to neither party. The omission to swell the costs with the additional expense in officer's fees and mileage, for issuing and serving the subpoenas furnishes no grounds of complaint by the other side." To guard against abuse of such right, the courts, in the absence of a clear showing in support of the claim, will not allow fees for the attendance or mileage of witnesses not subpoenaed, and not in fact sworn or examined on the trial. *Duree v. Chicago, M. & St. P. R. Co.*, supra; *Briggs v. M. Rumely Co.*, 96 Iowa 202, 209; *Fisher v. Burlington, C. R. & N. R. Co.*, 104 Iowa 588; *Casley v. Mitchell*, 121 Iowa 96. A stricter rule is, perhaps, to be applied in a criminal case, by reason of the statute which re-

quires an affidavit and order of the court before subpoena will issue for the attendance of witnesses at the public expense. *State v. Willis*, 79 Iowa 326. If, then, fees for the attendance and necessary travel may be al-

2. COSTS: witness fees: taxation: mileage out-side state. testified under circumstances showing him

to be a material and competent witness in the case, it follows of necessity, in our judgment, that the 70-mile limit upon the effective force of a subpoena has no effect to limit the authority of the court to allow mileage for a greater distance. In several of our cases, it has been said that the allowance of mileage beyond such limit is largely a matter of discretion in the trial court. See *Perry v. Howe Co-op. Cr. Co.*, 125 Iowa 415, and other cases already cited. In the *Perry* case, mileage was claimed for travel from another state; but it was allowed from the state line only, and we sustained the ruling. It is possible that cases may be found—though counsel cite none—where we have refused to interfere with the discretion of the trial court in allowing mileage from points beyond the state line; but, however that may be, we are disposed to hold the safer rule to be that authority and discretion to allow mileage allowances to witnesses should be limited to their necessary and proper travel within the state. Without such restriction, the costs in a contested case may easily be made unnecessarily burdensome; and if a witness may travel from Idaho at the expense of the losing party, others may also be brought from across the seas in either direction, until their allowance reaches mountainous proportions. Again, mileage, if taxed at all, is allowed as a statutory right, and to grant it for travel of a witness before he reaches the jurisdiction of Iowa is, in a certain sense, to give the statute extra-territorial effect.

We therefore reach the conclusion that the mileage of the witness in the present case should be reduced, and taxed upon the basis of the distance traveled by him from the state

line to Forest City. For this modification of the order appealed from, the cause will be remanded to the district court.—*Modified and remanded.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

IN RE ESTATE OF MARGARET A. NEWTON.

EDWARD E. HOLMES, Executor, Appellee, v. ROBERT H. HOLMES et al., Appellants.

APPEAL AND ERROR: Review—Law Actions—Trial to Court—

- 1 **Finding Has Effect of Verdict.** The finding of the trial court has the weight of a verdict of the jury.

EXECUTORS AND ADMINISTRATORS: Allowance of Claims—Suf-

- 2 **ficiency of Evidence—Services Performed.** Evidence reviewed, and held to sustain finding of trial court that claimant furnished services to deceased with intention to demand pay, and that the decedent was indebted to him therefor.

EXECUTORS AND ADMINISTRATORS: Allowance of Claims—

- 3 **Good Faith of Executor.** Testimony by executor that a brother of claimant's had made statements to him that decedent, the mother of claimant, had said that she wanted the claimant to put in a claim after her death, was competent, not as establishing the claim, but as bearing upon the good faith of the executor in allowing said claim, and as negating a charge of fraud and collusion.

APPEAL AND ERROR: Review—Presumptions—Disregarding Incom-

- 4 **petent Evidence.** On an appeal, it will be presumed that the trial court, in making its findings, considered evidence only so far as the same was material and competent.

WITNESSES: Competency—Transaction with Deceased. In a hear-

- 5 **ing on the objection to an allowance of a claim,** the wife of the claimant can testify as to a conversation overheard by her between claimant and decedent, in which she took no part.

Appeal from Greene District Court.—E. G. ALBERT, Judge.

APRIL 15, 1919.

APPEAL by objectors from an order in probate.—*Affirmed.*

E. B. Wilson, for appellants.

J. A. Henderson and Howard & Sayers, for appellee.

STEVENS, J.—I. This appeal is from the order of the court below, overruling objections to the annual report of Edward E. Holmes, executor of the estate of his mother, Margaret A. Newton. The objectors and appellants herein are his brother and sisters. The will of Margaret A. Newton was admitted to probate in Greene County, March 31, 1914, and shortly thereafter, appellee qualified as executor of her estate. On October 6th thereafter, David A. Holmes, a brother of executor's, filed a claim in the office of the clerk of the district court of said county for \$1,500 for services alleged to have been rendered by him to her in the management of her farm and business from January 1, 1902, to February 3, 1914, which claim was allowed in full, together with \$60 interest, on March 2, 1916, without an order of court. The executor reported the allowance and payment of said claim in his first annual report, and appellants filed objections to the approval of said report. A hearing was had thereon, resulting in the court's overruling the objections and approving the report.

In argument, counsel for appellant contends: (a) That the evidence does not support the finding of the court, and that it shows that the claim was allowed and paid by the executor in collusion with the claimant, and in fraud of the rights of appellants; (b) that the claim was paid without the approval or the authority of the court; (c) that the court should have reviewed the claim and allowed what was justly due, if anything, thereon, instead of overruling the objections to the report.

Respecting the allowance of the claim by the executor,

the evidence shows that he investigated the merits thereof, to some extent at least, before payment thereof, and consulted with his brother G. L. Holmes and with Mary Galbraith, one of the objectors. He testified that he was informed by his brother G. L. Holmes that deceased told him, shortly before her death, that the claimant had always taken care of her, and for him to put in a claim against her estate. He was also informed by the wife of claimant that she heard deceased tell her husband, shortly after her will was signed, to put in a claim for the services rendered to her by him, and to make it a big claim. The information thus obtained, together with answers to other inquiries made by the executor, induced him to allow and pay the claim in full.

Claimant was married, and resided on a farm within a mile and a half of one of the farms of deceased. Various witnesses examined on behalf of appellee testified to business transactions with claimant, in which he acted for his mother. It appears that he marketed the products of her farm for her, often purchased material, and directed repairs and improvements thereon; and that she frequently consulted with and relied upon him generally in business matters, although apparently not exclusively. But one of the objectors was sworn as a witness, and the testimony given by him was unimportant. Other witnesses gave testimony concerning transactions with Mrs. Newton during the latter years of her life in which claimant took little or no part. From this testimony it would appear that deceased continued, to some extent at least, to transact business for herself, but the preponderance of the testimony shows that she also,

1. APPEAL AND ERROR: review:
law actions:
trial to court:
finding has effect of verdict.

to a considerable extent, relied upon the judgment of claimant. Before her death, claimant borrowed \$1,016.17 from his mother, giving his note therefor. This fact is urged as a strong circumstance tending to show that deceased was not indebted to claimant, and that

he did not intend to demand payment for services rendered by him. While there is merit in the contention of counsel at this point, this transaction is by no means conclusive. The finding of the court has the weight of the verdict of a jury, and the preponderance of the evidence tends to sustain its finding. The evidence wholly fails to establish appellants' charge of fraud in the allowance and payment of the claim.

II. Counsel for appellants also complain of the ruling of the court upon objections to certain testimony offered on behalf of the executor. The executor was permitted to testify to a conversation with his brother G. L. Holmes, in which the latter stated to him that deceased told him, shortly before her death, that claimant had always taken care of her, and that she wanted him to put in a claim against her estate therefor. This testimony was offered as bearing upon the good faith of the executor in the allowance and payment thereof, and not to establish same. It tended also to negative the charge of fraud and collusion.

The evidence was clearly admissible for this purpose, and it will be presumed that the court considered the same only so far as it was material and competent. *Finnegan v. City of Sioux City*, 112 Iowa 232; *Wright v. Farmers Mut. L. S. Ins. Assn.*, 96 Iowa 360.

III. The wife of claimant was permitted to testify to a conversation which she claimed she overheard between her husband and deceased, and in which she took no part. The objection to this evidence was properly overruled. *Johnson v. Johnson*, 52 Iowa 586; *Lines v. Lines*, 54 Iowa 600; *Allison v. Parkinson*, 108 Iowa 154; *McElroy v. Allfree*, 131 Iowa 112.

2. EXECUTORS AND ADMINISTRATORS: allowance of claims: sufficiency of evidence: services performed.

3. EXECUTORS AND ADMINISTRATORS: allowance of claims: good faith of executor.

4. APPEAL AND ERROR: review: presumptions: disregarding incompetent evidence.

5. WITNESSES: competency: transaction with deceased.

Other objections to the admission of evidence offered by appellee, and to the refusal of the court to strike the answers of the witnesses, which are urged in argument by counsel, do not require separate consideration, as we find no reversible error in the record.

It follows that the order and judgment of the court below are—*Affirmed*.

LADD, C. J., EVANS and GAYNOR, JJ., concur.

WILLARD L. KING, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

EVIDENCE: Opinion Evidence—Sufficient Time to Get Off Track.

- 1 Whether an employee who was struck by a train while operating a mower on the railway right of way, had sufficient time between the warning given by a co-employee and the time the train struck him, to have stepped out of the way, is properly excluded, as calling for an opinion and as being argumentative.

SALINGER, J., dissents.

EVIDENCE: Admissibility—“Supposed to Use Sand on Rails. Evi-

- 2 dence of the engineer, operating the train that injured the plaintiff, as to what he was *supposed* to do in using sand on the rails, in trying to stop the train, held to have been properly stricken.

SALINGER, J., dissents.

NEGLIGENCE: Last Clear Chance—Sufficiency of Evidence—Em-

- 3 ployee on Railway Right of Way. Evidence reviewed, and held sufficient to justify the submission to the jury of the case on the theory of last fair chance, where a railroad employee operating a mower on the railway right of way was struck by a train.

TRIAL: Special Interrogatories—Discretion in Submitting—Error

- 4 only as to Ultimate Facts. The refusal to submit an interrogatory not calling for an ultimate fact, or the answer to which would not necessarily be decisive, is not error. Section 3727, Code, 1897.

SALINGER, J., dissents.

NEGLIGENCE: Last Clear Chance Doctrine—Erroneous Instruction

- 5 **Only Applies upon Discovered Peril.** An instruction applying the last chance doctrine, and stating that the plaintiff would be entitled to recover, not only if the employees of the company saw plaintiff upon the track in danger of being injured, but also "if it *ought* to have been known to defendant's employees, in the exercise of reasonable and ordinary care on their part, that they might, by the exercise of reasonable diligence," have avoided a collision, is erroneous, as the last chance rule does not apply unless the person injured was actually *seen*.

NEGLIGENCE: Last Clear Chance Doctrine—Erroneous Instruction

- 6 **—Harmless Error.** An instruction erroneously stating that the plaintiff could recover under the last chance doctrine if defendant *ought* to have known of plaintiff's peril, held harmless error, in view of the fact that the employees of the railway operating the train testified that they saw the employee's outfit when the train was half a mile away, and that they continued looking through the cab windows up to the time of the collision.

SALINGER, J., dissents.

TRIAL: Instructions—Applicability to Pleadings—Evidence. It was

- 7 not error to refuse to instruct that there was no evidence that plaintiff's bad eye was in consequence of the accident, where no claim was made in the petition therefor, and none was submitted, and where the evidence showed that his right eye, at the time of the trial, was not the same as it was before the injury.

APPEAL AND ERROR: Assignment of Error—Brief Points—Sufficiency.

- 8 Assignment of error generally to the overruling or sustaining of objections to questions asked, without referring to any particular question or ruling, is too indefinite for a review of the rulings.

Appeal from Johnson District Court.—R. P. HOWELL, Judge.

APRIL 15, 1919.

ACTION for damages consequent on a collision with defendant's train resulted in judgment for plaintiff. The defendant appeals.—*Affirmed*.

F. W. Sargent, Frank F. Messer, and Robert J. Bannister, for appellant.

Otto & Otto and Dutcher & Davis, for appellee.

LADD, C. J.—I. About August 2, 1918, the plaintiff was engaged in cutting weeds on the defendant's right of way in the vicinity of the Iowa City Canning Company's Works. This was being done with a team and mower owned by him. The company, through its foreman, Wachs, had employed one Norval Letts, then 17 years of age, to keep a lookout for defendant's trains. About 4:30 o'clock in the afternoon, while plaintiff was operating his mower, one of defendant's passenger trains approached from the east, at a speed of from 35 to 40 miles an hour, and, as is alleged, negligently omitted to give any signal or warning of its approach, of which plaintiff was unaware; and, by reason of such neglect, and a like neglect on the part of Letts, and without fault on his part, said train struck plaintiff, the team, and mower, seriously injuring him, killing one of the horses, injuring the other, and demolishing the mower. The petition further alleged that defendant knew, or by the exercise of ordinary care could have known, that plaintiff was engaged in mowing on its main track and switches, and was in a place of danger, and that, in the exercise of ordinary care, defendant's employee could have stopped the train and avoided the collision, but failed so to do, in consequence of which the injuries mentioned occurred. A general denial and charge of contributory negligence were interposed by defendant's answer.

That plaintiff, as employee of defendant, was engaged in cutting the grass along defendant's right of way, is not disputed. He had done so for several years, but not previously as close to the track as required when hurt. He was employed by the section foreman, who undertook to provide "someone to take care of him,"—that is, to keep a lookout for approaching trains, and assist him in the work. Norval Letts undertook so to do. As testified by plaintiff, the work had proceeded until, "in the afternoon, I was on the north side of the track; I started on the north rail by Smith's

Crossing. I was pretty near to the end when the train overtook me,—I guess about a quarter of a mile, I should think,—maybe a little better. Going along this track, you have to move awfully slow, got to hold your horses tight, keep them exact on the rail, and keep the lines tight in your hands. I had a rope on the end of the sickle bar.” He then explained that he had removed the dividing board, and put a rope on in its place, long enough so that the boy would not get into the machine; that the boy would raise the bar, upon approaching an obstruction. “Where this accident happened, it was graded 10 to 12 feet high.” A signal post was at that point, north of the track. As the mower reached it, “the boy made a scream; raised the sickle bar up. I supposed he caught on the bar. I look over my shoulder this way around, and it (train) was right behind me, and I immediately jumped off the seat to save myself,—I was scared so bad. Before I could get away from the machine,—smash! I didn’t know no more; I was gone to the world.”

On the other hand, the engineer testified that he gave four short whistles, when within 200 or 300 feet of plaintiff.

“I did not know just exactly the distance. I saw a man come from the north side of the team, go to the south side. That was after I gave this warning whistle. I had run a little west from where I gave the signal. He reached down for something. I do not know what he was doing. I supposed he was going to pick up the lines and drive his team away; then he turned around, and gave me his signal to stop. He gave this signal with his hat.”

And then the collision.

Letts swore that, when about 15 feet from the block signal, the team was started, plaintiff walking on the south side of the mower; that, on reaching the block signal, he raised the sickle bar, and, as it caught between some boards running to the signal block, the knives dropped down.

“The train was right on top of the hill, when I seen it

first, about half a mile away. I hallooed to him that the train was coming. He drove up in there; then he got caught. I saw the train before the sickle bar got caught. After the machine was caught there, Mr. King told me to try to pull the bar out, and I tried it. He kept going ahead with his team, kept pulling his team; he hit them with the lines. He was in the middle of the track. We have to drive between the block signal and the track, to get through, but he could have went down below and around. Q. Now, after Mr. King pulled his team over, as you say he did, what did he do, if anything, if he did anything more,—before this train struck? A. Why, he unhooked one tug, run around, unhooked the gray horse tug,—just run around. When he got half way, the train hit. He ran around to the south. The gray horse tug he unhooked was on the north side. Just after he unhooked the gray horse tug on the north side, he run around, was going to unhook the other tug of the other horse. Just about that time, I jumped down hill. I was not close to it when the train struck the mower. When I was on the edge of the ties yet, the train was close to me. I was down the hill when the train struck the mower.”

These excerpts from the evidence indicate the nature of the evidence bearing on the issues as to defendant's employee's alleged negligence and that of Letts, as well as the alleged contributory negligence on the part of plaintiff.

II. After Letts testified as stated, he was asked to “state whether or not there was enough time elapsed between the time you called to him, ‘There is the train,’ and the time it struck the mower, for him to have

stepped out of the way?” An objection as calling for an opinion and argumentative was sustained, and, we think, rightly so. To answer it, he must first have concluded at what speed the train was moving, where the train was at that time, how a

1. EVIDENCE: opinion evidence: sufficient time to get off track.

person of ordinary prudence would be likely to have acted before the mower was hit, and what efforts he would have made to save himself. The inquiry exacted a conclusion, to be drawn from many controverted facts, and, owing to this, was not permissible. Moreover, it required of the witness to say what the jury necessarily should have passed on: that is, whether, notwithstanding all that happened, he had time to have stepped away, and avoided injury. If, in the exercise of reasonable care, he had time enough to escape, there could have been no recovery for the personal injuries as claimed. All matters bearing on the issue submitted to the witness were shown the jurors, and they were as well qualified as the witness to pass thereon. The ruling is to be distinguished from that in *Boice v. Des Moines City R. Co.*, 153 Iowa 472, where objection to this question, propounded to plaintiff, was overruled: "Whether or not, if the conductor had not asked you to stop, you would have had time to get on the car before it started?" Without approving this ruling, the inquiry related to what the witness could have done in a certain time; while, in the case at bar, the inquiry called for the witness' judgment as to whether another could have stepped out of the way of a moving train, in a time to be estimated by the witness from conflicting evidence. For these reasons, there was no error in the ruling.

III. The engineer operating the train, when asked if "sand is of any benefit when you have a dry rail," answered:

"Not to amount to anything. * * * Q. It wasn't raining that day? A. I know it wasn't,—this sand wouldn't amount to anything. Q. I will put it in another form. You don't mean to say to the jury on a dry rail sand won't help you stop a train? A. It doesn't

2. EVIDENCE:
admissibility:
"supposed to
use sand on
rails."

amount to very much. Q. It does some? A. Some,—it might,—not very much. Q. It is carried on the engine for that purpose, isn't it? A. To a certain extent."

Re-direct Examination.

"Q. For what purpose is sand carried on the engine?
A. For a bad rail. Q. You mean wet or slippery rail? A. Yes, or any frosty morning, or dew on the rail,—anything like that. That is when you are supposed to use your sand, but on occasions like that we are not supposed to use that sand."

A motion to strike out what he is supposed to do, as incompetent, immaterial, and irrelevant, was sustained.

As the collision occurred in an afternoon of August, there could have been no frost nor dew; and therefore, whether "you are supposed to use sand" on a frosty morning, or when dew is on the rail, is immaterial. The last clause either refers to where the rail is dry, or is meaningless. If reference was had to a dry rail, in mentioning "occasions like that," then the ruling was favorable to defendant, and it cannot be heard to complain, for that no sand was used in stopping the train. The context indicates plainly enough that the witness, by saying what was supposed to be done or omitted, had reference to when the sand should be used, or customarily was used. He was qualified to testify on the subject, and we discover no error.

IV. An instruction that there was no evidence warranting the submission to the jury of the issue of the last fair chance was requested and refused, and defendant moved to strike all evidence bearing thereon from the record. This motion was rightly overruled, for that much, if not all, of such evidence related to other issues; and there was no error in refusing to give the instruction.

The fireman on the train testified that he—

"Saw the outfit about half a mile west, when they were coming over that knoll right at that crossing there, and

3. NEGLIGENCE:
last clear
chance: suffi-
ciency of evi-
dence: em-
ployee on rail-
way right of
way.

looked like three men to me at the time,—I couldn't distinguish them. I was ringing the bell for the crossing. I kept ringing the bell from then on down, and we got within 600 or 800 feet of this outfit, and we could distinguish them,—distinguish two horses and a man; and the engineer blew a warning whistle, and I was ringing the bell; and the man was between the rails, stooping over, like as though he were picking up the lines; and when we went on down within 80 to 100 feet of him, why, he stood upright, and took his hat off to flag us down, and almost instantaneously he started west, and went around the head of the horses, and that is the last I saw of him. The train was going 35 or 40 miles an hour. I was riding on the south side of the engine. This crossing I spoke of is at the top of the hill, about half a mile away. I thought he was going to pick up the lines and drive the team in the clear."

The testimony of the engineer was that he—

"Was riding on the right-hand side, or the north side of the cab. I first saw this team and mower about half a mile away. I saw that team of horses there. I didn't see any man with them. The team seemed stationed there. I could not tell, from where I was, whether they were moving away or not. I first saw them just about at the private crossing, just as we come from the private crossing. The first public highway is about a mile east of that. I gave a warning signal to this man on the track. I gave four short whistles. My engine was a couple or three hundred feet from them when I gave this warning whistle. I don't know just exactly the distance. I saw the man come from the north side of the team, go to the south side. That was after I gave the warning whistle. I had run a little west from where I gave the signal. He reached down for something,—I don't know what he was doing,—I supposed he was going to pick up the lines and drive his team away; then he turned round and gave a signal to stop. He gave this signal with his hat.

* * * Q. How close were you to the team when you did that? A. Oh, I was maybe 50 feet. * * * There was nothing more I could have done to stop the train any quicker. It is of no value in making a quick stop to reverse the engine. It has the effect of causing the wheels to slide. We always figure on not allowing the wheels to slide."

He then testified that he had passed a number of graders and a few men mowing weeds along the track; and that it is supposed the men will get out of the road at the approach of the train; and that, when he noticed the outfit in question, he thought plaintiff would get out of the way; and that his experience had led him to expect men on the track to wait until the engine was 25 or 50 feet away, before leaving the track; that both the horses were north of the track, but he did not see the machine, nor more than one man; that he "stopped the train as soon as he could after he flagged us down." The witness further testified that, when running 40 miles an hour, he could stop the train within 700 feet.

"Q. Did you ever see a man before this time on a track running a mower with a wheel along between the rails mowing weeds? A. No, sir, never did." This evidence leaves no doubt that plaintiff, with his team, was seen on the railroad track by the employees of the defendant when at a distance east of said team much farther than required within which to stop the train and avoid the collision. And yet, according to the engineer, no signal was given until 200 or 300 feet from him, or after all possibility of avoiding injury, were he to remain where he was, had passed. Apparently, he was then making no effort to get off the track; for, as the engineer says, "the team seemed stationed there," and he could not tell whether "they were moving away or not." As the train moved west, after the signal, according to both these witnesses, plaintiff then came from the north side of the team, went to the south side, reached down for something, which both witnesses thought to be the lines; and as

he rose, he signaled with his hat to stop. This was when the train was within 50 to 100 feet from plaintiff, and the engineer then did everything he could to stop the train, but this was too late; for the evidence that it must have moved 700 feet before brought to a stop was undisputed. The evidence was without conflict that the engineer observed this man and team, apparently giving no heed to the approaching train, when a half mile away; that, though the fireman testified to ringing the bell continuously, the engineer gave no warning whistle until too near the man and team to stop the train in time to avoid the collision; and manifestly, the only debatable issue is whether the engineer was, in view of the situation, negligent in not having his train under control, so as to be able to stop it, and in not stopping it in time to avoid injuring plaintiff and his property, in event that he was unable to, or did not, get from in front thereof. Plaintiff was an employee of the company, engaged where he had the right to be, and the employees in charge of the train owed him the duty of exercising ordinary care, not only in keeping a lookout for him when at work, but to guard against injuring his person or property while there. Whether, in the exercise of such care, they might properly have assumed that he would get from in front of the approaching train, and therefore not take any precautions for his protection, as in slowing its speed so as to be able to stop in time to avoid injury, was for the jury to decide. That both the engineer and fireman observed his situation is undisputed. The jury might well have found that these employees were aware that he was unmindful of the approach of this train at the high speed of 40 miles an hour, when more than 700 feet, the distance within which it could have been stopped from him, and that, because he was oblivious of such approach, as the jury might have found he was, his situation was one of great peril, and so known to those operating the train, in time to have avoided the collision. This being so.

there was no error in submitting the cause on the theory of last fair chance to the jury.

V. The defendant requested submission of the following special interrogatory: "How far away was the train when plaintiff first learned it was coming?" The plaintiff

4. TRIAL: special
interrogato-
ries: discretion
in submitting:
error only as
to ultimate
facts.

objected thereto on the ground that it did not call for an answer conclusive upon any issue in this case, did not require a finding as to a single element of neglect, was not controlling of the verdict, and was confusing. The court refused to submit the inter-

rogatory. Section 3727 of the Code declares that the jury "may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact, to be stated to it in writing." Though the statute does not specify the particular questions of fact which may be propounded to the jury, it is necessarily to be inferred that these are such as will serve some purpose in the trial, either by exacting from the jury a decisive finding, or the determination of some fact affecting the result. As said in *Morbey v. Chicago & N. W. R. Co.*, 116 Iowa 84:

"The design of special interrogatories is to point out the controlling questions in the case, exact for them separate consideration, and thereby guard against misapprehension of what are the vital issues to be determined. When the answers cover all the ultimate facts, these furnish a full explanation of the general verdict, and a safe test of its accuracy. Their use, however, should never be perverted to the purpose of confusing and misleading jurors, nor to that of merely satisfying the curiosity of parties. Yet this might, and no doubt would, often be the result, if, upon the request of either party, the jury must be required to find 'specially upon any particular question of fact, regardless of whether it inhered in or affected the general verdict.' A finding on

any question if it relate to 'material matters bearing on the issues' contended to be sufficient by appellant, if not involving the final result, could be of no real advantage to either party. 'However natural the curiosity parties may have to know the course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found especially by the jury, to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case.'"

On these grounds, this court has uniformly held that it is not error to refuse to submit to the jury interrogatories calling for other than ultimate facts. *Trumble v. Happy*, 114 Iowa 624; *Wilder v. Great Western Cereal Co.*, 130 Iowa 263; *Payne v. Waterloo, C. F. & N. R. Co.*, 153 Iowa 445. Nor is the court required to submit any interrogatory the answer to which would not be decisive of the cause or claim contained therein. *Nodle v. Hawthorn*, 107 Iowa 380; *Jones v. Ford*, 154 Iowa 549; *Ottaway v. Milroy*, 144 Iowa 631; *Neidy v. Littlejohn*, 146 Iowa 355. To require the submission of a special interrogatory, it must call for an ultimate fact, and an answer decisive of the case or some claim involved therein. *Heinmiller v. Winston Bros.*, 131 Iowa 32; *Brown Land Co. v. Lehman*, 134 Iowa 712; *Schulte v. Chicago, M. & St. P. R. Co.*, 114 Iowa 89; *Rutherford v. Iowa Cent. R. Co.*, 142 Iowa 744. If the interrogatory does not exact an answer calling for an ultimate fact, or is not decisive of the case or claim involved therein, it is not error to refuse the same. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126 Iowa 638; *Engvall v. Des Moines City R. Co.*, 145 Iowa 560; *Luisi v. Chicago G. W. R. Co.*, 155 Iowa 458.

There are cases, however, where the refusal of a proper special interrogatory or some other irregularity will not be regarded as error. *Brooks v. Van Buren County*, 155 Iowa 282; *Conway v. Murphy*, 135 Iowa 171; *Taylor v. Wabash*

R. Co., 112 Iowa 157; *McGuire v. Chicago, B. & Q. R. Co.*, 138 Iowa 664; *Luisi v. Chicago G. W. R. Co.*, 155 Iowa 458.

It is not always easy to determine what is an ultimate fact, or what answer will necessarily be decisive of the issue, and it may be that decisions will be found impinging somewhat on the rules as recited above. Thus, it may be doubtful whether all the interrogatories submitted to the jury in *Decatur v. Simpson*, 115 Iowa 348, copied from *Beck v. German Klinik*, 78 Iowa 696, were ultimate and decisive; but the decisions upholding their submission were on the ground that they "called for ultimate facts inhering in and necessary to be determined in reaching a verdict."

In *Runkle v. Hartford Ins. Co.*, 99 Iowa 414, in approving the refusal to submit certain interrogatories, it was said that:

"The court was not required to submit interrogatories for findings of fact not necessarily determinative of the case, nor to submit particular questions not ultimate in their nature, or which could not well be considered or answered without danger of conclusion or misrepresentation."

In sustaining the refusal to submit interrogatories, in *O'Leary Bros. v. German-American Ins. Co.*, 100 Iowa 390, the court said:

"It is not error to refuse to submit interrogatories as to immaterial facts, nor that are not ultimate in their nature, that may not be answered by 'Yes' or 'No,' or in some other brief or pertinent way."

See, also, *Hawley v. Chicago, B. & Q. R. Co.*, 71 Iowa 717; *Thomas v. Schee*, 80 Iowa 237, 238.

In *In re Estate of Townsend*, 122 Iowa 253, the defendant requested the submission of ten special interrogatories, which the court refused; and it was held that the first, sixth, and eighth should have been given, for that "they each called for ultimate facts, material to the issue in the case." Though it be doubtful whether one or two of these inter-

rogatories were such as designated, the error in refusal was put on the ground stated; and in *Scagel v. Chicago, M. & St. P. R. Co.*, 83 Iowa 380, the refusal to submit several interrogatories was justified, for that the answer "would not have controlled the general verdict, and is not reversible error."

It is apparent from these decisions that, regardless of how the language of the statute might have been construed, it has actually and uniformly been so construed as that, to constitute error in the refusal of a special interrogatory, it must have called for an ultimate fact, and an answer decisive of the case or of some claim involved therein. A large discretion is lodged in the trial court in the matter of submitting questions to the jury, even though omitting one or both of these elements; but we know of no case declaring that the refusal to submit an interrogatory not calling for an ultimate fact, or the answer to which would necessarily be decisive, has been regarded as an error. In the absence of prejudice, submission of interrogatories cannot well be denounced as erroneous. Error may be predicated only on the refusal of an interrogatory exacting an answer decisive of the case and calling for an ultimate fact. Any answer that might have been made would not have been controlling or decisive of any issue in this case, nor would it have called for an ultimate fact. The defendant might have been found negligent had plaintiff not observed its train until looking over his shoulder immediately before being struck, as he testified, or if he had seen it much farther back, and without fault, had he observed its approach at the time described by Letts and other witnesses. There was no error in refusing to submit the special interrogatory.

The doctrine of last fair chance was submitted in the eighth instruction. The first two objections thereto relate to the state of the evidence, rather than to the rules of law

5. NEGLIGENCE: it is said the evidence was insufficient to
last clear warrant giving the instruction. We have
chance doctrine: erroneous instruction already ruled otherwise. The second objec-
only applies upon discovered tion reads:
peril.

"There is no competent evidence that, at any time after it became apparent to the engine men, as reasonable men, that the plaintiff was in danger of being injured, there was no effort to stop the train to prevent the injury, under the undisputed evidence."

This again fails to criticise the instruction. It seems to assert that there was no evidence that, after the engineer observed plaintiff in danger, there was no effort to stop the train. If it does not mean this, we are unable to interpret the language used; and if it does, no one will pretend that it was necessary to prove that no effort was made. The evidence was such that the jury might have found that, after the discovery of such danger, no timely effort such as ordinary prudence dictated was made to avoid injury.

The first part of the third objection was that the instruction "requires too high a degree of care on the part of the appellee." This point was not raised in brief point or argument.

The exception taken in the brief point and argument is to that part of the instruction wherein the jury is told not only that, if "the employees of the defendant company saw plaintiff upon the track and in danger of being injured," but also that "*if it ought to have been known to defendant's employees, in the exercise of reasonable and ordinary care on their part* that they might, by the exercise of reasonable diligence" have avoided the collision, then plaintiff would be entitled to recovery. If the words in italic were properly included, the degree of care exacted, i. e., ordinary care, was such as by law required. The trouble with the instruction is that these words should have been omitted. Their omission,

however, would not have changed the degree of care required from defendant,—that is, ordinary care to avoid injury to the plaintiff. The error was in defining a situation in which it was said the doctrine of last fair chance applied,—that is, when defendant's employees did not know, but ought to have known, the plaintiff's peril; and such was the error assigned and argued. This did not involve a higher measure of care on the part of either party than exacted by law, as expressed in the instruction. The statute then in force required that:

"All objections or exceptions thereto must be made before the instructions are read to the jury and must point out the grounds thereof specifically and with reasonable exactness; * * * and no other objections or exceptions shall be considered by the trial court upon motion for a new trial or otherwise, or by the Supreme Court upon appeal." Section 3705-a of the Code Supplement, 1913.

The error complained of was not in the degree of care exacted, but that a situation was stated in which the doctrine of last fair chance ought not to have been applied. This objection was rightly disregarded.

The counsel in their argument referred only to the above objections, but, as appears from the abstract, later on, an objection was interposed to this instruction on the ground that "it submits the case to the jury upon the theory, not what defendant's employees knew, or knew and from knowing was reasonably apparent to them, but upon the theory of what ought to have been known and should have been seen in the exercise of ordinary care, whereas no duty arises under said doctrine (last fair chance) until the plaintiff is seen and his dangerous predicament is or should be appreciated." The writer was misled in the first instance by the quotation of the objections in appellant's brief, previously considered, and entire omission of reference thereto. The instruction was erroneous, as appears in *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579, 582, and subsequent decisions.

6. NEGLIGENCE:
last clear
chance doc-
trine: errone-
ous instruc-
tion: harmless
error.

The error, however, was without prejudice.

Both the engineer and fireman testified that they saw the plaintiff's outfit when the train was about one-half mile from where the collision occurred. The fireman testified that he kept looking at such outfit until the head

of the engine cut off his view; that he saw only one man, but did not see the mower; that he kept ringing the bell for the crossing until within 600 or 800 feet of the outfit, when the engineer blew a warning whistle. The engineer swore that he was 200 or 300 feet from the outfit when the whistle was blown, but that he did not exactly know the distance; that he then noticed the plaintiff come around from the north of the team; that he then gave a signal and shut off the air; that he saw only one man; that when he saw plaintiff come around from the north of the horses was the first time he saw them. The day was bright, and the road straight. As the evidence of the engineer and fireman is that they saw the outfit at a distance of a half mile, and that they continued in their seats and continued looking through the cab windows up to the time of the collision, there is no room for saying that they did not see whatever anyone would have seen, and therefore they necessarily saw what one in the exercise of ordinary care would have seen. Said employees are held to have appreciated plaintiff's peril, if a person of ordinary prudence would have done so, and this issue was fairly submitted to the jury by the instruction under consideration. The error was, then, without prejudice.

Objections raised to the seventh instruction require no attention.

Complaint is made of the court's refusal to instruct the jury that there was no evidence that plaintiff's bad eye was in consequence of the accident; that defendant was not re-

7. TRIAL: instructions: applicability to pleadings: evidence. sponsible therefor; and that the claim was withdrawn from consideration.

No claim for injury to the eyes was made in the petition, nor was any submitted. Moreover, there was evidence that his sight "was number one" before, and that his right eye, at the time of the trial, "glimmers." In this state of the record, there was no error in refusing to instruct as requested.

Errors 4 and 5 are assigned generally to the overruling or sustaining "objections" to questions asked certain witnesses, without referring to any particular question or ruling. The brief point is no more definite.

8. APPEAL AND ERROR: assignment of error: brief points: sufficiency. This is too indefinite to call for a review of the rulings, and that challenged in the second assignment of errors is not debatable.

We discover no reversible error, and the judgment is—*Affirmed*.

EVANS, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). I. Many matters raised in the brief are not mentioned in the opinion. I take it the reason for this is that the matters are deemed not to have been presented in rule manner. In my opinion, the assignments should be mentioned and disposed of for that reason.

II. There is complaint of the striking of certain testimony given by defendant's engineer, and the majority sustains the ruling.

It is difficult to determine from the record just what the court in fact excluded. The appellant asserts it was one thing, but its assertion is not proof. A different situation arises if it be the fact that appellee has conceded what the ruling of the court was. That concession would bind him, where, as here, there is doubt as to what the ruling in fact was. If appellee has conceded what a sustained ruling is, he is not entitled to the benefit of the rule that, where an objection is sustained, the ruling will not be interfered with

if, though erroneous on the objection made, it can be sustained for any good reason. Where appellee admits what a ruling was, and states upon what ground he defends it, there should be a reversal if, when so defined, the ruling is erroneous.

The stricken testimony was that, under the conditions existing, the employees were not supposed to use sand. Appellee states in his brief that this was rightly excluded because testimony as to a duty is admissible only where the duty is founded in usage, custom, or experience in the business, and such evidence may not be received where the duty spoken to is founded upon specific directions; and that same was rightly stricken for the further reason that the facts themselves could be fully disclosed to the jury for judgment and deduction.

The record clearly shows the excluded matter does refer to a duty founded in usage, custom, or experience in the business; there is not a suggestion that the witness speaks to a duty founded upon specific directions. And, within reasonable length, no statement of facts could as clearly put before the jury what the duty in the premises was as the statement of an experienced engineer who ran the very train that caused the injury. I am of opinion that testimony held to be admissible in *Quinlan v. Chicago, R. I. & P. R. Co.*, 113 Iowa 89, and *Yeager v. Chicago, R. I. & P. R. Co.*, 148 Iowa 231, was much more objectionable than that excluded here. And I see nothing in cases like *Allen v. B., C. R. & N. R. Co.*, 57 Iowa 623, 624, or *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462, or *Curl v. Chicago, R. I. & P. R. Co.*, 63 Iowa 417, which affects the rule in cases like that of *Quinlan* or *Yeager*.

III. I am of opinion it was error to refuse to let a witness who was present say whether or not enough time elapsed between the time the witness called to plaintiff "There is a train," and the time it struck the mower of the plaintiff,

for him to have stepped out of the way. As I construe it, it is fairly settled by *Boice v. Des Moines City R. Co.*, 153 Iowa 472, *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268, and *Robinson v. Springfield St. R. Co.*, 211 Mass. 488 (98 N. E. 576), that this testimony was competent, and should be received. I do not think the fact that, in one of these cases cited above, such testimony was held to be rightly admitted, changes the rule. If testimony is incompetent, it is incompetent whether the court receives it, and so the complaint is made of the reception, or rejects it, and so the complaint is of exclusion. The action of the court does not change the nature of the testimony.

I do not overlook that, in the *Boice* case, there is the casual statement that "the rulings as to this question and two or three others of similar character were so plainly within the exercise of a proper discretion on the part of a trial judge that no further discussion of them seems to be required." What I do say is that this casual statement does not establish it would not have been held error had the testimony been rejected. The reasons given for approving the reception are such that no casual remarks about the matter's being discretionary can obviate that the *Boice* case is an express holding that there is a right to have such testimony received. Its reception is approved on the ground that what was received was admissible, of necessity, because, though a conclusion, it was one that "could be drawn only from all the attending facts and circumstances as known to plaintiff:" in effect, that the testimony was the only practical way of bringing the point before the jury. When an ultimate evidentiary factor can be put before the jury only by a statement in the form of a conclusion, there is a right to put that conclusion before the jury. A refusal to receive it would be a refusal to let the jury hear material matter that could be submitted to it only in the form proposed. It is not a matter of discretion to reject what is the only practical form

of making material proof. The majority is diffident about what to do with the *Boice* case, and studiously refrains from "approving this ruling." It should be approved and followed. I have already indicated why I think it makes no difference that, in the *Boice* case, the objections to the evidence were overruled, while here they were sustained,—a distinction which the majority draws. It is remarkable that the finale is a holding that the evidence was rightly excluded because "the inquiry exacted a conclusion to be drawn from many controverted facts, and, owing to this, was not permissible." The *Boice* case holds that such testimony is receivable because it is a deduction from such facts. In other words, the majority sustains the exclusion of testimony for the very reason upon which the *Boice* case and many other authorities hold it is receivable.

IV. The court refused to submit a special interrogatory asked by defendant as to how far the train was away from plaintiff when plaintiff was first advised of its coming. It is proposed to affirm this refusal on the ground that the interrogatory called for nothing which was necessarily determinative of the case. It is not to be denied that many of our decisions have held that the interrogatory must be one that is necessarily determinative of the case. I submit that these decisions simply rewrote the statute, because the court believed that it would be mischievous to give the statute the only meaning which its plain words have. These words are that a special interrogatory shall be submitted "upon any particular questions of fact, to be stated to it in writing." Code Section 3727. It may be too late to recede from these, and to leave to the legislature to make such change in this statute as will avoid the things for fear of which this court has rewritten the statute. It is not amiss to add that, while we have often held that no interrogatory should be submitted unless it calls for some ultimate fact determinative of the suit, we have also held that they should

not be submitted whenever they do call for just such a fact, or call for the very matters which it is the province of the jury to determine by the general verdict. See *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187; *O'Leary Bros. v. German-American Ins. Co.*, 100 Iowa 390. All I care to emphasize is that, whatever classification the interrogatory at bar belongs to, there have been reversals for refusing to submit interrogatories which were not in the least more ultimate or determinative than is the interrogatory at bar. This must have been done on the theory that the submission of interrogatories should not be refused where the answer may be of use to the court for some purposes,—say, on determining on motion for new trial whether the verdict is the result of passion and prejudice. At any rate, I submit once more that we have upheld the right to interrogatories that were not more ultimate or determinative than the one which was refused in this case. And since the majority attempts a distinction between complaint that an interrogatory was submitted, and a complaint that it was refused, I call attention to the fact that, in the cases I shall cite, there was a reversal for refusing to submit what, as said, I think is not one whit more determinative than the interrogatory at bar. It may be true that reversal was accomplished by the argument that refusal was erroneous because the interrogatory requested *was* ultimate and determinative. Though that was done, it does not change the interrogatory passed upon. If these cases reverse by holding just such an interrogatory as the one at bar was ultimate and determinative, then the classification is immaterial; for the same authority that did the classifying would settle that this particular interrogatory now in review was ultimate and determinative.

Decatur v. Simpson, 115 Iowa 348, was a malpractice suit. There was a reversal for failure to give some interrogatories which are not in any way more decisive than the one at bar. In other words, they were not determinative of

the case, no matter how answered. One question was whether the defendants had properly treated plaintiff from the day on which they set his leg, up to the time they released him. Whether they did or did not would not necessarily decide the suit. So of another question, which was whether the methods and appliances used in the treatment were those generally approved by medical practitioners of average skill. Another inquiry was whether plaintiff's leg, when taken from the splint and bandages, was as crooked, or nearly as crooked, as when amputated. The most an answer to this could do would be to bear on the amount that might justly be recovered. All it could do would be to aid the court, if it were appealed to to grant a new trial. The case of *In re Estate of Townsend*, 122 Iowa 246, was a will contest. Two interrogatories, for refusal to give which there was a reversal, are certainly not more determinative than the interrogatory at bar. They inquired whether the proponents knew of the intention of the testator to make the will, before the same was made, and whether they knew, prior to the death of testator, that he had made a will. *Day v. City of Mt. Pleasant*, 70 Iowa 193, was an action to recover damages for personal injuries sustained from falling into a cellarway constructed in the sidewalk of one of the principal business streets of defendant. There was a reversal for refusing to submit interrogatories. One of them inquired whether there was sufficient light furnished at the place of the injury to enable a person with ordinary sight and using ordinary care to see the cellar opening. Clearly, whether such light was present or absent would not, of itself, settle which way the recovery should go. There might be no liability though the light was insufficient. There might be a recovery though the light was sufficient. My conclusion is that, upon the statute, and on reasoning and authority, it was error not to submit the interrogatory asked by appellant.

V. Instruction 8 charged that, if the employees of the

defendant saw the plaintiff upon the track, "and in danger of being injured and damaged, and had time, in the exercise of reasonable and ordinary care, to have prevented injury and damage to plaintiff, *or if it ought to have been known to defendant's employees, in the exercise of reasonable and ordinary care on their part, that they might, by exercise of reasonable diligence on their part in giving signals, warn plaintiff of his danger, or by using appliances at their command to stop the train have avoided the injury to plaintiff, and that, but for this neglect on their part, he would not have been injured or damaged, then the defendant was guilty of neglect.*" The majority concedes that the portion of this instruction which is in *Italic* here was erroneous, on the authority of *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579, 582, and subsequent decisions. One attempted avoidance of this error is that the exceptions to the charge do not raise such error. One exception was that the instruction "requires too high a degree of care on the part of defendant's employees." In the view of the majority, this exception is insufficient, because ordinary care was due the plaintiff, and that the charge, including the erroneous part, requires no more than ordinary care,—wherefore, an exception that same requires too high a degree of care is not well taken; that there was no error in requiring more than ordinary care demands, but "error in defining a situation in which the doctrine of last fair chance applies." A charge may be erroneous though it do not burden the defendant with more than ordinary care if there be error in defining what, in the circumstances, is ordinary care. As I view it, the court injected into a correct statement of what was ordinary care the incorrect statement that it was a lack of ordinary care, in the purview of the doctrine of the last fair chance, if, by using ordinary care, the employees might have ascertained, in time to save him, that plaintiff was in a perilous position. As there is no liability for failure to give

the last clear chance unless there was a wanton abstinence from effort to save one who was recognized to be in a place of peril, it is, of necessity, more than the care due to ascertain whether someone might not be in a place of peril. It would seem to follow that this exception was sufficiently definite, and that, therefore, the majority errs in its attempt to avoid the error on the score that the exception lacked definiteness. The majority adds, "This was not raised in brief point or argument." It is settled in this court that the one essential to appellate review is a brief point, supported by the exceptions. *Powers v. Iowa Glue Co.*, 183 Iowa 1082. Brief Point 11 is, it was error to give this instruction because, at least as to steam railroads, "the doctrine of the last clear chance does not apply when one who is negligently on the track might have been discovered, but only where he actually was discovered." It has been noted the majority concedes the instruction was erroneous on the authority of *Bourrett v. Chicago & N. W. R. Co.* In support of this brief point, there is a citation of the *Bourrett* case and of many other cases of which the majority says that they support the same point that is ruled by the *Bourrett* case. It would seem, then, that this brief point does sufficiently make complaint that Instruction 8 errs in holding it sufficient that the plaintiff might have been discovered, when it should have charged that there was no application of the doctrine of the last fair chance unless he actually was discovered. As to the statement that the point is not raised in argument, we have held that, while amplification by argument is both permitted and desirable, it is optional, and that failure to argue *in extenso* does not waive appellate review if the brief point be sufficient. *Powers v. Iowa Glue Co.*, 183 Iowa 1082. Though such argument was not essential, yet it is made. This brief point is fully and extensively argued, and on the lines made by the brief point. See pages 41 to 45, appellant's brief.

5-a

Since this was first written, it has been discovered there was an additional exception to the instruction, which all agree does raise the very point now in consideration. This exception was overlooked, because it is somewhat detached from other exceptions dealing with the same instruction. But being now found, it must have consideration. That exception was that the charge was in error because "it submits the case to the jury upon the theory, not what defendant's employees knew, or knew and from knowing was reasonably apparent to them, but upon the theory of what ought to have been known and should have been seen in the exercise of ordinary care; whereas no duty arises under the doctrine of the last fair chance until the plaintiff is seen and his dangerous predicament is or should be appreciated." As said, we are all agreed that the charge was erroneous, and that this last exception adequately raises the error, so far as exceptions are concerned. As to this, there seems to be no claim, and there could not well be one, that the brief points and the arguments do not adequately present the exception. The avoidance this time is that the error was without prejudice. This holding of the majority is based upon the fact that it appears without conflict the engineer and fireman saw the plaintiff's outfit when the train was still a half mile away from the point where the collision occurred; that the fireman kept looking at the outfit until the head of the engine cut off his view; that he saw only one man, but did not see the mower; that he kept ringing the bell for the crossing until within 600 or 800 feet of the outfit, at which point the engineer blew a warning whistle. The engineer testifies he was 200 or 300 feet from the outfit when the whistle was blown, but did not exactly know the distance; that he then noticed the plaintiff come around from the north of the team, and then gave a signal and shut off the air; that he saw only one man; that the first time he saw plaintiff was when he came around from the north of the horses. It fur-

ther appears the day was bright and the road straight. Upon this is based the ultimate deduction that there was no prejudice in giving this erroneous instruction, because "there is no room for saying that they do not see what anyone would, or might have seen in the exercise of ordinary diligence." In effect, the majority holds the erroneous charge was without prejudice because the employees of the defendant actually did see the plaintiff in time to have avoided injuring him. The trouble is that the last fair chance rule is not invoked merely by the fact that the injured person was seen in time to be saved by the exercise of ordinary care, but that it must be appreciated that the person seen is in a peril which demands an effort to save him. I do not say we may hold, as matter of law, that the peril of this defendant was not appreciated in time, but do contend that, at the least, it was a question for the jury whether the employees of defendant, after seeing plaintiff and appreciating that he was in a place of peril, still made no effort to save him, when reasonable effort might or would have done so. I agree that the error in the instruction was without prejudice if we may hold, as matter of law, not only that the plaintiff was seen in ample time to be protected, but that, after he was seen, and it was appreciated he was in danger, no reasonable care was used to avert that danger. I base my dissent from the holding that this error was without prejudice upon the one proposition that we cannot hold this essential element to be established as matter of law.

5-b

It is not as clear to me as I could wish, but I think it may be gathered from the majority opinion that this error in charging was without prejudice for the further reason that plaintiff was, as matter of law, free from contributory negligence. It seems to me the record demonstrates it was at least a question for the jury whether this is so. Freedom from such negligence was directly put in issue by the peti-

tion and answer. The last statement in Instruction 8 shows that the presence or absence of contributory negligence was for the jury, because this statement charges the jury what to do if and though they found that plaintiff was guilty of such negligence. Instruction 9 advises of the effect, should it be found that there was contributory negligence. Other instructions define what such negligence consists of. The entire trial theory assumed that contributory negligence was, in this case, a jury question. The error aforesaid, then, is not avoided on the reasoning that, as matter of law, there was no contributory negligence. It is not amiss to add that if, as matter of law, contributory negligence was absent, it was misleading to inject into the charge an instruction which, whether abstractly right or erroneous, had no business in a suit where contributory negligence was absent. Such an instruction was due only to define what would avoid contributory negligence. It should not have been given at all if there was no such negligence to avoid. I would reverse.

NEOLA ELEVATOR COMPANY, Appellee, v. J. W. KRUCKMAN,
Appellant.

CONTRACTS: Requisites and Validity—Consideration—Mutuality.

- 1 An agreement in writing, by the terms of which one party buys and the other sells a definite quantity of corn, to be delivered at a certain place before a specific date, signed by the parties to be bound, is supported by a good consideration, and is not void for want of mutuality.

CONTRACTS: Requisites and Validity—Mutuality not Destroyed by

- 2 Privileges to One Party. Contracts are not deprived of mutuality simply because one party thereto is granted privileges not given to the other, as their obligations need not be mutual.

FRAUDS, STATUTE OF: Sale of Personal Property—Oral Modifica-

- 3 tion of Written Contract—Extension of Time of Delivery. An oral agreement extending the time of delivery of corn under a

written contract, without modifying or altering the written contract or interfering with its enforcement, does not involve any question of the statute of frauds.

TRIAL: Verdict—Verdicts Contrary to Instructions—Failure to Get 4 Cars as Defense to Acceptance of Corn. The verdict in favor of the buyer was not contrary to an instruction that the buyer was excused from taking corn only on grounds excepted in the contract, where the contract provided that corn need not be accepted when it was impossible to get cars, when there was evidence to sustain the claim that cars could not be secured.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

APRIL 15, 1919.

AN action for damages on account of the alleged failure to deliver 2,100 bushels of corn, purchased by plaintiff of defendant. There was judgment on a verdict for plaintiff. Defendant appeals.—*Affirmed.*

Healy & Thomas, for appellant.

E. C. Stevenson, for appellee.

STEVENS, J.—Plaintiff alleges in its petition that, on February 13, 1917, a written contract was entered into by it with defendant for the purchase of 2,100 bushels of No. 3 yellow corn at the agreed price of 91 cents per bushel, to be delivered at its elevator at Adaza, Iowa, before March 13, 1917; that the contract provided that, "if corn is not delivered within the time specified, contract will be considered open until Neola Elevator Company notifies seller in writing that same is canceled. Seller agrees not to refuse to deliver on this contract in case it is impossible (on account of car shortage, embargo or breakdown in elevator) for Neola Elevator Company to receive grain when tendered." It is further alleged that, on account of shortage of cars or embargo on same, it was unable to receive the corn before March 13, 1917; that, by oral agreement with defendant, the time for delivery was several times extended; that plain-

tiff notified defendant when it could receive the corn, and that he promised to deliver the same as soon as he was able to do so; that defendant thereafter again orally promised to deliver said corn, but, on or about June 29th, informed plaintiff's representative that he had sold it at Churdan, and did not intend to deliver it to plaintiff. Defendant, for answer, following a general denial, admits the execution of a written agreement, and avers that he repeatedly, prior to March 13th, tendered delivery of the corn to plaintiff, who declined to receive it, and specifically denies that he ever orally agreed to an extension of time for the delivery of the corn. At the conclusion of plaintiff's evidence, defendant moved for a directed verdict upon various grounds, which motion the court overruled.

Defendant relies for reversal upon the following matters: (a) That the court committed error in refusing to direct a verdict in defendant's favor upon the ground that the alleged contract is, in effect, a unilateral contract, and void for want of mutuality; (b) that same, as shown by the evidence, was modified and superseded by an oral contract, not enforceable under the statute of frauds; and (c) that the verdict of the jury was contrary to the court's instruction No. 4.

I. For a contract to be mutual, an obligation must be thereby imposed upon each party to do, or permit something to be done, in consideration of the act or promise of the other. Unless both are bound by the

1. CONTRACTS :
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contract, neither will be bound thereby. Manifestly, an agreement in writing, signed by the parties to be bound, by the terms of which one party buys, and the other sells, a definite quantity of grain, at a stipulated price, to be delivered at a certain place before a specified date, is supported by a good consideration, and is not void for want of mutuality. Both parties are legally bound thereby, the one to de-

liver the grain at the place within the time fixed, and the other to receive and pay the agreed price therefor. Elliott on Contracts, Sections 229-232; *Emerson v. Pacific C. & N. P. Co.*, 96 Minn. 1 (104 N. W. 573); *Grove v. Hodges*, 55 Pa. St. 504; *Hoagland v. Murray*, 53 Colo. 50 (123 Pac. 664); *Maccalum Printing Co. v. Graphite Comp. Co.*, 150 Mo. App. 383 (130 S. W. 836).

By the contract in question, plaintiff acknowledged the purchase from defendant of 2,100 bushels of a certain grade of corn, and agreed to pay him 91 cents per bushel therefor, upon delivery thereof to its elevator at Adaza, Iowa, before March 13, 1917. The contract was signed by both parties. By it, defendant was bound to deliver the specified quantity of corn at the place and within the time designated, and plaintiff was bound, upon receipt thereof, to pay the stipulated price therefor.

But it is contended by counsel for appellant that the purchase clause of the contract is deprived of mutuality of obligation by the following provision thereof:

"If corn is not delivered within the time specified, the contract will be considered open until Neola Elevator Company notifies seller in writing that same is canceled. Seller agrees not to refuse to deliver on this contract in case it is impossible (on account of car shortage, embargo or breakdown in elevator) for Neola Elevator Company to receive grain when tendered."

Objection to the admissibility of the contract was interposed by defendant when it was offered in evidence, upon the ground here urged, and his motion for a directed verdict was in part based thereon. The court submitted the case to the jury upon the theory that, if defendant offered to deliver the corn to plaintiff before March 13, 1917, or within a reasonable time thereafter, and plaintiff refused, without justification or excuse, upon the grounds specified in the

2. CONTRACTS :
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party.

contract, to receive the same, it could not recover. The instructions are not complained of in argument.

Contracts are not deprived of mutuality simply because one party thereto is granted privileges not given to the other. Their obligations need not be equal. The contract in question contained mutual promises and imposed mutual obligations, and is not, therefore, without consideration, or void for want of mutuality.

- II. No question of the statute of frauds is involved upon this appeal. An oral agreement extending the time for the delivery of the corn did not otherwise modify or alter the written contract, and in no way interfered with the enforcement of the terms thereof. *Cox & Shelley v. Carrell & Co.*, 6 Iowa 350; *Brown v. Sharkey*, 93 Iowa 157.

III. Appellant's contention that the verdict of the jury was contrary to the fourth instruction is based upon the thought that the provisions of the contract quoted excuse the plaintiff from receiving the corn, if at all, only upon the grounds therein specified, and such was the purport of the instruction; whereas appellant claims that the reason assigned by the agent in charge of the elevator for not receiving the corn prior to March 13th was that the elevator was full. The witness, however, further testified that this condition was due to a shortage of cars. The jury could well have found from the evidence that plaintiff did not receive the corn because it was impossible to obtain cars with which to ship grain and make room therefor. The verdict is not, therefore, contrary to the instruction. As we find no error in the record, the judgment of the court below is—*Affirmed*.

LADD, C. J., EVANS and GAYNOR, JJ, concur.

NORTHERN GRAVEL COMPANY, Appellant, v. MUSCATINE NORTH
& SOUTH RAILWAY COMPANY, FRANK E.
HOOPES, Intervener, Appellees.

CARRIERS: Facilities Furnished—Discriminations—Allowing Use of

1 **Spur Track by Shipper.** Where a railway company has constructed a spur track for the convenience of shippers, it cannot grant to a particular shipper, as against other shippers, the exclusive right to use such track, as the same would be in violation of Section 2125, Code Supp., 1913, forbidding discriminations; and such a contract, when made, is void.

PARTIES: Intervention—Right to Intervene. An owner of land

2 along a spur track, who has sold part of the same, with an agreement to defend his grantees in the use of switch tracks, has such an interest as to be allowed to intervene in a suit brought by another shipper, seeking to restrain the railway company from allowing the use of the track by other shippers.

Appeal from Muscatine District Court.—A. P. BARKER,
Judge.

APRIL 15, 1919.

THE opinion sufficiently states the case.—*Affirmed.*

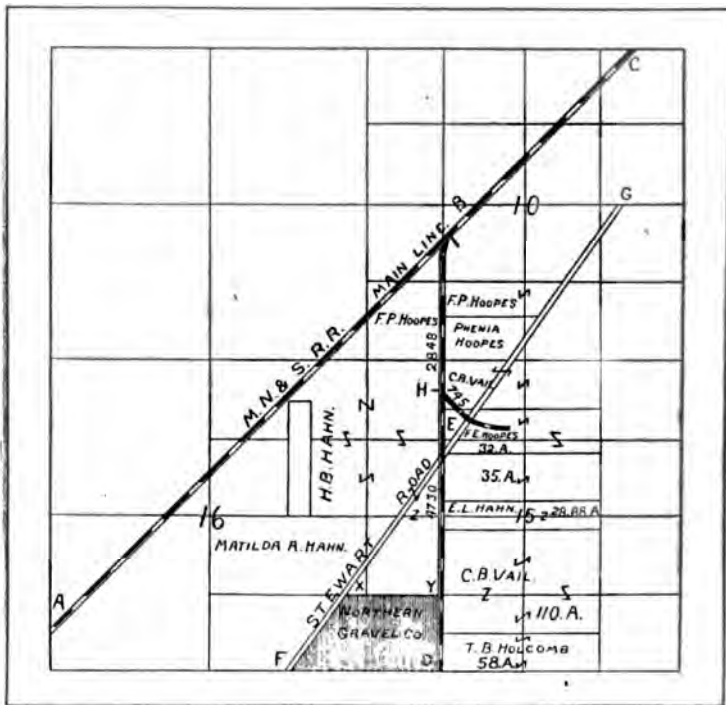
J. G. Kammerer and E. F. Richman, for appellant.

Jayne & Hoffman and J. F. Devitt, for appellees.

WEAVER, J.—The defendant company owns and operates a line of railroad in Muscatine County in this state. At the place under consideration, the company's right of way and track extend from the southwest to the northeast, as indicated by the line A B C on the following plat.

The land lying along and to the east of the railway has, for many years, been very largely devoted to the raising of melons and other garden products. In the year 1899, the owners of these lands, or some of them, desiring more convenient shipping facilities, entered into an arrangement with the railroad company by which, in consideration of the construction and maintenance of a switch or spur track from

its main line at B southward to a point at or near E, they, the landowners, undertook to and did furnish and grade the right of way therefor. The track was laid by the company,



and since that time has been quite largely used, especially in the summer season, for loading and shipping out the produce of the neighborhood, as well as for the delivery of other freight from outside sources to that portion of the public. This switch line between the points mentioned is generally spoken of in the record as the "Hahn Switch." As originally constructed, it extended from B straight south, a little more than a half mile, to H, where it curved a short distance east to or near the highway F E G, known as the "Stewart Road." About the year 1911, the railway company extended the track from the Hahn switch at H directly south to D, and used the entire line from B to D

for the handling of large quantities of sand and gravel for the ballasting of its main track and other purposes. In the year 1914, one Boynton, being the owner of a sand pit on the tract marked X Y F D, entered into a written contract with the railroad company, by which he undertook to construct and make ready machinery and other facilities of a prescribed capacity for operating the sand pit and loading its product on cars to be furnished by the company. In consideration of the covenants on Boynton's part, the company agreed "to maintain and operate the said side track from its main line to the pit, with necessary turnouts, switches, and connections." It was by the contract further provided that:

"These tracks shall be for the exclusive use of the second party (Boynton) or his assigns, except that, in the event the first party (railroad company) can locate an industry or industries on or along the same between the main line connection and the present switch to the icehouses, the second party shall make no objection thereto, always provided that such industry shall not be a competitor of the first party, and that the business thereto and therefrom shall be handled so as not to interfere with the business to or from the gravel pit. * * * The lessor shall have the privilege of loading any farm produce on the line from the icehouses to the gravel pit."

The icehouses referred to were, as we understand the record, at the southern terminus of the Hahn switch, at E. There was also built at the same point a warehouse for the storage of goods. In consideration of these and other privileges, which we will not extend this opinion to mention at large, Boynton undertook to pay to the railroad company, "as rental for the use of the said side tracks, switches, and connections at the pit, the sum of \$1,080 yearly," also certain switching and transportation charges, and to furnish for such transportation a certain minimum of carloads of

the product of his pit. The contract provided for its continuance for a term of six years.

Returning now to the matter of the Hahn switch and its original construction, it appears that its terminus at or near the Stewart road was upon the land of one Hoopes. As did other landowners, Hoopes conveyed the right of way to the company. The deed therefor provided that such right of way was to be used for a switch or side track for the purpose of receiving, transporting, and unloading freight, and that the title so conveyed should revert to the grantor, should the switch thereafter be abandoned. This switch from the main line to the Stewart road has, at all times since its construction, been maintained and used as a side track or convenience for the shipment of the products of the lands of that neighborhood, and for the delivery to the landowners of fertilizers, feed, and other supplies. In the more recent years of that period, the volume of business of that character has diminished, but it has never been abandoned, and the company has at all times continued such possession, maintenance, and use of the track. Hoopes, the grantor above mentioned, is now dead, and the intervener in this action, as one of his heirs, has succeeded to the title to the land. On this land is another sand and gravel pit, and from time to time after the construction of the Hahn switch, and beginning before the extension of the track to the Boynton pit, sand and gravel had been shipped by Hoopes or by other landowners of that neighborhood over the Hahn switch to points on the main line. The Hoopes switch was not so situated as to permit of direct loading upon the cars, and the product was hauled to the track by wagons. These shipments were not very great, but were made in carload quantities, and continued for such length of time as to afford material bearing upon the question of the mutual understanding by the company and the public at that point concerning the purpose and use for which the switch track was

provided. In 1914, and after the making of the contract between the company and Boynton, the company, under an arrangement of some kind with Hoopes, extended the "spur" end of the Hahn switch across the Stewart road and further into the land owned by Hoopes. The record at this point is neither clear nor definite, but we may assume that this extension was made to facilitate the shipment of sand and gravel from the Hoopes pit, and with the intent and purpose to haul such product over the said Hahn switch to the main line. Hoopes thereafter sold or entered into contract to sell his pit to other parties, and by the terms of his contract he warranted or covenanted that the extension of the "melon spur track" to said pit had been lawfully placed there, and he undertook to defend his grantees in the free and unrestricted use thereof for a period of five years. It should also be said that Boynton, who entered into the contract with the company for the southern extension of the switch, has since transferred all his right and title to the Northern Gravel Company, a corporation of which he is president. Before the commencement of this action, the plaintiff gave notice to the railroad company of its claim to the exclusive use of the entire switch from its pit to the main line, for the transportation of sand and gravel, and objected to the use of the Hahn switch for the shipment of such products from the Hoopes pit.

Thereafter, this action was begun in equity to confirm and establish plaintiff's alleged right to exclude all competitors in its line of business from the use of the switch, and to enjoin the railway company from hauling or transporting over said switch the product of any sand or gravel pit other than plaintiff's.

The defendant railway company denies that the contract with plaintiff does or was intended to give the plaintiff any exclusive or superior right in the use of that part of the track known as the Hahn switch. Hoopes also inter-

venes, alleging that the Hahn switch is and was a part of the defendant's railway system, and as such is open to the use of the public, and especially of that portion of the public owning and using the land in that vicinity. He also claims that the terms of the conveyance by his father of the right of way insured to said grantor, and to the intervener, as his heir and successor in title, an indefeasible right to ship the product of his lands (including sand and gravel) over said switch, and that the railway company was and is without right or authority to exclude him from such use, or to grant a monopoly of its use to the plaintiff or to Boynton.

On trial to the court, the testimony developed the facts substantially as we have stated them. The court denied the demand for relief, dismissed the bill, and from this decree plaintiff appeals.

I. The admitted or well proved facts in the case clearly demonstrate the correctness of the conclusion reached by the court below. That the original Hahn switch was constructed for the use and convenience of the

1. CARRIERS: facilities furnished: discrimination: allowing use of spur track by shipper.

public and the railway company in receiving, discharging, and transporting freight, is not open to reasonable doubt. It is true, perhaps, that it did not serve a very large section of the public, but it was sufficiently large and its needs for shipping facilities for marketing its products and for the receipt of such freight as it required were sufficiently great to induce the company to stimulate and promote the business by providing this accommodation. That some of the people thus to be benefited asked for the switch, and that others contributed the right of way or gave their services in grading the track bed, only strengthens the inference or presumption of its public character which may fairly be drawn from the manner of its use after its construction. The fact that its terminus was upon a public road, where conveniences for loading and unloading were

afforded; that icehouses and a grain warehouse were located there; that the company there received and carried whatever freight was offered, and there delivered more or less freight shipped by residents of the neighborhood, is shown without substantial dispute. The further fact that, owing to various causes, this general business has been diminished to small proportions, has no tendency to show that the switch has lost its public character, or to vest in the railway company the right to refuse legitimate business offered to it at that point, and grant to a single individual the exclusive use of the track, or to bind itself to operate such track for the benefit of such individual only. Code Supplement, 1913, Section 2125.

For the purposes of this case, it may be admitted that, under appropriate circumstances, a railway common carrier may construct or make use of a private track connecting its line with a factory or other business concern, without giving such connecting link a public character. But nothing of that kind is here presented, unless such private character may be attributed to the extension track from H on the Hahn switch to the plaintiff's pit at D. That track and its use are not here in controversy. But the original track was designed, conceived, constructed, used, and its public character determined, long before the contract on which plaintiff relies was made. Let us suppose that, instead of improving the pit at D, plaintiff had acquired title to one located directly on the Hahn switch,—for example, at H,—and had then secured from the railroad company an agreement to operate that switch for the benefit of plaintiff's business alone, and to exclude from such use all other dealers and shippers. It is quite unthinkable that, in such case, the right or power of the company to grant, or the right of the plaintiff to acquire, such exclusive use of the switch, and divest it of the public character which it had borne for many years, would have the sanction or approval of any court.

If not, then no greater advantage can be secured to it by the expedient of going beyond the terminus of the old switch for the site of its plant, and then extending the track to its door.

II. Whether the contract between plaintiff and the railway company was intended to give the former the exclusive advantage it claims, is a matter of dispute in the testimony of witnesses and arguments of counsel. The trial court held to the theory that such was the intention of the parties, but was of the opinion that the contract was, to that extent, void. As we agree with the view that the company was without power to grant the alleged exclusive rights in the use of the switch, it is unnecessary for us to go further into the construction of the agreement.

III. Counsel for appellant argue very earnestly against the right of Hoopes to intervene in this action. That Hoopes was directly interested in the subject-matter of the controversy between plaintiff and defend-

2. PARTIES: inter-
vention: right
to intervene.

ant, seems to be very apparent. He was the owner of land, the use and value of which might reasonably be affected by a decision affirming the right of the railway company to grant the exclusive use of the switch to the plaintiff. He had sold a sand or gravel pit on his premises, and agreed to defend his grantees in their right to the use of the switch for the shipment of their product, and he was very materially interested in the decision whether the railway company should be or could be enjoined from handling such freight. True, not having been made a party, such decision might not have bound him as an adjudication; but, if contrary to his contention, it would prove a serious handicap in a subsequent action by or against him. The chief purpose of allowing intervention in any case is to avoid multiplicity of actions, and to give the court a comprehensive view of all the angles of the controversy and of the manner in which its findings

will affect all the parties in interest. We are disposed to hold that, as to that portion to which he still holds title, as well as to the other portions which he has agreed to protect in the use of the switch, he was entitled to intervene, and the court did not err in so deciding.

We do not undertake any review of the authorities cited. Their general correctness may be conceded. None of them justifies any departure from the elementary principles, to say nothing of the provision of our statute which forbids discrimination by a railway carrier, and requires it to afford equal advantages to its patrons in the use of its transportation facilities. Code Supplement, 1913, Section 2125; 33 Cyc. 637; *Roby v. State*, 76 Neb. 450 (107 N. W. 766); *Bedford, etc., Co. v. Oman*, 115 Ky. 369 (73 S. W. 1038).

The decree below is both equitable and just, and it is—
Affirmed.

LADD, C. J., EVANS and STEVENS, JJ., CONCUR.

L. R. ZECK, Appellant, v. SAMUEL R. BOWERS, Appellee.

BROKERS: Duties of Brokers—Bad Faith of Agent. An agent who

- 1 was employed by the owner of a moving picture machine, and who, by his false statements, induced the purchaser found by the owner to abandon the deal which would otherwise have been made, is liable for any damages resulting therefrom to the owner.

BROKERS: Duties of Brokers—Prevention of Sale—Slander of Title

- 2 —**Malice.** Where an agent employed to find a buyer for a moving picture machine is sued by the owner on the alleged grounds that the agent prevented a sale to a purchaser, by false statements that the owner was not able to give the purchaser a good title, it is immaterial whether the agent was actuated by malice, or whether the alleged false representations would be technically sufficient to sustain an action for slander of title.

PLEADING: Amendments—Conforming Pleading to Proof. Where

- 3 the parties treated the pleading as presenting a jury question, and an allegation of malice, made in an amendment, did not call

for any evidence in addition to what had been offered, a request to be allowed to file such amendment should have been granted, and its refusal was prejudicial error.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

APRIL 15, 1919.

ACTION at law to recover damages. The facts are stated in the opinion. Trial to a jury, and directed verdict for defendant. Plaintiff appeals.—*Reversed and remanded.*

John McLennan and H. F. Zeuch, for appellant.

McHenry & Bowers, for appellee.

WEAVER, J.—Plaintiff alleges that, being the owner of a certain moving picture outfit, which he desired to sell, he engaged the defendant as his agent to assist in finding a purchaser; that thereafter, plaintiff by his own effort found a purchaser, one Kirkwood, who agreed to purchase the property for \$1,000, on condition that plaintiff made proper showing of good title. He further alleges that Kirkwood was ready, able, and willing to complete the purchase and pay the price, but was prevented from so doing by the wrongful interference of defendant, who represented to said Kirkwood that he (defendant) was the owner of the property, or of a lien thereon to the amount of several hundred dollars, and that plaintiff was not able to give a purchaser a good title; that said statements and representations were false, and known by the defendant to be false, but served to deter Kirkwood from proceeding further in the matter. It is further alleged that plaintiff thereafter sold and disposed of the property at the best obtainable price, which was materially less than Kirkwood had agreed to pay and would have paid, but for defendant's wrongful interference; and a recovery of damages because of such wrong is demanded. In a sec-

ond count, the plaintiff restates his cause of action, omitting therefrom the allegation of the defendant's agency.

The defendant denies the plaintiff's claim, and sets up a counterclaim for \$80 on account of commissions alleged to have been earned by defendant in a prior transaction. The counterclaim is admitted.

The issues were tried to a jury. Before the cause was submitted, plaintiff asked leave to amend his petition, to cure an alleged oversight therein, by inserting words to the effect that the alleged wrongful act or representation by the defendant was malicious. This application was denied by the court, which thereupon sustained defendant's motion for a directed verdict in his favor, and judgment was entered accordingly.

The questions presented for our consideration may be stated as follows: (1) Upon the issues as made by the first count of the petition and the answer thereto, did plaintiff make a case on which he was entitled to go to the jury? (2) Did the court err in overruling plaintiff's application for leave to amend his petition?

I. Taking up the first inquiry, it appears that defendant had acted as agent for plaintiff in a transaction or trade by which the latter acquired the moving picture outfit, and plaintiff swears that, at or about the time of

1. BROKERS: duties of brokers: had faith of agent.

that deal, he asked defendant to find him a buyer for that property, and that defendant responded that he would have no trouble in doing so. The witness further says that the matter was thereafter frequently discussed by them, and defendant "kept telling me he had some party coming in a few days." If the jury believed this evidence, it would have been justified in finding that defendant had undertaken to act as plaintiff's agent, and as such, he was bound in good faith to aid and assist, so far as he honestly could, in making a sale of the property; and if he not only failed to do so, but by

false statements induced a purchaser found by plaintiff to abandon the deal, and thus prevented a sale which would otherwise have been made, he is clearly liable for the damages, if any, resulting therefrom to the plaintiff. There is also evidence tending to show that the purchaser was ready, able, and willing to buy, but was deterred therefrom by defendant's representations. Under such cir-

2. **BROKERS:** duties of brokers: prevention of sale: slander of title: malice.

cumstances, we think it immaterial whether, in the absence of an allegation and proof of defendant's agency, his alleged false representations would be technically sufficient to sustain an action for slander of title. In short, the petition in its original form sufficiently alleges a cause of action, and there was testimony tending to support the same, sufficient to take that issue to the jury.

Moreover, under the issues as joined, we think the omission to allege, in express terms, that defendant acted maliciously was not such a defect as to defeat his right of recovery, as a matter of law. In other words, his liability for breach of duty as an agent depends in no manner upon the question of malice.

II. Did the trial court err in refusing plaintiff leave to amend his petition?

Our statute providing for amendments to pleadings is very liberal, and the rule so provided has been very liberally construed by the courts. Amendments pertinent to the matter in controversy are very frequently allowed after the close of the testimony, and even after verdict; and it may be said that the right to amend is the rule, and its denial is an exception, applied only where there is a clear lack of diligence by the party asking leave, or where it is evident that its allowance will not tend to promote the ends of justice. In this case, as we have already noted, plaintiff stated his cause of action in two counts. In

3. **PLEADING:** amendments: conforming pleading to proof.

the first count, he set up the alleged agency of the defendant and his wrongful interference in the deal with Kirkwood. In the second count, he omitted the allegation of agency, but otherwise restated, in substance, the matter of the first count. Our discussion in the first paragraph of this opinion has special reference to the issues joined upon the first count of the petition, and the conclusion is reached that an allegation of malice on defendant's part is not essential to the statement of a cause of action, and that there was sufficient evidence to require its submission to the jury. Construing the claim stated in the second count as alleging a slander of title, the defendant made the point, and the court seems to have held, that allegation and proof of malice were essential to a recovery of damages. Assuming, for the purposes of this appeal, the correctness of the legal proposition so made, it is at least doubtful whether the allegation in the original pleading that defendant's representations to Kirkwood were false, and known by him at the time to be false, is not, in substance and effect, an allegation of malice. It is unnecessary, however, to so hold at this time; for the appellee, yielding to the view of the court in that respect, then offered to amend by inserting the necessary clause in his petition, but the offer was denied. In so ruling, the court erred. We have often held, for example, that, while an allegation of due care by the plaintiff is essential to the statement of a complete cause of action in a negligence case, yet, where such allegation is omitted, and the parties proceed to a trial without any advantage's being taken of the omission, the plaintiff will be permitted to amend, at the close of the evidence, to conform the pleading to the evidence adduced. We see no good reason why the same reasonable rule should not be applied here. The parties, plaintiff and defendant, each treated the pleadings as presenting jury issues, and each offered and introduced evidence in support of their respective claims. So far as is suggested by the record, the

allegations of malice made in the amendment did not call for any evidence in addition to what had been offered. Defendant's counsel, while saying that his client had left the court on the supposition that the testimony had been closed, made no claim or showing that he desired further time, or that he had any other testimony in reserve; and, had such objection been made, we must assume that the court would have granted reasonable time for its presentation. The request for leave to amend should have been granted, and its refusal was prejudicial error.

For the reasons stated, a new trial must be granted. The judgment of the district court is reversed, and the cause remanded.—*Reversed and remanded.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

FRANCIS BRADLEY et al., Appellants, v. FRANCIS BRADLEY et al., Appellees; MARY BRADLEY LOGUE et al.,
Interveners, Appellants.

DEEDS: Presumption of Title—Sufficiency of Evidence to Over-

- 1 come. The presumption ordinarily obtaining, that the beneficial ownership is in the holder of the legal title, held, in a suit to declare a deed void, to have been clearly overcome by the evidence.

DEEDS: Validity—Undue Influence—Insufficiency of Evidence. Evi-

- 2 dence reviewed, and held insufficient to show undue influence in obtaining a deed.

DEEDS: Validity—Undue Influence—Incompetency of Evidence—

- 3 Statements of Grantor. Testimony of a witness that the grantor in a deed stated "that they tortured him so, they wanted him to sign a will and sign over everything to them," was incompetent, and entitled to no weight as evidence of undue influence, in an action to declare a deed void.

DEEDS: Validity—Presumptions—Confidential Relations. The mere

- 4 fact that the grantor and the grantee were brothers is insuffi-

cient to raise any presumption of fraud or undue influence, in an action to set aside a deed.

DEEDS: Validity—Unsound Mind—Sufficiency of Evidence. Evidence reviewed, in an action to set aside a deed, and held sufficient to show that grantor was of sound mind.

DEEDS: Requisites and Validity—Deposit for Delivery after Death
6 —**Title not to Pass during Life.** A provision in a deed that title to land is not to pass while the grantor lives, was not equivalent to a declaration that the grantee should have "no interest" during the life of the grantor. *Held* that, under all the provisions of the deed and the circumstances under which it was made and deposited for delivery after the death of the grantor, the deed took effect by relation as of the date of such deposit.

DEEDS: Requisites and Validity—Deed Effective after Death of
7 **Grantor—Acceptance.** A deposited instrument was, in all essential features, a deed of conveyance, subject only to the postponement of its completed delivery until the death of the grantor, and the grantee acquired an interest therein which would ripen into a legal title upon the termination of the grantor's life; and, where the deed stated in terms that it was given in consideration of \$2.00 and care and support while grantor lived, and that its delivery to the grantee was in lieu of no charge for any care and support, and where such support was given the grantor, *held* that the acceptance by the grantee, after the death of the grantor, of the benefits of such conveyance was the legal equivalent of an express acceptance of the same at the date of the deed.

DEEDS: Requisites and Validity—Deposit to Take Effect after Death
8 —**Vesting of a Present Interest.** A deed deposited to be held until the death of the grantor shows a purpose to clothe the grantee with a perfected title upon the death of the grantor, and is sufficient to invest grantee with a present interest in the land, and constitutes a valid interest, in law and in equity.

Appeal from Fremont District Court.—O. D. WHEELER,
Judge.

APRIL 16, 1919.

Suit in equity to establish and confirm the plaintiffs' and interveners' claims of title to certain land, and to set aside a certain deed to the defendant Francis Bradley: The

trial court, after hearing the evidence, found for the defendants, dismissed the bill, and plaintiffs and interveners appeal.—*Affirmed.*

Ferguson, Barnes & Ferguson, and J. E. Van Dorn, for appellants.

Tinley, Mitchell, Pryor & Ross, for appellees.

WEAVER, J.—Barnard Bradley, a resident of Fremont County, Iowa, died intestate, May 4, 1905. Some 20 years or more prior to his death, he acquired the legal title, by deed from one Yocum, to a tract of 136 acres of land in said county, and retained the same until January 21, 1905, at which time he made and executed a deed in the following form (omitting certificate of acknowledgment):

“Warranty Deed.

“Know All Men By These Presents: That I, Barnard Bradley, single, of the county of Fremont and state of Iowa, in consideration of the sum of two dollars and care and support while I live in hand paid by Francis Bradley of Fremont County and state of Iowa, do hereby sell and convey unto the said Francis Bradley the following described premises, situated in the county of Fremont and state of Iowa, to wit: All that part of the southeast quarter of Section Number Thirty-five (35) in Township Number Seventy (70) north of the center of the track of the Wabash Railroad Company, containing one hundred thirty-six acres more or less as surveyed by the county surveyor.

“The title to this land is not to pass while I live. This deed to be held in escrow at the Shenandoah National Bank, Shenandoah, Iowa, to be delivered at my death, and is to be in lieu of any charge for my care and support.

“And I hereby covenant with the said Francis Bradley that I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the

same; that they are free and clear of liens and incumbrances whatsoever.

"And I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

"Signed the 21st day of January, A. D. 1905.

his

"Barnard (x) Bradley.

mark

"In the presence of J. H. Bradley."

When he had made this instrument, he placed it in the hands of the scrivener, one Bogart, an officer in the bank named in the deed, telling him to keep it until he, the grantor, had "passed away." Bogart took the paper, and held it in the bank until the grantor died, when he caused it to be recorded. When Barnard Bradley died, the defendant grantee, Francis Bradley, was in possession of this land, and has ever since remained therein. No claim adverse to the title which said deed purports to convey was made by the plaintiffs or interveners until this action was begun, on April 3, 1915, within one month of the expiration of the 10-year period from the death of the grantor. No administration was ever had upon the estate of Barnard Bradley. The deceased left neither wife nor child nor other lineal descendant; and one defendant, Francis Bradley, a brother, and the plaintiffs and interveners, who claim through other brothers and sisters, now deceased, are his only surviving heirs at law.

The petition in this case asks that this deed, set out, be declared void and of no effect, and that the title to the land be established in the several parties, in the share and proportion to which they severally would have been entitled, had such deed never been made, and Barnard Bradley had died seized of the absolute title to the property. As grounds for this demand, it is alleged:

1. That the instrument was not, in fact, signed or executed by Barnard Bradley.

2. That, at the date of the alleged deed, Barnard Bradley was of unsound mind, and incompetent to make a valid deed.

3. That the alleged signature of Barnard Bradley was not witnessed as the law provides, and was not acknowledged before a person competent or authorized to so act.

4. That the signature of Barnard Bradley to the deed was obtained by undue influence on the part of the grantee.

5. That the deed is void for want of due delivery in the lifetime of the grantor.

6. That the deed does not purpose to grant any present interest in the land, and is not validly executed as a testamentary disposition of the property.

It is further alleged that the defendant Francis Bradley has been in the exclusive possession of the land, enjoying its rents and profits, for which an accounting is prayed. Answering the petition, the defendant Francis Bradley admits that, at the date of the deed, the legal title to the land was in Barnard Bradley, but alleges that he himself was then, and for many years had been, the equitable and true owner of the north 56 acres of the 136-acre tract of land, and that, in so far as that part of the land is concerned, the effect of the deed was simply to clothe him with the legal title which was rightfully his. Moreover, he alleges that, for 20 years or more, he has been in the open, notorious, exclusive, and hostile possession of said 56 acres, under claim of right, and that his title thereto is now unassailable by the heirs of Barnard Bradley.

As relates to the remaining 80 acres of said tract, the defendant alleges that Barnard Bradley lived to the age of 62 years; that he never married; and that, by reason of an injury received in early life, he was at all times so disabled as to be unfit to work, or to properly care for himself, and

for many years before his death had made his home with the defendant, who supported and cared for him; that the deed in controversy was made in recognition of the situation and relation of the parties, as above stated, and in further consideration of the care and support of the said Barnard Bradley during the remainder of his life, all of which was in fact furnished and provided by the defendant.

Other defenses are pleaded; but, in view of our conclusion in regard to those already indicated, further statement of the issues is unnecessary.

I. Turning first to defendant's claim of title to the north 56 acres of the tract, it appears from the record, without serious dispute, that the 136-acre tract, together with an additional 190 acres, was formerly owned by Yocum, who conveyed the larger tract to the appellee Francis Bradley, and the smaller to his brother, Barnard Bradley. Time was given to each for a large part of the purchase price, and payment was secured by their several mortgages upon their respective tracts. Francis appears to have paid off his indebtedness within a few years, but Barnard found difficulty in removing the mortgage on his part, and entered into an agreement with Francis whereby the latter purchased or took over the north 56 acres of the 136-acre tract, and assumed and paid the debt to Yocum; but no formal conveyance of the 56 acres to Francis was ever made, until the execution of the deed in controversy. A partition fence was erected, separating his land from the remaining 80 acres, and it was thereafter occupied, possessed, and used exclusively by Francis as a part of his own farm, with all the acts of dominion and control usually exercised by owners over their own property, and without any appearance of objection or protest or adverse claim by Barnard. Moreover, there is abundance of proof that Barnard, on different occasions, stated to others that his brother was the owner of this portion of the land, and his own conduct was at all times

consistent with the truth of such admissions.

1. DEEDS: presumption of title: sufficiency of evidence to overcome.

As against this conclusion, the appellants' sole reliance is upon the presumption which ordinarily obtains that the beneficial ownership of property is in the person having the

legal title; but in our judgment, such presumption is so clearly overcome as to establish, beyond reasonable doubt, the claim of the appellee to have been the equitable and beneficial owner of this 56-acre tract, from a date long prior to the making of this deed.

II. Confining our attention, therefore, to the issues as they affect the remaining 80 acres of the tract described in the deed from Barnard Bradley to the appellee, we have first to consider the allegation of the petition that the said conveyance was procured by fraud and undue influence.

2. DEEDS: validity: undue influence: insufficiency of evidence.

Of the truth of the claims made by the appellants in this respect, there is a distinct

failure of proof. There is an entire absence of evidence that the appellee or any other person in his behalf ever at any time asked or demanded such conveyance from Barnard, or by solicitation or argument or persuasion of any kind sought

to influence his action in that respect. In

3. DEEDS: validity: undue influence: incompetency of evidence: statements of grantor.

saying this, we do not overlook the testimony of a witness who undertakes to repeat an alleged statement by Barnard that "they tortured him so; they wanted him to make

a will and sign everything over to them." This evidence was clearly incompetent, and entitled to no weight as proof of the fact of undue influence. The one competent witness who mentions any conversation with the grantor on the subject before the notary was called to draw the deed, is a son of the appellee's, who says that, on one occasion, he suggested to his uncle Barnard that he ought to make a deed of the 56 acres to the appellee, and that Barnard assented, saying, "I

will just make him a deed for all of it, and that will clean it up." Appellee was not present when the deed was drawn and signed. To the notary who prepared the deed, Barnard said—not in the appellee's presence—that he wished to "make a deed giving Francis the title to the land when he was gone." When the paper had been written out, it was read over to him, and he signed it. So far as the evidence shows, this business was transacted without interruption or interference on part of the appellee or any of his family, and without any assistance on their part, except by one of the sons, who gave the notary the description of the land, which was assented to by Barnard. Not only is there an absence of any evidence of undue influence in the procurement of the deed, but such evidence as there is tends to negative its existence.

Nor is there shown to have been any such peculiar relation of trust or confidence between Barnard and the appellee as will raise any presumption of fraud or undue influence, or cast upon the appellee the burden

4. Deeds: validity: presumptions: confidential relations.

of an affirmative showing of good faith on his part. The mere fact that these men were brothers is insufficient for that purpose.

Reeves v. Howard, 118 Iowa 121. It may be true that Barnard's crippled condition led him to depend to a considerable degree upon the help of his brother and nephews, in doing those things for which he was thus physically incapacitated; but there is nothing whatever to indicate that, with respect to matters requiring the exercise of his will or opinion or judgment, he was in any manner controlled by them, or that he was accustomed to rely upon their advice or suggestion rather than his own, in the conduct of his own business. The trial court's conclusion that the charge of undue influence was not proved is well sustained by the record.

III. Nor do we find any substantial evidence that Barnard Bradley was of unsound mind. There is nothing

Is such purpose manifest in the deed now before us? This inquiry, we are persuaded, must be answered in the affirmative. It is doubtless true that a deed which is so limited or so conditioned as not to pass to grantee any interest in the described property during the lifetime of the grantor is ineffectual as a conveyance, though, under some circumstances, it may operate as a valid will. *Burlington University v. Barrett*, 22 Iowa 60; *Leaver v. Gauss*, 62 Iowa 314. In the cases here cited, and others which follow the rule of these precedents, it will be seen that, by the express terms of the deeds there being considered, or by necessary implication from such terms, the grantees were to have "no interest" in the property until the grantor's death. There is no such provision in the deed now under consideration. It does provide that the "title shall not pass" until the death of the grantor, but this is by no means the equivalent of a declaration that the grantee shall have "no interest" in the property during the lifetime of the grantor. That a deed made and by the grantor placed in the custody of a third person, to be delivered to the grantee only upon the death of the grantor, is valid, and, when delivered to the grantee by the depositary after the grantor's death, will take effect by relation as of the date of such deposit, is too well established to admit of discussion. *White v. Watts*, 118 Iowa 549, 553; *Trask v. Trask*, 90 Iowa 318, 321; *Matheson v. Matheson*, 139 Iowa 511; *Foreman v. Archer*, 130 Iowa 49; *Shaul v. Shaul*, 182 Iowa 770. See, also, the many other decisions to the same effect, which are approved in disposing of the cases here cited. In this class of cases, title, strictly speaking, does not pass to the grantee in the lifetime of the grantor. The title remains in the grantor until his death, when, by relation, it becomes perfected in the grantee as of a prior date. In other words, so long as the grantor lives, there is no completed or per-

7. DEEDS: requisites and validity: deed effective after death of grantor: acceptance.

fect delivery of the deed or passing of the title to the grantee, and the clause in the deed from Barnard to Francis providing that title to the land "shall not pass" in Barnard's lifetime is no more than an expressed recognition of what would have been implied had it been wholly omitted from the writing, and the document had been deposited with Bogart, to be delivered after Barnard's death. That Barnard intended to transfer the land to Francis is not open to doubt. He undertook, as we have already noted, to "sell and convey," and this he did with covenants of warranty. It was a deed of conveyance in all essential features, subject only to a postponement of its completed delivery to the grantee until the death of the grantor. By this device the grantor retained the legal title and the beneficial use of the land during his life, and the grantee acquired an interest or estate therein which would ripen into a legal title with the termination of the grantor's life. It is not very material whether the deed was made pursuant to a prior contract, express or implied, between these brothers; for it was entirely competent for Barnard to make such conveyance as a gift, if so inclined, and proof of a valuable consideration is not essential to its validity. Francis not being a competent witness to the transactions had between them, and no other witness attempting to speak of his personal knowledge upon the subject, the deed itself supplies all the information available on this subject. The writing signed by Barnard not only imports a consideration for its execution, but states in terms that it is in consideration of "two dollars and care and support while I live," and that its delivery to Francis was "to be in lieu of any charge for my care and support." This declaration is broad enough to cover all charges against him for the care and support already given, as well as for that which he would require during the remainder of his life; and such care and support having in fact been furnished to him, the appellee's acceptance of the benefits of such conveyance

after the death of Barnard is the legal equivalent of an express acceptance at the date of the deed. *Van Valkenburg v. Allen*, 111 Minn. 333 (126 N. W. 1092); *Creswell v. Creswell*, 138 Iowa 607. For the support of this conclusion, no mere presumption of acceptance from the beneficial character of the grant is needed. The grantee did and does accept the benefits of the conveyance, and is in court asserting title thereunder; and this is all that could be required, even if the deed should be treated as one of mere gift, which, manifestly, it is not.

Whether the word "escrow," as used in the deed, is employed in its strictly technical sense, is discussed by counsel on either side; but we do not regard it as a matter of material import. It shows without dispute that, when the deed was made, Barnard deposited it with Bogart, to be held until Barnard's death; and this, together with the language of the deed itself, shows the purpose and intent of such deposit to clothe Francis with the perfected title upon the death of his brother. The act and the intent being lawful, the name or designation to be given the transaction is not of controlling importance.

The case, as presented by the conceded facts, falls well within the rules approved by this court in *Shaul v. Shaul*, 182 Iowa 770, and others of our cases cited therein. The rule there specially emphasized makes it the duty of the court to carry out the lawful intention of the maker of the deed, and, if possible, to give effect to all parts of the instrument. In the *Shaul* case, the deed provided that it was to "take effect immediately upon the death of both grantors;" and in *Saunders v. Saunders*, 115 Iowa 275, the deed expressly stated the intention that it should "not take effect until after the death of this grantor." The purpose of the grantors in the cited cases to withhold a completed delivery dur-

8. DEEDS: requisites and validity: deposit to take effect after death: vesting of a present interest.

ing their lifetime is no more clear than it is in the deed from Barnard Bradley to the appellee herein, and in each instrument, it was held sufficient to vest the grantee with a present interest in the land. The rule so applied commends itself to our adherence, not only because of the numerous precedents in which it has been recognized, but also because it is so clearly just. Following it, we hold that the deed here in controversy constitutes a conveyance, valid in law and in equity, to the grantee therein named, and that the appellants, as heirs of the grantor, acquired no right, title, or interest in the land so conveyed.

IV. Counsel have given considerable attention to the question whether, in case the deed should be held to be ineffective as a conveyance, it could still be made effective as a valid testamentary disposition of the property, or as a contract which the appellee might enforce in this or some other appropriate action; also whether the appellants, by their laches in bringing suit, and in failing to procure administration upon the estate of Barnard Bradley, are estopped to maintain this action to set aside the deed to appellee; but our conclusion upon the issues hereinbefore discussed makes it unnecessary for us to consider or decide the questions so raised.

For the reasons stated, the appeal cannot be sustained, and the decree of the district court must be, and it is,—*Affirmed.*

LADD, C. J., EVANS and GAYNOR, JJ., concur.

SALINGER, J., concurs in the conclusion, but not in all of the argument.

BANK OF WAYLAND, Appellant, v. MARTINE STADLEY et al.,
Appellees.

MORTGAGES: Validity—Bona-Fide Assignee. Evidence reviewed, and held sufficient to show that plaintiff was not a bona-fide purchaser of a mortgage.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

MAY 6, 1919.

THIS action is in equity, to foreclose a real estate mortgage. Defendants M. L. Wilsey and wife claim that they are the owners of the property in question, and that their title is prior and superior to any claim of the plaintiff's. The trial court so found, after a full hearing on the merits, and the plaintiff appeals.—*Affirmed.*

John M. Dawson and William Timberman, for appellant.

Hollingsworth & Blood and Boyd & McKinley, for appellees.

PRESTON, J.—It is alleged that, about March 19, 1914, defendant Martine Staidley made her promissory note for \$600, due in one year, to O. V. Davis. The note was secured by a mortgage upon certain real estate in the city of Keokuk. The mortgage was duly recorded, March 21, 1914. About April 20, 1914, Davis transferred the note to D. H. Sage, by endorsing on the back thereof the following:

"April 20th, 1914. Pay to order of D. H. Sage, without recourse on me in either law or equity. O. V. Davis."

Subsequent to said last-named date, D. H. Sage transferred the note to plaintiff, by endorsing on the back thereof, "D. H. Sage." The date of this transfer is in dispute.

plaintiff claiming that it was May 1, 1914. The defendants say that it was not until after August 25, 1914, at which time defendant Wilsey became the owner of the real estate; and they contend that there is evidence that the note and mortgage were not transferred until after Sage went into bankruptcy, November 27, 1914. Defendant Wilsey testifies that, on May 13, 1915, Boyd, the plaintiff's cashier, told him that the note and mortgage fell into their hands after Sage went bankrupt; and witness Harsch, who was apparently disinterested, testified to having heard this conversation. This is denied by the cashier. It will be referred to later. Subsequent to the last transfer, Sage was adjudged a bankrupt. This was on November 27, 1914; and thereafter, his whereabouts were unknown. Plaintiff is operating a bank at Wayland, Missouri, about ten miles from the city of Keokuk. Sage, at the time of the transaction in question, was operating a private bank at Alexandria, Missouri, about half way between Keokuk and Wayland. The defendant Martine Staidley made no defense to this action, and the defendant Angle, as trustee, moved to be dismissed, for want of jurisdiction to adjudicate this matter, so far as the same affected the bankrupt. This motion was sustained. The real defendants, Wilsey and wife, answered by expressly denying that Sage transferred the note to plaintiff on May 1, 1914, and say that defendant M. L. Wilsey is the absolute and unqualified owner of the real estate in question, and that his title is superior to that of plaintiff and all other persons; that Sage purchased the property from Martine Staidley, April 21, 1914; and that, as he was, at that time, the owner of the note and mortgage in suit, the interest of said Sage in the note and mortgage became merged in the title; and that said Staidley executed said warranty deed to Sage for the purpose of satisfying said note and mortgage, which was thereby settled; that the transfer of the mortgage to plaintiff bank

was not recorded; and that there was no notice of said transfer to these defendants, or to anyone; and that, hence, they took the title to said property without any notice of said note and mortgage; that, when Sage sold the property to these defendants, instead of executing a warranty deed he took the deed which he had received from Martine Staidley, and changed the amount of the consideration, and the name of the grantee from Sage to Wilsey; that the note and mortgage in suit were transferred by Sage to the bank, as collateral security for the payment of another note, due August 1, 1914, which note had been canceled and paid, and the collateral released. Numerous authorities are cited in argument, some of them general propositions of law, about which there seems to be no dispute. Other questions argued are questions of fact, upon which the trial court has made its finding. Other facts are not in dispute. The trial court made a finding of facts, and found as follows:

"The court finds that the note and mortgage upon the property, as described in plaintiff's petition, was, on the 19th day of March, 1914, executed and delivered by Martine Staidley, at that time the owner and occupant of the property therein described, to one O. V. Davis; that, on the 20th day of April, 1914, O. V. Davis assigned said note to one D. H. Sage; that thereafter, on the 21st day of April, 1914, the said Martine Staidley sold and delivered the said property to the said Sage, executing to Sage a warranty deed for said property; that said transfer from Staidley to said Sage was to pay off the indebtedness created by the aforesaid note and mortgage, together with other debts owing to Sage, and that the balance of the consideration for said property was paid by said Sage to said Martine Staidley in cash; that, at said date, possession of said property was turned over to the said Sage; that, on or about August 25, 1914, the said Sage sold the said property to the defendant M. L. Wilsey, the purchase price for said property

being at that time paid by said M. L. Wilsey to the said Sage; that the possession of the said property was at said time turned over and delivered to the defendant Wilsey; that no deed was executed at said time, but that, on said date, there was an actual sale of said property by said Sage, as above stated; that the deed executed on April 21, 1914, by Martine Staidley to D. H. Sage, has never been put on record, but, on November 7, 1914, said deed was changed by erasing the name of D. H. Sage as grantee, and inserting instead thereof the name of M. L. Wilsey, which deed was on that day recorded in the recorder's office of Lee County, at Keokuk; that, on the 10th day of November, 1914, an unacknowledged mortgage, executed by M. L. Wilsey and Ida Wilsey to D. H. Sage, said mortgage being dated August 31, 1914, securing a note for \$800, was recorded; that the said Sage assigned the note and mortgage executed by Martine Staidley to O. V. Davis, and by Davis assigned to him, to the plaintiff in this action; that plaintiff has failed to establish that said note was assigned to it before the sale of the said property by the said Sage to the said defendant Wilsey; that no assignment to plaintiff of the said mortgage described in plaintiff's petition was placed on the records of Lee County, Iowa.

"Under the foregoing facts, the court is of the opinion that the plaintiff is not entitled to recover, as against the defendant Wilsey, and the court is of the further opinion that, even if the assignment of the Staidley note by the said D. H. Sage was made to the said plaintiff before the sale of the said property by the said Sage to the said Wilsey, that, nevertheless, the plaintiff would not be entitled to recover, because of the failure of the said plaintiff to have the assignment thereof placed on record."

The decree was entered in accordance with the findings. It is contended by appellant that the trial court was in error in finding that plaintiff had failed to establish that

the note and mortgage were assigned to it before the sale of the property by Sage to defendant Wilsey; in finding that plaintiff was not entitled to recover, because of its failure to have the assignment of the note and mortgage recorded; in holding that the mortgage merged in the title held by Sage; and in holding that the deed from Stadley to Sage was made for the purpose of paying off the indebtedness represented by the note and mortgage. Appellant also contends that the decree is not sustained by the evidence, and is contrary to the law and the evidence. It will serve no useful purpose to go into the evidence in detail, on the disputed fact questions, and we shall not attempt to do so, but will refer to some of the more important circumstances only, and state our conclusion.

1. It is, and seems to be so considered, quite important whether the note and mortgage were received by the plaintiff bank before defendant Wilsey became the owner of the property, or whether it was afterwards. A considerable part of the argument is taken up at this point, and in reviewing the testimony. Some of appellant's arguments on other questions are based upon the assumption that it became the owner thereof before defendant bought the property. Appellant says that the evidence is undisputed; but to this we cannot agree. On the contrary, we are satisfied from the evidence that the finding of the trial court at this point is amply sustained by the evidence. On May 1, 1914, Sage gave to plaintiff a note for \$2,500, with two other parties as sureties. This note was renewed, later, at about the time Sage was becoming financially embarrassed, and some of the prior sureties did not sign the renewal note. At the time of the execution of the \$2,500 note, May 1, 1914, Sage gave collateral security—one note for \$700, and a deed of trust, and another note for \$1,000. It is true that Boyd, the cashier, and Fore, the president of the bank, testified that they received the note and mortgage on May 1,

1914, but their testimony is somewhat weakened on cross-examination. The transfer by Sage is undated; the bank records do not show this paper. The cashier testified that, on May 1, 1914, plaintiff kept no record of its collateral security; that he kept these securities in an envelope; that he thinks the envelope would show the date he received the note; but that he could not produce the envelope. The testimony of Harsch and of defendant has already been referred to. There is evidence tending strongly to show that the note in question was taken as collateral for the \$2,500 note. Defendants contend that the \$2,500 note has been paid off. We do not so understand the record. It does appear that the \$2,500 note was filed as a claim in the bankruptcy court, and that a dividend of 25 per cent has already been paid; and the claim is that further dividends will be declared. There are other circumstances bearing upon the question as to whether plaintiff was an innocent holder, and, as said, the evidence is sufficient to sustain the finding of the trial court that plaintiff had failed to establish that the note was assigned to it before the sale of the property by Sage to defendant Wilsey.

At the time defendant Wilsey purchased this property from Sage, Sage was the real owner of it. Sage had repeatedly assured Wilsey that there was no incumbrance against the property, and that the title was clear at the time Wilsey bought, in August. Martine Staidley had deeded the property to Sage for the purpose of settling the note and mortgage in suit. She so testifies, and that she settled the whole thing. Thereafter, plaintiff came into possession of the note and mortgage, and, as it claims, from Sage. But, as said, defendant claims that the plaintiff bank, in some way, obtained possession of the note and mortgage as

additional collateral security, after Sage had become bankrupt.

Appellant cites cases to sustain its proposition that a party who takes a note and mortgage in good faith, for valuable consideration, before maturity, and without knowledge or notice of any infirmities, is entitled to the protection of the law. Appellees do not dispute this legal proposition. Under the evidence before set out, and the findings of the trial court at this point, which we sustain, plaintiff was not such a holder. The weight and preponderance of the evidence so show. This being so, a discussion of the other propositions presented is rendered unnecessary.

On the whole case, we are of opinion that the equities are with the defendants, and that the trial court properly rendered the decree in their favor.—*Affirmed.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

W. F. CRAM, Administrator, Appellant, v. CITY OF DES MOINES, Appellee.

TRIAL: Instructions—Waiver by Request of Instruction. A party
1 cannot object to an instruction that submits an issue not raised by the evidence, where he himself has requested an instruction upon that issue.

NEGLIGENCE: Imputed Negligence—Sufficiency of Evidence—Non-
2 **Joint Venture.** Evidence reviewed, and held sufficient to go to the jury upon the question as to whether the passenger and the driver of an automobile were engaged in such a joint enterprise that the negligence of the driver could be imputed to the passenger.

NEGLIGENCE: Imputed Negligence—Directions by Passenger as to
3 **Place to Be Driven.** The negligence of the driver of a vehicle is not imputable to the passenger merely because the passenger suggested a ride, and directed as to the place where the car was to be driven.

TRIAL: Instructions—Error—Determination of Issues—Logical Or-

4 der. There is no prejudicial error in telling the jury to first determine whether the driver of an automobile was negligent, even if it be the logical way to have the jury first determine whether the negligence of the driver was imputable to the passenger.

NEGLIGENCE: Contributory Negligence—Acts Constituting—Suffi-

5 ciency of Evidence. Evidence reviewed, and held that whether the passenger in an automobile, where the driver was negligent, was guilty of contributory negligence in not requiring the driver to exercise proper care, was a question for the jury, and that the same did not constitute negligence as a matter of law.

TRIAL: Instructions—Prejudicial Error. That the jury might have

6 found that decedent was guilty of contributory negligence did not cure the error in having charged the jury that it could find that decedent had joined in a joint enterprise, or in having charged that, if he directed the driver where he wished to travel, the driver's negligence was imputable to him.

TRIAL: Special Interrogatories—Ultimate Facts. Where, if the

7 driver was not negligent, there would be no negligence to impute to the decedent, who was a passenger in the automobile, an interrogatory as to whether the driver was negligent in approaching the bridge was properly submitted.

TRIAL: Special Interrogatories—Discretion of Court in Submitting

8 Ultimately Determinative Interrogatories. Rule recognized that the action of a trial court in submitting an interrogatory that is not ultimately determinative will not be interfered with on appeal, although the trial court would be sustained for refusing the same interrogatory on that ground.

Appeal from Polk District Court.—C. A. DUDLEY, Judge.

MAY 6, 1919.

A car driven by one Brownell was alleged to have been diverted from its course and thrown into the railing of a bridge because of the condition in which the defendant is alleged to have kept a roadway. The decedent, Teague, was in this car, and was so injured as to come to his death shortly thereafter. There was verdict and judgment for the defendant. On this appeal, the complaint is limited to

the giving of one instruction, and the submission of certain interrogatories.—*Reversed and remanded.*

Dunshee & Haines, for appellant.

H. W. Byers, Eskil C. Carlson, and E. M. Steer, for appellee.

SALINGER, J.—I. The jury was told that they might impute the negligence of the driver, Brownell, to the decedent, if they found that Brownell was driving the car “at the request of said decedent, for the use and benefit of the said decedent.” Again, “or if you find that decedent controlled or had the right to control and direct the driving of said car, whether he exercised the right or not.” Appellant urges there was no evidence whereon to base this much of the charge. We hold with appellee that no such complaint may be made now, because a party is precluded from objecting to an instruction upon the ground that it submits an issue not raised by the evidence where he has, himself, requested an instruction upon that issue. We think Instruction 1, offered, invokes this rule.

II. Eliminating, as we have, some objections involving that there was no evidence to support the charge, we have next for consideration a direction as to what the jury should do if it found that the driver and decedent “were using said car in a common enterprise, to wit, a mutual pleasure ride at the request or upon the suggestion of said decedent.” Was there any evidence of a joint venture, and that the car was used in a common enterprise? It appears that Brownell arrived in Des Moines about midnight of the night preceding the accident; that he arose about seven the next morning, and about nine, began entertaining prospective purchasers of Haynes cars. He was the service man for the company that manufactured that car. The state agent of that com-

1. TRIAL: instructions: waiver by request of instruction.

2. NEGLIGENCE: imputed negligence: sufficiency of evidence: non-joint venture.

pany had engagements with some out-of-town dealers, to demonstrate this car to certain prospective customers, but was taken sick that morning, and requested Brownell to demonstrate the car. In the afternoon, he drove a dealer, a prospect, and another man to a ball game, in the demonstration car. He continued with these men until after supper, and continued entertaining two of the men and driving them around all evening, and up to the time at which he met decedent. If there be any evidence of a joint enterprise in which decedent was engaged with Brownell, it must necessarily be because of what happened after the time when Brownell and decedent met. This occurred about eleven at night. Brownell chanced to meet decedent and a young lady, whose escort to the theater he had been, and at the request of the young lady, took her and decedent into his car and drove them to her home. There, decedent asked Brownell to wait for him, and said he would ride back to the city with him. Brownell waited some five minutes. Decedent and some of the dealers, who had been in the car all the time, returned to the city. Then one dealer was taken to where he was staying. Brownell and decedent then returned to the city, and still another person in the car got out at a drug store. Thereafter, the car was left in front of the hotel at which decedent was staying, and on his invitation, Brownell went to decedent's room with him, arriving there about one o'clock. The two smoked, and drank about a pint of beer apiece. This was followed by a lunch. After this lunch, decedent suggested that they take a little ride before they retired, and Brownell consented. He then inquired of decedent where they should drive; whereupon, decedent suggested that they go out Grand Avenue and back, and this they proceeded to do.

It is upon this evidence that the support of submitting joint enterprise or joint venture must rest. Is it any evidence of such venture or enterprise?

2-a

Speaking to *Payne v. C., R. I. & P. R. Co.*, 39 Iowa 523, and to the analysis of it made in *Nesbit v. Town of Garner*, 75 Iowa 314, it was said in *McBride v. Des Moines City R. Co.*, 134 Iowa 398, at 408, that the ground of the decision in *Payne's* case "is very briefly and inadequately stated, and that case has been cited in other courts [citing] as supporting the general rule of imputed negligence announced in *Thorogood v. Bryan*, 8 C. B. 114, which has been expressly repudiated in practically all the courts of last resort in this country in which the question has been considered" (citing *Little v. Hackett*, 116 U. S. 366, [6 Sup. Ct. Rep. 391]; *Union Pac. R. Co. v. Lapsley*, 51 Fed. 174; *Kowalski v. Chicago G. W. R. Co.*, 84 Fed. 586; and *Robinson v. New York C. & H. R. Co.*, 66 N. Y. 11). To the repudiations of the *Thorogood* case may be added *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225; *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97 (27 N. E. 339); *Nesbit v. Town of Garner*, 75 Iowa 314, 318, 319; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Danville, L. & N. T. R. Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville, C. & L. R. Co. v. Case's Admr.*, 9 Bush. (Ky.) 728; *Cuddy v. Horn*, 46 Mich. 596 (10 N. W. 32); and *Tompkins v. Clay Street R. Co.*, 66 Cal. 163 (4 Pac. 1165). We pointed out, in *Nesbit v. Town*, 75 Iowa 314, 318, that the *Thorogood* case has been criticised and discredited in the courts of England.

As we define it in the *McBride* case and the *Nesbit* case, the *Payne* case and others like it merely announce "the general rule that, where several persons are engaged in a common enterprise, in the carrying on of which each is participating, the negligence of one of them may be imputed to the others." And it is justifiable to add that the *Payne* case exhibits an indubitable case of joint enterprise. As much

is true of *Yahn v. City of Ottumwa*, 60 Iowa 429. We are unable to see how *Stafford v. City of Oskaloosa*, 57 Iowa 748, has any substantial bearing on the controversy in hearing. And this is so of *Boyden v. Fitchburg R. Co.*, 72 Vt. 89 (47 Atl. 409). Though *Koplitz v. City of St. Paul*, 86 Minn. 373 (90 N. W. 794), is cited by appellee, it certainly does not aid it. The plaintiff, a young lady, was one of a picnic party, consisting of young men and ladies, the latter furnishing the lunch and the former the transportation, an omnibus drawn by four horses, with the hiring or driving of which the lady had nothing to do. The conveyance was overturned, and the plaintiff was injured by the negligence of the defendant city and the contributory negligence of one of the young men, who was driving at the time. In holding that his negligence could not be imputed to the defendant, like unto *Payne's* case, there is a declaration of the general rule that, if two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, expressed or implied, to act for all in respect to the conduct or the means of agency employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others. To formulate a rule is one thing; to hold it applicable, quite another.

In *Nesbit v. Town of Garner*, 75 Iowa 314, plaintiff resided in the country, and, on the day of the injury, was invited by one of his neighbors to accompany him to the town. They were accompanied by one Sheridan, who had been in the employ of the neighbor, but his term of service had expired the day before. The vehicle in which the party rode and the team by which it was drawn belonged to the neighbor. Some time after arriving in town, plaintiff and Sheridan went to a shop for the purpose of procuring some shovels belonging to a brother of the owner of the team and wagon, which he had requested them to carry out to the

country for him; and it was when they were driving from the shop to another part of the town, Sheridan driving, that the accident occurred. It was due to some fault of the city in proper maintenance of the street. Plaintiff testified he neither gave any direction as to the manner of driving nor assumed any control over the team or its movements. It was contended that what occurred after plaintiff and Sheridan left the shop constituted a joint venture, and brought the case within the rule of the *Payne* case; and we disapproved an instruction, in effect that, if Sheridan's negligence contributed to the injury, plaintiff could not recover.

Mere friendly companionship in a walk will not constitute a common enterprise. *Barnes v. Town of Marcus*, 96 Iowa 675; *Bailey v. City of Centerville*, 115 Iowa 271.

"The mere fact that they both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation." *Withey v. Fowler*, 164 Iowa 377.

Carpenter v. Campbell Auto Co., 159 Iowa 52, affirms every rule asserted by appellant, but rightly finds that the *Carpenter* case is not controlled by these rules. In that case, one Means was the owner of a car which he had had only a few days, and had never tried. He was interested in knowing whether or not it worked properly; in whether there was anything wrong with it. While on the street, trying to adjust the machinery, he met Black. Black told him the car was not working right; that he would show him it was not; and suggested that he get in the car. The owner went with Black for the purpose of ascertaining what, if any, defect there was in the car, to see how it worked and performed. Black had no interest in knowing whether the machine worked right or wrong. Means had given Black no right to the possession of the machine, no

right to use it or try it. As soon as he saw Black on the street, he asked Black what was the matter with the machine, and then, with his consent, and for the first time, Black ran the machine, for the sole purpose of enabling Means to know how the machine was working, and how his own property performed. Means alone was the one interested in the experimental trial, and consented to Black's making such trial. The express holding is:

"Black was, therefore, in and about Means' business; or at least they were engaged in a common enterprise in ascertaining what was the cause of the trouble with the car."

Properly enough, it was held to be at least a question of fact whether negligence on part of Black in driving the car could be fastened upon Means. The appellee relies wholly upon the following excerpt from the *Carpenter* case:

"In every case in which it is held that the negligence of the driver cannot be imputed to the party riding with him, an exception is always made to the effect that, where they are engaged in a common enterprise, or where the driver is in an enterprise of any kind for the use and benefit of the party charged in his employ, or under his control, or where the instrumentality used is under the control and direction and owned by the party charged, and where he has a right to control and direct it, whether he exercises that right or not, he is held for the negligence of the driver. The question here was clearly for the jury, and not for the court, under the record made in this cause, and the court rightly overruled defendant's motion for an instructed verdict."

As applied to the record in the *Carpenter* case, no one will quarrel with this pronouncement. It settles that negligence will be imputed where there is an engagement in a common enterprise, or where the driver is the agent of the one in the car with him, and rightly settles that these

premises were present in the *Carpenter* case. But nothing decided by the *Carpenter* case furnishes any ruling for the case at bar. In *McBride v. Des Moines City R. Co.*, 134 Iowa 398, 407 *et seq.*, the ground for holding that there was no joint enterprise is that the fireman riding on the hose truck was not a volunteer, and had no part in the selection of the driver. Of course, that is not intended to be a ruling that there is a joint venture when the passenger is a volunteer and does have a part in selecting the driver. It will presently appear that joint venture or enterprise has often been denied where the passenger was a volunteer and chose his driver.

We conclude that the evidence, which comes to no more than we have set forth, is no warrant for having permitted the jury to determine whether these parties had engaged in a joint enterprise.

IV. The jury was charged that the negligence of Brownell might be imputed to decedent if the jury found from the evidence that "decedent did direct as to the place of the driving of said car." This is made a

3. NEGLIGENCE:
imputed neg-
ligence: direc-
tions by pas-
senger as to
place to be
driven.

distinct basis for imputing such negligence and for defeating recovery, and is stated without any qualification whatsoever. This told the jury that the naked fact that decedent had directed Brownell as to the place of driving the car would make the negligence of Brownell a bar to recovery for injury to the decedent.

True, in *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa 492, the passenger did not direct where the driver should travel, and left it to his determination. But that negligence is not imputable because no directions are given, of course, does not tend to establish that negligence is imputable merely because such directions are given.

The relation is not created because the passenger left

the route to be traveled to the determination of the driver, and gave him no directions as to the course to take. *Withey v. Fowler*, 164 Iowa 377, at 394, analyzing *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa 492. The same result is reached in *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391), where the hirer did give directions as to the place he desired to be conveyed, and, reaching there, and finding he had further time, directed the driver to take him for a pleasure trip through a park. It is there said that those in a hack do not become responsible for the negligence of the driver, if they exercise no control over him beyond indicating the route they wish to travel, or the places they wish to go. To like effect is *Nesbit's* case, 75 Iowa 314, at 319; *Withey v. Fowler*, 164 Iowa 377, 393.

It is quite self-evident that the negligence of the driver is not imputable to the passenger merely because the passenger gives the direction as to the course over which the conveyance is to be driven. If it were, the passenger who engages the driver of a taxi and tells him to take him to a stated destination over a stated route, can recover nothing if the joint result of negligence on part of the driver and of a third person injures the passenger; and because of such direction, the passenger would be liable if his driver, through negligence, injured a third person. This cannot be so.

V. Appellee contends that, if the question of joint enterprise be eliminated, yet the relations of Brownell and decedent were such as that the negligence of Brownell is imputable to decedent. We hold to the opinion that, even as negligence will not be imputed because of joint enterprise, where the driver and owner invites another to ride as his guest, or because the one injured comes to ride because of a request to be given a pleasure ride, or because of the hiring of a conveyance, none of these things will create the relation necessary for imputing negligence. We

held in *Nesbit v. Town*, 75 Iowa 314, 318, 319, that these things did not, as matter of law, create such relation. We have approved *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391), in its ruling that the relation is created only where the negligence or fault is that "of some person towards whom he sustains the relation of superior or master;" and that hiring a conveyance with its driver does not create that relation between the parties; and that the driver so hired remains the servant of the owner of the conveyance who appointed him to drive it for hire. That, in effect, is the holding of *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161. In that case, in *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225, and in many well-considered decisions on part of courts of highest standing, the test has been declared to be whether, if the driver's negligence injured a third person, the passenger could be made responsible to such person. Certainly, the naked fact that one accepts an invitation to take a pleasure ride as a guest, or that one employs the driver of a taxi for pleasure or for business purposes, will not work that the passenger can be made to respond for injury to third persons, caused by the negligence of the driver. There must be more than the relation of guest and host. *Withey v. Fowler*, 164 Iowa 377. There must be what amounts to the relation of principal and agent. *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391, at 397); *Wymore v. Mahaska County*, 78 Iowa 396; *Chapman v. New Haven R. Co.*, 19 N. Y. 341. That is fairly one pronouncement made in *Carpenter's case*, 159 Iowa 52, at 61.

5-a

In many of the cases wherein we and courts of last resort in other jurisdictions have held that there was no imputable negligence, it happened that the invitation to ride was given by the driver. See *Nesbit v. Town*, 75 Iowa 314, at 319; *Withey v. Fowler*, 164 Iowa 377, at 393; *Town of*

Knightstown v. Musgrove, 116 Ind. 121 (18 N. E. 452), cited by appellee; *Dyer v. Erie R. Co.*, 71 N. Y. 228. But the same rule has been announced, time without number, where the driver or owner did not do the inviting, and where the injured person initiated riding in a conveyance by engaging a driver and his vehicle to carry him as a passenger, and where it may not be said that the case comes within the rule governing where the driver or owner invites another to take a ride as his guest. See *New York, L. E. & W. R. Co. v. Steimbrenner*, 47 N. J. L. 161; *State v. Boston & M. R. Co.*, 80 Me. 430 (15 Atl. 36); *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391).

5-b

Whittaker v. City of Helena, 14 Mont. 124, and *Predeaux v. City of Mineral Point*, 43 Wis. 513, cited by the *Whittaker* case, do sustain the position of the appellee. But they are not abreast of the time, and contrary to the great weight of authority. Both rest on the basis of the discredited *Thorogood* case. The sum and substance of *Granger v. Farrant*, 179 Mich. 19 (146 N. W. 218, 224), is found in the naked statement that, if the jury should find the driver was guilty of contributory negligence, "such negligence might, under our decisions, be imputed to the plaintiff."

5-c

Whatsoever is said in *Stafford v. City of Oskaloosa*, 57 Iowa 748, tending to support the claim of appellee, is said in *Nesbit's* case, 75 Iowa 314, to be due to the law of the case, as arbitrarily fixed on the application of the rules of appellate review. That is to say, the case does not turn upon when negligence is imputable, but on the fact that, in that case, it was conceded that the negligence was imputable, or that the record was in such position as that such questions should not be considered. The same may be said for *Slater v. Burlington, C. R. & N. R. Co.*, 71 Iowa 209, and *Olson v. Town of Luck*, 103 Wis. 33 (79 N. W. 29). In

effect, the last, too, involves nothing but a question of practice.

5-d

The point that the charge proceeded in illogical order needs no serious consideration. If it be the logical way to have the jury determine first whether negligence is imputable, we see no prejudicial error in having told the jury to determine first whether the driver was negligent.

4. TRIAL: instructions: error: determination of issues: logical order.

VI. Appellee urges that "appellant is clearly guilty of contributory negligence, and not entitled to recover in any event;" that "one who, while riding with another who is negligent in such driving, fails to require the driver to exercise proper care and prudence or take other steps for his own protection, is guilty of negligence." We may concede, for the sake of argument, that the jury might have found that the conduct of decedent in the respects just stated constituted contributory negligence. But no

5. NEGLIGENCE: contributory negligence: acts constituting sufficiency of evidence.

case is cited, and we believe none may be, holding that such conduct establishes contributory negligence as matter of law. On slightest reflection, one can think of many things that would justify a jury in finding there was no contributory negligence, even though the passenger did not require that the driver exercise proper care, and took no steps for his own protection. The passenger might feel that the driver would pay no attention to remonstrances against his conduct; or the passenger might be utterly unable to do anything that would save him from the driver's negligence; or the fact that such negligence was endangering him might become apparent so suddenly and under such conditions as that the passenger was unable to formulate remonstrances, or to think of and obtain safety. As said, the most that appears is that the jury might have found decedent contributed to his own injury by his own negligence.

6. TRIAL: instructions: prejudicial error.

But the fact that that was permissible is, of course, no cure for erroneously having told the jury that it might find these parties had engaged in a joint enterprise, or charging it erroneously that the negligence of Brownell was imputable to decedent merely because the latter had given directions as to the place where he desired to travel.

Of course, one to whom the negligence of the driver is not imputable may be guilty of such conduct as that recovery should be denied for contributory negligence established as matter of law. That is the real holding of *City of Vincennes v. Thuis*, 28 Ind. App. 523 (63 N. E. 315, at 317); *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97 (27 N. E. 339); *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199 (18 N. E. 648); *Brannen v. Kokomo, G. & J. G. R. Co.*, 115 Ind. 115 (17 N. E. 202); *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16 (15 N. E. 733); *Kano v. Boston Elev. R. Co.*, 192 Mass. 386 (78 N. E. 485); *Bush v. Union Pac. R. Co.*, 62 Kan. 709 (64 Pac. 624); *Quarman v. Burnett*, 6 Mees & W. *499; *Jones v. Corporation of Liverpool*, 14 Q. B. Div. 890.

State v. Boston & M. R. Co., 80 Me. 430 (15 Atl. 36), cited by appellee, seems to us, in essence, to run counter to decisions also relied on by appellee, to the effect that inaction may, in effect, impute negligence, by means of ruling that such inaction constituted contributory negligence as matter of law. So far as the direct point is concerned, the only holding of the case is that the doctrine which imputes to a passenger the negligence of a driver, over whom the passenger exercises no influence or control, is not accepted in Maine.

VII. We agree with appellee that, where the evidence shows that plaintiff is not entitled to recover in any event, and that a new trial would not affect the result, that any error in the giving of the instructions or other error is er-

ror without prejudice, and that reversal will not ensue. But we fail to see the applicability of the rule. We are not favored with any suggestion how we may, in reason, hold, as matter of law, that plaintiff must fail, should a new trial be awarded. We are not prepared to say that if, on remand, a jury should find that the driver was not negligent, or that, if he was, the plaintiff did not contribute to the negligence, we should hold, on appeal, that such findings cannot be sustained on the evidence. For that matter, we cannot know in advance that plaintiff will not add to the strength of his testimony. The rule invoked by appellee is applied where the appellate court can find that some essential to recovery is nonexistent. A familiar illustration is where there is judgment against an officer for having levied upon property belonging to another than the execution defendant, and it appears that no notice of ownership was served. As said, we cannot affirm on the ground that reversal and remand will be idle.

VIII. Over objection, the court submitted special interrogatories inquiring whether the driver, at the time in question, was approaching the bridge in a reasonably careful and prudent manner. Under the decisions, it was proper to submit such interrogatories, because an answer to them might be determinative. Had the jury found that the driver was guilty of no negligence, the representatives of the decedent were entitled to recover. For, if the driver was not negligent, there was no negligence to impute to the decedent.

Other interrogatories, however, are not thus ultimate and determinative. Two of them went to the question whether, on approaching the bridge, the driver was going at

7. TRIAL: special interrogatories: ultimate facts.

8. TRIAL: special interrogatories: discretion of court in submitting ultimately determinative interrogatories.

an average speed of more than 20 miles an hour. Whether answered yes or no, these would not be decisive. So of the interrogatories inquiring who requested the ride, and who indicated or directed the route over which the automobile was to be driven. The writer is of opinion that the giving of these interrogatories should be sustained, on the ground that, though not determinative and ultimate, the statute gives the right to have such submitted. But it has often been held, and the majority adheres to the rule, that a discretion is involved, and that, though the trial court might be sustained for refusing a special interrogatory on the ground that it is not ultimately determinative, it will not be interfered with if it submits such an interrogatory. With this rule, too, the writer is not in accord. But enough has been said to work that there may be no reversal because said interrogatories were submitted. It should be said that none of them were vulnerable to the objection that they dealt with immaterial and irrelevant matter.

It goes without saying that, though there was no error in taking the answers made, these answers are of no avail to cure an instruction giving an improper effect to the facts found by such answers.

For the errors in instructing that have been pointed out, the cause must be, and is,—*Reversed and remanded.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

IN RE ESTATE OF OSBORN.

C. N. OSBORN et al., Appellees, v. JOSEPHINE WHITLOW,
Appellant.

WILLS: Requisites and Validity—Execution—Proof. Proof that a

- 1 deceased subscribing witness to a will actually signed the will as a witness, plus testimony by the surviving subscribing witness that, while he had no distinct and independent recollection of having signed the will as a witness, yet he knows he would not have signed if the testator had not signed, presents prima-facie evidence of the due execution of the will.

WITNESSES: Credibility, Impeachment, Etc.—Conviction of Mis-

- 2 demeanor. A witness may not be cross-examined as to his former conviction of the crime of having unlawfully obstructed the course of public justice,—a misdemeanor,—because:

1. Such offense is not a felony, as provided by Code Section 4613, and
2. Such examination would expose the witness to public ignominy, in violation of Section 4612, Code Supp., 1913.

BASTARDS: Paternity—Declarations of Putative Father. The re-

- 3 ception, without objection, in a will contest, of declarations of a testator at the time of executing his will, to the effect that he had doubts whether he was the father of one who was ignored in the will, presents no issue on the paternity of such person, when such paternity was, at the trial in question, fully conceded.

TRIAL: Reception of Evidence—Objectionable Document Admissi-

- 4 ble for One Purpose. The reception in evidence of an instrument which is very largely irrelevant, and which, preferably, ought to have been kept out of the record, is not error, when such instrument did have some small bearing on one of the issues, and was specifically so limited by the court, and especially when complainant first prominently injected the document into the testimony, but without offer of its introduction.

NEW TRIAL: Misconduct of Court—Re-reading Instructions. It is

- 5 not misconduct for the court, after long deliberation of the jury, to re-read his instructions, and that, too, with such emphasis and intonations of voice as he may think necessary in order to convey understanding.

TRIAL: Verdict—Impeachment. A verdict may not be impeached

- 6 by the testimony of a juror to the effect that he yielded to mere weariness or weight of numbers.

WILLS: Testamentary Capacity—Evidence. A record without some

- 7 substantial evidence of testamentary incapacity *at the time the will was executed* will not support a verdict overthrowing the will.

Appeal from Madison District Court.—L. N. HAYS, Judge.

JUNE 24, 1918.

REHEARING DENIED MAY 6, 1919.

THIS is a will contest. The contestant is the daughter of the deceased. There was a verdict sustaining the will, and the contestant has appealed.—*Affirmed.*

Robbins & Smith, for appellant.

A. W. Wilkinson, Jno. A. Guher, and *J. P. Steele*, for appellees.

EVANS, J.—The testator is known in the record as Dal Osborn. The contest was based upon alleged mental incompetency and undue influence. No evidence was offered, however, on the question of undue influence, and such issue was not submitted to the jury. The testator died, July 29, 1915. The will was executed on July 26, 1911, and on its face appears to be executed in due form. The testator was married to the contestant's mother on March 23, 1881. A few days thereafter, the contestant was born, in lawful wedlock. At the time of the testator's marriage, both civil and criminal proceedings were pending against him, wherein he was charged with the paternity of the unborn child. After the marriage, the parties lived together for several months as husband and wife. In November following, the wife left the testator, together with her child. In 1884, the testator obtained a divorce from his wife, on the ground of desertion. No question is made of the paternity or of the legitimacy of the contestant as the child of the testator, though the circumstances of the marriage and separation were allowed consideration, as bearing upon the naturalness and reasonableness of the will.

The record does not disclose the age of the testator. It is undisputed that, in the year 1913, the testator met with a severe accident, and that, about July, 1914, he had a stroke of apoplexy, and that he died in July, 1915. Immediately after July, 1914, a guardian was appointed for him, who continued as such until his death. It is without controversy that, from and after July, 1914, the testator was mentally incompetent.

I. The appellant's first contention is that the will was not sufficiently proved by the witnesses thereto. It appeared regular upon its face. The purported witnesses thereto were Dr. Embree and R. L. Huston.

1. WILLS: requisites and validity: execution: proof.

Huston had died before the presentation of the will for probate. His signature was proved by the opinion of a witness familiar therewith. Dr. Embree also testified:

"R. L. Huston signed at the time I signed it. We signed as witnesses, at the request of this man Osborn."

The objection of the contestant to the proof of the will is based upon the cross-examination of this witness, whose actual recollection of the event was confessedly slight. He testified, on cross-examination:

"I have a slight recollection, but not very much. Q. As I understand you, one reason you know G. M. D. Osborn signed this is that you would not have signed as a witness unless he did? A. That is the best reason. Q. And you have no recollection of seeing him sign that on the bottom of that first page? A. I know this: I would not have signed it unless he did. Q. Read the question. (Question read.) A. To the best of my knowledge and belief, he did. Q. I am inquiring whether you have an independent recollection of seeing him sign it. A. I recollect that Huston signed it; I would not have signed it if they hadn't both signed. Q. That is the only reason you say you know Osborn signed it? A. That is the best one.

and that is a good one. * * * Q. Were these two sheets fastened together at the time you signed it? A. I ain't going to say that. Q. You don't know? A. I don't remember."

The objection made to the will, and now pressed upon our attention, was that its execution had not been "proved by two competent witnesses, as provided by the statute." The evidence was sufficient at least to go to the jury. No complaint is made of any instruction to the jury on the subject.

II. One of the witnesses for the proponent was confronted, when cross-examined, with an indictment which had been found against him some 20 years ago, and with his written plea of guilty thereto. The

2. WITNESSES :
credibility,
impeachment,
etc. : con-
viction of
misdemeanor.

charge in that indictment was that of unlawfully obstructing the course of justice by spiriting away a witness. Over objection, the witness was interrogated, on cross-examination, concerning the indictment and the plea, both of which were identified and offered in evidence. The trial court ruled out such cross-examination as "improper and incompetent." Complaint is now urged against such ruling. Counsel for appellant state the point in their brief as follows:

"The court excluded the testimony, doubtless, upon the theory that the crime charged in the indictment was not felony, and hence the matter did not fall within the provisions of 4613 of the Code, which authorizes the interrogation of a witness as to his previous conviction for a felony. The right to the introduction of the testimony was not claimed under this section, but is claimed on the theory that the crime charged in the indictment, Exhibit 7, was an infamous one, even though not a felony; and hence the matter would be governed by the provisions of 4602 of the Code, rather than by 4613 of the Code."

If counsel had made the point in the lower court as they have made it here, they would be in a better position to ask review of the ruling. It is undoubtedly true that the ruling of the court was predicated upon the provisions of Section 4613 of the Code. There was no suggestion to that court that the offer was made in pursuance of the provisions of Section 4602 of the Code. This section of our statute has been rendered a quiescent one. If any evidence has ever been received exclusively pursuant thereto in any case, it does not appear in the annotations. The only case where its provisions appear to have been considered is *Palmer v. Cedar Rapids & M. R. Co.*, 113 Iowa 442. In that case, the evidence was held properly rejected. The offer of the evidence by contestant could have been construed as pursuant to Section 4613. So construed, the ruling was right. In view of that fact, it was incumbent upon the contestant to be more specific in its disclosure of purpose to the lower court. If the ruling were erroneous, therefore, we should incline to hold that the error was not available to the appellant. But we think that the propriety of the cross-examination was governed by Section 4612, Code Supplement, 1913, which protected the witness against any cross-examination which would tend "to expose him to public ignominy * * * except as provided in the next section [4613]."

Section 4613 is:

"A witness may be interrogated as to his previous conviction for a felony. But no other proof is competent, except the record thereof."

Section 4602 provides:

"Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility."

The indictment identified and offered was for a misdemeanor, and not for a felony. But appellant contends

that the misdemeanor was an infamous offense at common law, conviction for which rendered the witness incompetent to testify at all; and that, though such incompetency has been removed under our statute, the purpose of Section 4602 is to allow the fact to be shown, to lessen the credibility of the witness. Assuming this view, without now passing upon it, Section 4602 does not, in terms, permit such fact to be shown by an examination of the convicted person. Section 4612 expressly forbids such examination, except as permitted by Section 4613. The permission of Section 4613 applies only to convictions for felony. There is authority for holding that conviction for an infamous offense, though not a felony, may be shown by cross-examination of the convicted person. But the question is foreclosed by our statute, and we are not free to look for judicial authority thereon. The ruling was not error.

III. The contestant offered testimony of conversations with the testator many years ago, wherein he, in effect, acknowledged the paternity of the contestant. Objection to these offers was sustained. Complaint is made thereof. The reason urged for the admissibility of this evidence is that Cooper, the attorney who drew the will, testified to certain statements made to him by the testator at the time the will was formulated. These were to the effect that he doubted the paternity of the child, and that his wife had made a written confession to him, implicating another as the father; that he had a copy of such confession at home, and had given the original to his then attorney, Wilkinson. This evidence was introduced without objection. After full cross-examination of the witness on the subject, counsel for contestant moved to strike all the testimony on that subject. This motion was overruled, with a statement by the court that it could be considered as bearing only upon the

3. BASTARDS :
paternity :
declarations of
putative father.

testator's recollection of his family, and as to the reason he had, if any, for the disposition that he did make. We do not think that this testimony opened up any issue as to the paternity of the contestant, or as to whether the testator had ever acknowledged the paternity. She was born in lawful wedlock. She was conclusively presumed to be the child of the testator. This fact was expressly conceded upon the trial, and the jury was expressly instructed thereon. Whether any of this evidence on behalf of proponent was objectionable, we have no occasion to determine. It went in without objection.

IV. Complaint is made of the introduction in evidence of a certain Exhibit L. This was a purported copy of a purported confession by the wife of the testator concerning

4. TRIAL: reception of evidence: objectionable document admissible for one purpose.

the paternity of her child. The contestant caused the paper to be produced by one of her own witnesses. The testimony of Cooper as to what the testator had said about a confession appears to have been challenged by contestant, by calling to the witness stand Wilkinson, who was acting as attorney for the proponent, and by interrogating him concerning such original. It was proved by him that he had no recollection of ever receiving such original. Thereupon, D. A. Osborn, one of the beneficiaries under the will, was called as witness, and he was interrogated concerning a search among the papers of the testator. The result of the examination of this witness was the producing of the paper, Exhibit L, and the contestant rested. On cross-examination, the proponents offered the exhibit in evidence. The first objection thereto by counsel for contestant was:

"I don't know whether I want to object to it or not,—I will see. The Court: Take your time. Look it over."

Thereupon, objection was made that it was not proper

cross-examination, and is not a copy of the paper inquired about of the witness; also, that there is no showing of the loss of the original, of which the paper purports to be a copy. Thereupon, the court stated that it would admit the paper for a limited purpose only, which should be stated in the instructions. In the instructions, the jury was expressly admonished that the paper was not to be considered as tending to show that the contestant was not, in fact, the legitimate child of the testator, and that it was to be considered only as indicating a reason, if any, operating upon the mind of the testator. It is complained in argument that no basis was laid for the introduction of the copy, by showing a loss of the original. Such rule is not involved. The paper was not introduced in evidence as proof of any statement contained therein. It was the paper, and not its recitals, that was introduced. It was introduced as the paper that had been in the possession of the testator. Its existence among his papers was consistent with the alleged statement made by him to his attorney that he had a copy of his wife's confession. It is true that there was very little reason for introducing it in evidence at all, but the contestant had brought it into the case with some display, and is not in a position to complain. While the court might well, and perhaps would better, have held that the evidence along that line had proceeded far enough, without receiving the paper itself in evidence, it was not reversible error to receive it for the limited purpose for which it was received. There was very little reason for the contestant's pursuing the subject to the extent which she did. Such explorations are always attended with some degree of danger to the explorer.

V. Upon motion for new trial, complaint was laid of misconduct of the jury in their deliberations, and of erroneous conduct of the trial judge in connection with such

5. NEW TRIAL:
misconduct of
court: re-
reading in-
structions.

deliberations. The facts pertaining to the alleged misconduct are involved in some conflict. The finding of the court was against the appellant. There was a showing that the jury retired, in charge of a bailiff, on Saturday; that they deliberated until 10:30, without reaching a verdict; that the bailiff then conducted them to their beds, which had been provided for them on another floor of the courthouse; that they arose late on Sunday morning, some of the jurors contending that they could not deliberate on Sunday; that they did not at first resume their deliberations; that one or more of them bought a Sunday newspaper, and that some of them engaged in games; that, at 10:30, the judge appeared at the door of the jury room, and stated to the foreman that they were empowered to carry on their deliberations on Sunday; that some of the jurors read a newspaper item about a case which had been appealed to the Supreme Court, wherein the mental competency of a party to a contract had been called in question, and had been sustained in the lower court; that, at 4 P. M., the trial judge called at the door of the jury room again, and asked the foreman if they had agreed upon their verdict; that the foreman replied that they had about agreed to disagree; that the judge said he could not receive such a verdict; that he said, jokingly, that court would be in session through the week; that, at the time of these occurrences, the jury stood eleven to one; that, at 5 P. M., the jury was called into the court room, the attorneys for both sides being present, and the instructions were by the court re-read to the jury. They were thereupon sent out for further deliberation. One hour later, a verdict was returned. The outstanding jurymen were Gray. The claim of misconduct was based upon his affidavit. It is claimed that undue pressure was brought to bear, to induce him to

agree to the verdict; that the judge read the instructions with an emphasis that was not apparent at the first reading; and that such emphasis gave prominence to those instructions which were said to be favorable to the proponents.

It was not error for the judge to re-read the instructions. Questions of emphasis and intonation are quite beyond our reach. It may safely be said that no two judges read their instructions alike. Some read them badly, and some well. Good reading requires some intelligent emphasis.

Juror Gray testified:

"Aside from the matter of emphasis, he read the instructions a little slower than he did the first time. I could hear him a little plainer. During the second reading, he looked at the jury, and I believe he said if anyone had any particular point that he wanted light on, to make it known."

It is manifestly important that the jurors should understand the instructions. It is evident, also, that to read them slowly and plainly, and with the appropriate emphasis, would conduce to that end. There is no error apparent at this point.

On the question of misconduct, we have frequently held that a new trial will not be granted for misconduct of the jury, unless prejudice appear. *Carbon v. City of Ottumwa*,

95 Iowa 524; *Bowman v. Western Fur Mfg.*

6. TRIAL: Verdict; impeachment. *Co.*, 96 Iowa 188; *Hathaway v. Burlington, C. R. & N. R. Co.*, 97 Iowa 747. The principal prejudice put forward in this

case is the influence upon the juror Gray. This juror testified, however, in support of the motion as follows:

"Well, after we retired to the jury room, they said, 'Mr. Gray, what about it now?' and I says, 'I am more firmly

convinced than ever I am in the right.' I was getting pretty well worn out, and they says, 'That will settle it;' and I says, 'The only proposition that I will vote with you on is with the understanding I am voting against my sentiments, just simply to get the case off my hands.' "

This testimony would indicate that the juror was in no manner misled or convinced to change his position by anything that was done. On the other hand, the claim of the juror that he yielded to mere weariness or weight of numbers is only an impeachment of the verdict and of the juror himself, and is not permissible.

VI. We have assumed, up to this point, that the evidence for the contestant was sufficient to have sustained a verdict in her favor, if one had been rendered. We think

7. WILLS: testam-
entary ca-
pacity: evi-
dence.

it must be said, however, that we do not find in the record any evidence to sustain a finding for the contestant, if one had been had. Appellant does not profess to have abstracted all her testimony. She has abstracted more than 50 pages thereof. In addition thereto, she has stated therein that other witnesses testified to facts tending to show the mental incompetency of the testator at the time of the making of the will. This statement is appropriately denied by the appellees, and an amended abstract has been filed. The volume of the evidence is not important for our consideration; but it is essential that it should appear here that there was some evidence of the testator's mental incompetency at the time of making the will. Many witnesses appear to have testified for the contestant, and to have testified to transactions with the testator. Some of these fix the time on and after July, 1914. Some of them fix no time whatever; others fix an earlier and appropriate time. As to these latter, we find none who have testified to any transaction having any significance as tending to show mental incompetency. We think it was incumbent upon the con-

testant to produce evidence of conduct or condition antedating the stroke of apoplexy, and perhaps the previous accident, before a finding of mental incompetency in July, 1911, could be said to have support. Some witnesses testified to their opinion that he was mentally incompetent on such date, but they adduced no facts upon which such opinion could be legally based.

It is manifest, therefore, that, even if we were to find error in this record, we should have to deem it error without prejudice. No useful purpose can be subserved by a further discussion of specific errors assigned. Sufficient to say that we find no reversible error.—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

O. C. MORTRUDE, Appellee, v. JAMES P. MARTIN et al.,
Appellants.

NEGLIGENCE: Landlord and Tenant—Injuries of Employee of Ten-

- 1 ant—**Sufficiency of Evidence.** Evidence reviewed, and held sufficient to present a jury question, and to sustain a verdict, on the ground that the defendants were negligent in permitting water to leak from the ceiling, where an employee of the tenant was injured by the fall of plaster from the ceiling, during construction work being carried on above by the landlord.

PRINCIPAL AND AGENT: Liability of Principal—Negligence of

- 2 Architect and Engineer. The owner of a building is liable for the negligence of his architect and engineer while the latter is acting within the scope of his employment in constructing the building.

TRIAL: Verdict—Form—Joint Defendants. There was no error in

- 3 not submitting separate forms of verdict as to the defendants where, under the evidence, if there was any liability, both defendants joined in the action would be liable.

NEGLIGENCE: Landlord and Tenant—Injuries to Tenant—Con-

- 4 tributory Negligence—**Sufficiency of Evidence.** Evidence reviewed, and held a question for the jury as to whether the employee of a tenant, injured by being struck with a piece of

plaster falling from the ceiling, was guilty of contributory negligence.

NEGLIGENCE: Landlord and Tenant—Construction of Lease—Dam-

5 **ages from Dangerous Condition.** A provision in a lease whereby the tenant waived claims for damages from the construction of an additional story to a building referred only to damages received from proper construction, and did not cover damages for negligence in constructing the additional story, and did not release the landlord from his acts in creating a dangerous condition.

TRIAL: Examination of Juror—Association with Insurance Com-

6 **pany—Discretion of Court—Harmless Error.** The trial court is within its discretion, in a personal injury case, in allowing prospective jurors to be examined in regard to their being associated with insurance companies insuring against personal injuries; and where objection to the question was sustained, there was no prejudice.

TRIAL: Instructions—Applicability to Evidence—Instructions Tak-

7 **en as a Whole.** In an action for injuries caused by the fall of plaster from the ceiling, instruction as to the pouring of concrete and water held not objectionable as to the use of the word "water" when only concrete was poured, when taken in connection with the other instructions.

TRIAL: Verdict—Excessiveness—Personal Injury. Evidence re-

8 **viewed,** and held that a verdict for \$7,500 was not excessive, where a fracture of the skull had been received, causing intercranial hemorrhages and intense suffering to a 36-year old man, who had not recovered at the time of the trial, 8 months after the injury, and whose memory was bad, and who could not keep books as well as before the injury, and when there was a possibility that the injuries might result in epilepsy or insanity.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

MAY 6, 1919.

THIS is an action at law, in which the plaintiff seeks to recover damages for personal injury received by him on May 11, 1916, said injuries having been caused by the falling of plastering from the ceiling of the store in which plaintiff was employed. Plaintiff was struck on the head

by the falling plastering. He claims that his skull was fractured, and that there were internal hemorrhages, and permanent injuries. There was a trial to a jury, and a verdict and judgment for plaintiff for \$7,500. The defendants appeal.—*Affirmed*.

Robert H. Munger, and Sears, Snyder & Boughn, for appellants.

O. D. Nickle, and Henderson & Fribourg, for appellee.

PRESTON, J.—1. The defendant Martin is the owner of the building known in the record as the Frances building, and defendants Stevens & Company, as architects and engineers, were employed by Mr. Martin to superintend and supervise the construction of the building. They did the work on the commission plan. Defendants commenced the construction of the building in 1914, but at that time, the first story only was constructed. That story was completed, and the furnished store rooms were rented by defendant Martin. One of these rooms was leased to the Gately-McIntyre Company, which occupied the storeroom as a retail clothing store. Plaintiff was employed in the store. He went to work for the Gately Company six or seven weeks before he was hurt, at which time the canopy was up, and plaintiff knew that the construction work was going on above, and that it was concrete construction work; he knew, also, that the Gately Company was a tenant. The lease provided that the tenant should pay for repairs of all kinds, in connection with said leased premises, and that the owner might, at any time, build the building higher, without the consent of the party of the second part, and without any claim from it.

Plaintiff was injured by falling plastering from the ceiling of the storeroom, caused, as plaintiff alleges, by the negligence of the defendants in allowing water to pass

from above to the storeroom ceiling. Four grounds of negligence were charged in the petition; but under the evidence and the law, the trial court was of opinion that but one ground should be submitted to the jury, and that was whether defendants were negligent in permitting water and concrete to be poured on the floor or floors above the Gately-McIntyre store, causing the ceiling in the store building occupied by said company to fall. Answering separately, defendants deny generally, but admit the corporate capacity of Stevens & Company, the ownership in Martin, and the leasing of the premises, and allege that the construction work of enlarging the building was done with the full knowledge and consent of the tenant; that the entire building was constructed in conformity to plans and specifications prepared and approved by competent architects and engineers; that defendant had no knowledge of any defect or weakness in the ceiling and plastering, and any defects which may have existed were latent, invisible, and unknown defects; that the same were inspected and approved by competent inspectors. They deny that they ever directed or caused any water and concrete to be poured upon the ceiling of said storeroom, or any floor of which said ceiling was a part. Defendant Stevens & Company further says that it did not construct the ceiling and plastering complained of, and was in no way responsible for defects therein.

We do not understand either party to now claim that the ceiling and plastering were improperly constructed, or that improper material was used. The question is as to whether defendants caused or permitted water to impair the plastering, after it was constructed, and during the construction of the floors above.

The building was completed as a one-story building in 1914, and leased to the Gately Company in February,

1915. The construction work for enlarging the building was commenced about the middle of March, 1915, and it was completed as an eight-story building in 1916. Plaintiff was injured on May 11, 1916, at which time the forms were being finished on the roof above the eighth story, and there were six concrete floor slabs above the Gateley store, and all forms had been removed, except in the seventh and eighth stories. There is evidence that, at that time, the concrete below the two top stories had set, and was hard, and there was no dripping of water from them. It appears from undisputed evidence, or the jury could have found, upon conflicting evidence, the following state of facts: That there was no written contract between the owner, Martin, and Stevens & Company, who were erecting the building for Martin. Stevens & Company furnished the superintendent, Stevenson, who had the selection of all the material, with the confirmation and approval of the defendant Martin. Stevenson had full charge, as superintendent of construction. He was a civil engineer, and there is evidence tending to show that he was a competent superintendent. They also supervised the labor. Martin furnished the money and paid off the labor, and contracts with other parties were let, with the confirmation and approval of Martin. Stevens & Company were acting as supervising architects for Martin, and represented him in all matters pertaining to the building. The arrangements between them were practically the same as between them for the erection of what is known as the Martin Hotel, a case which has been in this court, and is referred to in the argument.

The structural framework of the building in question, is reinforced concrete, a combination of steel rods with concrete, the last being a mixture of rock, sand, and cement. The first construction work above was to build a protection around the building over the sidewalk, and extending over

the entrance to the Gately store; then the false roof, which had been constructed over the first story, was opened. This false roof was about two to three feet above the second floor of the building, at the point above the room occupied by the Gately Company, and where the plastering fell. In these openings, the forms for the columns, reaching to the third floor of the building, were placed. The forms on the second floor were about $11\frac{1}{2}$ or 12 feet long, and were constructed of rough pine, or hemlock, 6-inch boards, of lumber called stock lumber, set edge to edge, and not matched. For a 24-inch column, about a 36-inch hole would be cut in the false roof. The wooden forms were placed over the steel rods that came from the lower floor, over the Gately store; the form work was built first; then the steel rods were placed and wet concrete deposited; and, when the concrete was sufficiently hardened, the form work was removed, and that operation continued. The columns were constructed about the same way. After the forms were set down in, the false roof was carried over against the columns, and was flashed with tar paper and pitch. The object in the flashing and the joining of the false roof to the columns was to keep the water from getting through onto the floor. It seems to be established that proper precautions were taken by defendants to prevent water from reaching the ceiling, from storms, steam drip, and in other ways and places than through the forms over the Gately store; and as to these, defendant's evidence tends to show that the forms were properly caulked, so that they were water-tight, both above the flashing and below the flashing, between the false roof and the ceiling below; but plaintiff's evidence is contrary to this.

As we view it, this is the turning point in the case, appellants contending that the evidence was insufficient to take this question to the jury, while the plaintiff contends that the evidence was ample. This fact question as to

whether there was sufficient evidence of defendants' negligence is the one most elaborately argued and most seriously relied upon for a reversal. There is evidence tending to show that plastering sometimes falls without any known reason therefor. As said, appellants' evidence tends to show that the forms were properly caulked, and there was evidence by witnesses for defendants that frequent inspections were made, and that no leakage was discovered, and that, after the accident, when the rest of the plastering was taken off the ceiling, on the first floor, it could not be determined what was the cause of the falling of the plastering which injured plaintiff. We shall not set out the testimony for appellants, nor that of plaintiff in too much detail; but enough of plaintiff's evidence will be stated to show that, even though contradicted by defendants' testimony, the evidence was sufficient to take the case to the jury on the question of defendants' negligence.

The testimony for plaintiff is to the effect that some of the forms were made on the canopy over the sidewalk, and some on a vacant lot near by. A witness testified that he saw these forms erected there, and that they were stuffed with oakum, down at the bottom, just around the bottom.

"Q. What was done, if anything, as to stopping the cracks between the boards, and up and down the cracks of the columns? A. Nothing, that I know of. I saw the forms erected there. Q. When you helped set these columns on the east side, were they caulked at the time you set them up, in the cracks between the boards,—did they have any oakum or anything between them? A. No, sir."

There is evidence that, when the columns of the second floor were poured, the third floor forms were up, and the concrete was poured off the level of the third floor, into the column forms of the second floor; that, unless these forms were absolutely tight, there would be a volume of water flowing away from the cement when it was poured,—

that there always is in concrete work; that, when concrete was poured into these forms, water would escape from the bottom of the forms, up to where it was protected by the flashing, and would go out through the cracks and wet the floor, and water from above the flashing would follow the columns down when they filled the columns, and the beams of the floor above. If water got on the concrete floor, it would go through to the ceiling, and would have a tendency to destroy the plastering; it would weaken the bond and destroy its adhesion, and the ultimate tendency would be to make it come off. It would not necessarily fall at the time of being wet. The plastering, such as that which fell, would absorb water, the amount depending upon its age. These facts were known to Stevenson, the superintendent of construction. There was no difference in the construction of the forms below the false roof and above it. Quite a lot of water escaped through the cracks above the false roof. Prior to the accident, different parts of the ceiling of the Gately store were damp and wet. Dampness and gravel fell from this ceiling on the adding machine in the office, so it would have to be moved. This adding machine sat alongside the column near which this plastering fell.

The plastering that fell and injured plaintiff was an irregularly shaped piece, averaging five or six feet square. After the accident, defendants immediately ordered the plastering taken off all the ceiling of the other first floor stores, as a precaution that similar accidents should not happen elsewhere. In taking it off, the plastering was found loose at different places, in spots from a foot to two or three feet square. Pinch bars and hammers were used to take the plastering down. To discover the loose places, a hammer was used, and if it was loose, it would sound like hitting a drum. There is no evidence for defendants, as we understand the record, that the forms were caulked prior to the time they were erected, or as to the placing of

the flashing. Their evidence is that the caulking was done from the inside of the forms; while another witness for defendant says that some of the caulking was done from the inside of the forms, and some of it by creeping underneath the false roof. Appellee contends that the physical facts are such that, under the condition described, the forms could not be properly caulked in the manner described, the forms being but two feet square; and that it is unreasonable to assume that defendants would caulk the forms under such conditions, when they could easily have been caulked before they were erected. Evidence for plaintiff shows that the ceiling on the whole first floor of the Frances building was furnished in the same manner, and of the same material as the ceiling of the Gately store; that all the columns on the second floor were erected of the same material, and in the same manner; that water did come through the floor slabs, and to the ceiling of the first floor. The superintendent of construction knew that, if water got on the floor above, it would soak through; and the superintendent says, on cross-examination, that, if water did get through the ceiling, he would take that into consideration in determining the cause of the ceiling's falling at the time plaintiff was hurt. He also says that, in pouring concrete, there is a volume of water that would separate from the concrete after it was poured. When the erection of the second floor of the building in question was begun, both defendants knew the manner of construction of the first floor, and the nature of the ceiling. They also knew that the store had been leased to the Gately Company, and that it was occupied, and would continue to be occupied, by the Gately people and their employees. The Gately store is 96 feet long and 20 feet wide, and is the second storeroom from the east side of the building. The office is about half way back. One of the columns is about midway of the office. The place where the plastering fell,

was near the column in the cashier's office. At the time the plastering fell, which injured plaintiff, he was inside the office, engaged in the performance of his duties.

Such, in a general way, is the nature of plaintiff's testimony; and, though denied by witnesses for defendants at some points, and though there is a sharp conflict in certain particulars, yet, taking the evidence altogether, we are of the opinion that, on this question of fact, there was evidence sufficient to take the case to the jury, and to sustain the verdict as to the ground of negligence submitted.

2. Error is predicated upon the overruling of the motion of each defendant for a directed verdict. The contention as to Stevens & Company is that a mere employee who is not an independent contractor is not liable for the master's tort, and as to defendant Martin, that he was not guilty of any negligence contributing to the falling of the plaster which injured plaintiff, for which liability could result. Cases are cited on each proposition. Appellee cites the case of *Manton v. Stevens & Co.*, 170 Iowa 495, to show that Stevens & Company were the agents or employees of defendant Martin. The evidence in the instant case shows that the arrangement between Stevens & Company and Martin was the same as in that case. No question is raised in the instant case but that, in the construction of this building and pouring of the concrete, Stevens & Company was acting within the scope of its employment for and in behalf of defendant Martin. If Stevens & Company were negligent, it was their tort, and the defendant Martin is responsible therefor. Of course, Stevens & Company might not be liable for the negligence

1. NEGLIGENCE:
landlord and
tenant: in-
juries of em-
ployee of ten-
ant: suffi-
ciency of
evidence.

2. PRINCIPAL
AND AGENT:
liability of
principal:
negligence of
architect and
engineer.

3. TRIAL: VER-
dict: form:
joint de-
fendants.

of Martin alone. Appellee also contends that the negligence alleged and submitted to the jury was the joint negligence of both defendants. However this may be, under the evidence before set out, the jury could have found that there was negligence, and that it was the negligence of Stevens & Company, or of both it and Martin. Under the evidence, we are unable to see any theory by which Stevens & Company or Martin would be alone responsible. This disposes of another error assigned: that the court erred in not submitting separate forms of verdict as to the defendants. The verdict should be moulded according to the facts, and to suit the exigencies of the case. Code Section 3730.

3. Appellants' next contention is that plaintiff was guilty of contributory negligence, as a matter of law. The thought is that he knew that the Gately Company was a tenant; that the construction work was going on above; and that it was reinforced concrete; that he worked in the store several weeks while the work was going on; and that, if the testimony of the witness who observed the moisture upon the ceiling, at different places and at different times, is

4. NEGLIGENCE:
landlord and
tenant: in-
juries to ten-
ant: contrib-
utory negli-
gence: suffi-
ciency of evi-
dence.

true, then plaintiff was guilty of negligence in not avoiding the obvious danger, if there was any, because of the moisture on the ceiling. Among the cases cited, we have examined *Reams v. Taylor*, 31 Utah 288 (8 L. R. A. [N. S.] 436, 437), and *Town v. Armstrong*, 75 Mich. 580 (42 N. W. 983). We are unable to see that the *Reams* case has any application. In the *Town* case, plaintiff was the tenant of defendant, and was injured by the falling of cellar stairs. Her own evidence showed that she had lived in the building for 13 years; was fully acquainted with the condition of the stairs; knew that they were rotten and rickety; and she had not gone down the stairs for over

a year. The court held that she was negligent, and grossly so; and that, even though the defendant was negligent, she went into a dangerous place, fully aware of the risk she was taking; that she was going down the stairs for a trifling purpose. Though plaintiff in this case, as an employee of the tenant's, may have had no greater rights than his employer,—and counsel for appellee so concedes, for the purposes of the case,—still, plaintiff had the right to be in the premises, and at the point where the plastering fell, when he was hurt. Regard should be had to the entire situation, the obviousness of the danger, plaintiff's duties, and his knowledge or lack of knowledge of the leaking, and its effect upon plastering. There was a jury question as to this.

4. It is assumed by appellants that, because of the provision in the lease, before set out, the tenant, Gately Company, would have no right of action; and that plaintiff has no greater right than his employer. Ap-

5. NEGLIGENCE:
landlord and
tenant: con-
struction of
lease: dam-
ages from
dangerous
condition.

pellee concedes, for the purposes of the case, that plaintiff has no greater right of recovery against the landlord, Martin, than the tenant would have, under like circumstances. They concede, in like manner, that the

landlord is not liable for hidden or latent defects, except such as were within his knowledge; although they say that the better rule is that he is liable for such defects as he should have known, in the exercise of reasonable care. We may say, in passing, that we think there was no question of latent defects. The defendants knew the effect on the plastering, and what was likely to follow, if it became wet. The clause in the lease relied upon by defendants, only waives the right of claim for damages resulting from the proper construction of the building, and not claim for damages because of negligence in the construction. Surely, the parties did not contemplate by this provision that the land-

lord could proceed with the construction of additional stories to the building, in utter disregard of the rights of the tenant, and of the landlord's duty to the tenant. Under such a construction, the landlord could proceed in such a manner as to utterly destroy the tenant's stock of goods, and render the storeroom unfit for use. The plaintiff was rightfully in the storeroom. The clause in question excuses the landlord's entrance, and permits the work above the storeroom leased, and for the purposes indicated. Under the record, the lessor, by himself or his servants and agents, was creating a dangerous condition about the premises, from which injury resulted. His liability is for the affirmative wrong in creating a dangerous condition. *Poor v. Sears*, 154 Mass. 539 (28 N. E. 1046); *Barman v. Spencer*, (Ind.) 49 N. E. 9; *Davis v. Pacific Power Co.*, 107 Cal. 563 (40 Pac. 950); *Griffin v. Jackson L. & R. Co.*, 92 Am. St. 496, 499, and note.

5. When the jury was being empaneled, one of the jurors was asked whether he was, or had been, directly or indirectly, connected with any company which makes a

business of insuring property owners or builders against damages growing out of personal injuries sustained by people who may be in the buildings which are being built or altered or added to. Defendants' objection to the question was sustained, and the plaintiff excepted. The ruling was in favor of the appellants, but they predicate error upon the asking of the question, as we understand it. Appellants cite *Northwestern Fuel Co. v. Minneapolis St. R. Co.*, 134 Minn. 378 (159 N. W. 832). A question somewhat similar was asked in that case, by defendant's counsel, to which the plaintiff, the unsuccessful party, excepted. The ruling was condemned by a dissenting justice, but was approved by the majority. Counsel for plaintiff may have had information that de-

6. TRIAL: examination of juror: association with insurance company: discretion of court: harmless error.

fendants were insured. Even though it was shown that the juror was so connected, and that it would not be a ground for challenge for cause, it might properly enough aid counsel for plaintiff in making their peremptory challenges. At any rate, there was nothing in the question to excite prejudice. We are unable to see any prejudice to the defendants. The trial court has a discretion in such matters. Furthermore, the asking of such a question was approved by this court in *Flick v. Globe Mfg. Co.*, 172 Iowa 561, 568.

6. Some of the instructions offered by defendants relate to matters which we have already discussed in this opinion. Others, in so far as they announced correct principles of law, are covered by the instructions of the court. The instructions given

7. TRIAL: instructions:
applicability
to evidence:
instructions
taken as a
whole.

by the court are criticised, but the argument is broader than the exceptions taken thereto. The exception to Instruction No. 9 is that therein the court made mention of the pouring of concrete and water, and the claim is that there is no evidence in the record warranting the use of the word "water," because the evidence shows that only concrete was poured; and that, therefore, the instruction was misleading, and unfair to defendants. As before stated, the record shows that, unless the forms were tight, there would be a volume of water flowing away from the cement when it was poured, and that there always is in concrete work. Under the record, the jury could not have understood that the court referred to pouring water other than as it was in the thinned cement, and this always flowed away, as testified to by the superintendent of construction. Though perhaps the instruction is not accurately worded in regard to the matter complained of, still we think there could have been no prejudice.

Another sentence in Instruction No. 9 reads, substan-

tially, that, if the jury should find that, in the pouring of said water and concrete, the defendants exercised reasonable care and diligence to prevent the water from entering the ceiling below, then plaintiff could not recover, etc. We think this states the correct rule, taken in connection with the other instructions given, considering all the circumstances in the case.

7. Lastly, it is argued that the verdict is excessive. It is true that, under the evidence, plaintiff's condition was somewhat improved at the time of the trial, in January, 1917; that he had gained some in weight;

8. TRIAL: verdict: excessiveness: personal injury.

and that his severe headaches were less frequent. He had worked some at a reduced wage, prior to the time of the trial; but at the time of the trial, he was out of employment, because of his inability to properly perform the duties assigned him. The opinion is already too long, and we shall not go into detail as to his injuries. In a general way, the evidence shows that he was about 36 years of age, and his expectancy about 25 years. He had a diploma in bookkeeping and telegraphy, and had taught these lines in business colleges. He was injured by being struck on the head by the falling plastering, causing a fracture of the skull, intracranial hemorrhage, and intense suffering. Immediately, or very soon after his injury, his pulse was 120, but later dropped to about 40, indicating hemorrhage inside the skull and pressure on the brain. After he was able to be around, he attempted to do the same kind of work he had done for two of his former employers, and about two weeks for the Gately people, but he could not hold his position, the employer stating that he could not stand plaintiff around, because he was so nervous. In October, he commenced working for a former employer, and worked long enough to make out two months' bills. He could not keep books, made many mistakes, and was an entirely different man in his

disposition and competency as a bookkeeper. His weight was considerably reduced, though he had gained some at the time of the trial; his sleep is broken; he has a feeling of depression, and sickness of the stomach, is nervous, and worries about his condition; he cannot concentrate his mind as he used to; his memory is bad. The medical witnesses say that he received a very serious injury. They say that, as to the permanency, it is largely a matter of percentage; but the fact that he had not yet recovered would indicate a more serious injury, and show more strongly that it might be permanent. From 5 to 50 per cent of the injuries of this character result in epilepsy; some result in insanity; sometimes there are abscesses and brain tumors, severe headaches, and a general inability to attend to business. His doctors' bills were \$235. There is nothing in the record to indicate passion and prejudice on the part of the jury, unless the amount of the verdict is so excessive as, in itself, to show passion and prejudice. Cases are cited by way of comparison, but they are not always helpful. The allowance of compensation is so largely within the discretion and judgment of the jury that, considering the seriousness of plaintiff's injury, we are not prepared to say that the verdict is too large.

Some other matters are argued; but those discussed in the opinion are controlling. We find no prejudicial error in the record, and the judgment is—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

OTTUMWA NATIONAL BANK, Appellee, v. N. M. NORFOLK et al., Appellants.

GARNISHMENT: Contingent Rights—Property Subject to Garnishment. Where, after the holder of a beneficiary insurance certificate disappeared, and was presumed to be dead, the in-

suror and the beneficiary under the policy contracted that the money due on the policy should be deposited in the bank by the insurer, to be paid to the beneficiary at the end of 10 years thereafter, unless the insurer could prove that the insured was alive, the beneficiary had an existing contingent beneficial property right in the funds held by the bank, and this was a vested interest, subject to the subsequent condition provided for in the contract, and one which was subject to garnishment for the debts of the beneficiary; and, in a garnishment action thereon, the court could continue the garnishment proceedings, subject to the further order of the court, until it was seen whether the defeasance provisions resulted, and whether the funds went to the beneficiary.

GARNISHMENT: Notice—Principal Defendant — Appearance—Proceedings. Where there is an informality in the service of notice of garnishment upon the principal defendant, and both he and the garnishee appear, and, making no objection, move to cancel and set aside an order continuing the proceedings for further orders as to the garnished funds, and where, if the notice was wrong, another one could be served, and where no judgment has been rendered as yet against the garnishee, the garnishee and the debtor cannot object that no notice of the garnishment has been served on the debtor, as required under Section 3947, Code Supp., 1913.

Appeal from Wapello District Court.—D. M. ANDERSON,
Judge.

MAY 6, 1919.

THE appellant Phoenix Trust Company was garnished as a supposed debtor of the principal defendant, N. M. Norfolk. The answer of the garnishee did not show an absolute indebtedness to the principal defendant, but, as contended, only a contingent liability. The court ordered that the garnishee hold the money until the further order of the court, subject to be applied, when due, to defendant, and that the garnishment matter be continued, subject to the further order of the court. From this order, the defendant and the garnishee appeal.—*Affirmed.*

Geo. F. Heindel and Roberts & Webber, for appellants.

Work & Work, for appellee.

PRESTON, J.—Plaintiff brought action against N. M. Norfolk, to recover judgment on promissory notes. The petition was filed on March 29, 1916, and on the same day, a writ of attachment was issued, and the Phoenix Trust Company was garnished thereunder. The garnishee answered, September 9, 1916, in which answer it says that, about March 23, 1916, the Modern Woodmen of America paid to said Trust Company \$3,000, under a contract of trusteeship, dated February 21, 1916, executed by defendant N. M. Norfolk and Hazel M. Norfolk, as parties of the first part, Modern Woodmen of America, as party of the second part, and Phoenix Trust Company, as party of the third part; that, about February 20, 1896, the Modern Woodmen of America issued to one Burnabee a benefit certificate for \$3,000, payable, in the event of his death, to defendant N. M. Norfolk, in the sum of \$2,000, and to Hazel M. Norfolk in the sum of \$1,000; that Burnabee disappeared from his home about August, 1905, and that the beneficiaries claim he is dead, but are unable to make proof of such death, and therefore claim said \$3,000, for which they have brought suit in the district court of Wapello County, Iowa. Said contract provides for the dismissal of said suit, and the payment of said \$3,000 to Phoenix Trust Company, upon the following conditions:

“The \$3,000 to be repaid by the Trust Company to the Modern Woodmen of America, with interest, in the event that Burnabee shall, within 10 years from the date of the contract, be located and found to be alive * * *. If it shall be determined that said Burnabee shall have died at any time during the period of 10 years subsequent to the date of the contract, then the Norfolks shall pay to the Woodmen a sum of money equal to the amount of dues and

assessments that would have been due and owing to said Woodmen on account of said certificate, in order to keep it in force during the entire lifetime of said Burnabee. That, if the Modern Woodmen of America does not, within 10 years, notify the Norfolks or the Trust Company of any claim that Burnabee is alive, or has been alive subsequent to the date of the contract, then the Trust Company shall pay to the Norfolks the said \$3,000, with interest at the rate of 3 per cent from the date of the contract, \$2,000 to N. M. Norfolk, and \$1,000 to Hazel M. Norfolk, and that thereafter the obligation shall be void; but if the said Woodmen shall, within 10 years, notify said Norfolks and the Trust Company that it claims that the said Burnabee is alive, or has been alive during any portion of the said time, then the agreement shall remain in force until said claim of said Woodmen has been determined in the manner provided for in the contract. The Trust Company shall pay to the Norfolks annually the net interest earnings on said \$3,000 in excess of the 3 per cent to be retained by the Trust Company, during the period covered by the contract."

In July, 1916, the Trust Company received from Woodland Camp, M. W. A., the further sum of \$50, under a written agreement whereby the same is to be held subject to all conditions and agreements set out in the contract of February 21, 1916. Upon the foregoing answer, the garnishee prayed that it might be dismissed and discharged.

We have not set out the details of the contract as to how any dispute as to whether said Burnabee was alive or dead should be determined. An original notice was served on the principal defendant, N. M. Norfolk, on October 9, 1916; and on January 10, 1917, judgment by default was entered against the principal defendant, N. M. Norfolk, on the notes, in the sum of \$1,851.42, with costs, the court finding that due and timely notice had been

served upon said principal defendant, both of the pendency of this cause and of the attachment and of the garnishment of the Phoenix Trust Company, and continued the garnishment matter, subject to the further order of the court, in this language:

"And it further appears that the said Phoenix Trust Company, garnishee, has in its possession, as appears from its answer, as garnishee, filed in this case, the sum of \$3,000, in which the defendant (Norfolk) has a contingent interest of \$2,000, bearing 3 per cent interest, to be due said defendant on contingency, set forth in said garnishee's answer. It is therefore ordered that the said garnishee shall hold and retain the said \$2,000, with interest, accrued and accruing, until the further order of this court, subject to be applied, when due, to defendant, upon the judgment hereinbefore rendered, and said matter of garnishment is hereby continued, subject to the further order of this court."

In June, 1917, defendants, N. M. Norfolk and the Trust Company, garnishee, filed a motion to correct the record entry and to set aside the order and judgment of January 10, 1917, by striking out the word "both" in said entry; also the words "and of the attachment issued in said cause, and the garnishment of the Phoenix Trust Company;" also to strike out of said entry, beginning with the words, "and it further appears," and ending with the words, "hereinbefore rendered, and," for the following reasons: (1) There was no notice to the defendant of said garnishment, as required by Code Section 3947, and for that reason the court has no jurisdiction to enter said judgment against the garnishee. (2) The answer of the garnishee shows that the obligation from the said garnishee to the defendant N. M. Norfolk is uncertain and contingent, and may never become due and payable, and is not subject to garnishment. This motion was overruled in December, 1917.

1. The principal contention of appellant is that, because the obligation from the garnishee to the principal defendant is uncertain and contingent, it is not subject to garnishment. Their proposition is that a debt which is uncertain and contingent, and may never become due and payable, is not subject to garnishment; that it is only indebtedness that is in its nature absolute and payable at some time, without contingency, that can be reached by such process. To support this contention, they cite Code Section 3897; *Victor v. Hartford Ins. Co.*, 33 Iowa 210, 212; *Dickinson v. Davis*, 164 Iowa 449, 455; *Huntington v. Risdon*, 43 Iowa 517; *Thomas v. Gibbons*, 61 Iowa 50; *Euler v. National Mot. Veh. Co.*, 181 Iowa 679; and cases from other jurisdictions.

We think the cases cited are distinguishable from the instant case, because of the difference in the facts. In the *Victor* case, where a policy of insurance was forfeited, and there was no obligation on the part of the insurance company to repay to the insured the unearned premium, which the plaintiff was seeking to hold, it was held there was no debt, and that, therefore, the garnishee should be discharged. In the *Dickinson* case, it was held substantially that the liability of a garnishee is not greater than that of the judgment debtor; and, in the absence of some fault on his part, he will not be put in a position where he may be compelled to pay the debt twice; and that a garnishee is not liable for indebtedness due the judgment debtor, where a note evidencing the indebtedness had been transferred by the judgment debtor to another as complete security, as the garnishee would not be owing anything until the note was transferred back to him. The holding in the *Huntington* case was that a prior settlement between the defendant in the main action and the garnishee, by which the indebtedness of the latter to the former is extinguished, avoids any liability of the garnishee upon a judgment against the

defendant. It was shown by the facts in that case that, at the time of the service of garnishment, the garnishee was not in any manner indebted, nor had he any money or property of the principal defendant's in his possession. In *Thomas v. Gibbons*, supra, it was held that a debt which is not in existence at the time of garnishment is not a debt to become due, within the meaning of the statute. It was there sought to hold wages earned after the service of the garnishment. In the *Eller* case, it was held that the relation of debtor and creditor did not exist at the time of the garnishment, because the written contract was not a contract of sale upon which the garnishee became indebted in any sum, but was a contract to make said sales in the future, such sales to be made and consummated on the basis of cash payment, before delivering to the garnishee the bill of lading for automobiles, which delivery preceded the right to demand and take possession of the cars purchased; and for the further reason that the transaction in question occurred after the garnishment was served. Section 3897 of the Code provides that:

"Property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment as hereinbefore provided."

Code Section 3935 provides that the notice of garnishment served shall forbid the garnishee's paying any debt owing such defendant, "due, or to become due," and requires him to retain possession of all property of the defendant in his hands, or under his control, to the end that the same may be dealt with according to law. Code Section 3949 provides that, if the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. It is appellee's contention that the garnishee has, as trustee, the actual possession of this sum of money paid to it by the insurance company, and that it is payable to the defendant Norfolk, except upon a possible contin-

gency; that this contingency does not inhere in the proposition that the trustee may never have the property in its possession, and it is in the latter case only that it is not subject to garnishment; that it is the uncertainty whether anything will ever come into the hands of the trustee, or whether he will ever be indebted, that precludes liability; that the principle contended for by appellant has never been applied to a case where the property is actually in the possession of the trustee; and that, in such cases, the process is considered as attaching, and is postponed until a liability to the debtor is ascertained. They cite *Rankin v. Smith*, 174 Iowa 537; *Capital City Bank v. Wakefield*, 83 Iowa 46, 49; *Boyer v. Hawkins*, 86 Iowa 40; Drake on Attachments (4th Ed.) Section 552; *Downer v. Curtis*, 25 Vt. 650; *Dwinel v. Stone*, 30 Me. 384; also, 12 R. C. L. 779, to the proposition that the broad principle has been asserted that debts, though not due, are subject to garnishment; also, 12 R. C. L. 786; *Groome v. Lewis*, 23 Md. 137 (87 Am. Dec. 563); *Phoenix Ins. Co. v. Willis*, 70 Tex. 12 (8 Am. St. 566); *Keiser v. Shaw*, 104 Ky. 119 (84 Am. St. 450); *Biggett v. Straub*, 193 Mass. 77 (118 Am. St. 449), to the point that garnishment is a proper remedy to hold a balance of money in the hands of trustees, if the specific objects of the trust have been satisfied. The statute seems to have been somewhat different than it is now, in some of the earlier Iowa cases cited by appellee, but in the *Rankin* case, page 545, we said:

"He was under a contingent liability to Smith, at the time of garnishment; but the amount thereof, if any, could be determined only upon a sale of the land. In such circumstances, we think that he was subject to garnishment. The title to the property and the constructive possession thereof being in him, in trust, for the purpose of sale, and the defendant Smith having a contingent interest in the purchase price, that interest could be reached by garnishment,

although the property itself could not have been taken on attachment, because Smith had no tangible interest therein. Plowman's liability arose under his agreement with Smith, which was consummated before the garnishment notice was served. It is not a case where the debt was created, or the interest arose after garnishment, as in some of the cases cited."

In the *Boyer* case, it was said that, in most of the states, and in this state, the tendency was to broaden the scope of the remedy by garnishment; and that, under the statute as it then existed, Section 2976, now 3936, an executor could be held for money due from decedent to defendant; and that the answer could be taken, and the cause continued for further proceeding, until the amount was ascertained by the settlement of the estate.

It should be remembered that the insurance company in this case has paid to the Trust Company, for the beneficiary, the full amount of the policy, or certificate. The only contingency is as to whether Burnabee shall, within 10 years from the date of the contract, be located and found to be alive: if not, then the money in the hands of the trustee, or \$2,000 of it, belongs absolutely to the principal defendant herein, N. M. Norfolk. No judgment has been entered in this case against the garnishee, nor is it sought to have a judgment against it at this time, condemning the money in its hands as the property of the principal defendant. The order simply refused to discharge the garnishee, but continued the garnishment matter. Some of the cases cited are where an executor was garnisheed, and the matter was continued until the settlement of the estate. In this case, none of the parties, and especially the garnishee, can be adversely affected. The order that the trustee shall hold and retain the money, subject to be applied, when due, to the principal defendant, in no way contravenes the trust imposed by the contract. It is in harmony with

the trustee's duties under the contract. The trustee is not prejudiced. No judgment can ever be entered against it in any event until the time expires, or if Burnabee should be found to be dead. The trustee must hold the money, or hold itself in readiness to pay, until that fact is determined. The real questions involved are: (1) Did the debtor, Norfolk, have an existing property right in the fund held by the garnishee? (2) If so, was such property interest subject to seizure by process of garnishment under attachment or execution? If these two questions are answered in the affirmative, then, under the record, no one could justly contend that there was any impropriety in the action of the trial court in continuing the garnishment proceedings, without judgment, until the time when the nature of plaintiff's property interest would be ascertainable to a certainty.

In regard to the first question, defendant Norfolk, the principal defendant herein, as beneficiary of the insurance policy, brought her action thereon against the insurance company. At the commencement of such

1. GARNISHMENT:
contingent
rights: prop-
erty subject to
garnishment.

action, the insured was presumptively dead. Nevertheless, the parties entered into the stipulation whereby the insurance company paid to a trustee the amount of the policy, to be held by the trustee for a period of 10 years, and then \$2,000 of it was to be paid to her, unless the insurance company should be then able to prove affirmatively that the insured was, in fact, alive. The fund being thus deposited with the trustee, who was the beneficial owner of it? It was not the trustee. It was not the insurance company, although it had a contingent interest in it. We think the principal defendant herein, Norfolk, was the beneficial owner, subject, however, to a condition subsequent. Under the stipulation, she is under no burden of affirmative condition. No condition or contingency need come to pass, in order to entitle her to the possession of the money at the

expiration of 10 years. If the *status quo* be maintained, then her right to the fund becomes incontestable at the end of 10 years. On the other hand, the insurance company is under the burden of proving affirmatively the condition which will defeat her right of property. In other words, the insurance company has received, for 10 years, a right of defense on the sole ground specified. Does the saving of a right of defense wholly destroy her presumptive right of property? Conceding that it creates an infirmity in or a cloud upon her title, and thereby impairs the value of her property, yet the property right remains. We think, therefore, that the beneficial ownership vested in N. M. Norfolk, subject to defeasance by the subsequent condition provided for in the stipulation.

In the foregoing discussion, we have disregarded the provision of the stipulation whereby she might come into immediate possession of the fund, prior to the expiration of 10 years, by making affirmative proof of the death of the insured. This provision was a method of acceleration for her benefit. It does not impair her right to take possession of the property at the expiration of 10 years, in the absence of defeasance by the other condition.

As to the second question, if N. M. Norfolk had a property right, then it was subject to seizure by her creditors, by some method. We see no reason why the process of garnishment is not adequate and proper to that end. No wrong is thereby perpetrated upon the debtor. In garnishment cases, the law is concerned as to the garnishee, that he be not trapped, but the mere process of garnishment does not encroach on the rights of the garnishee. The proper protection of the garnishee is to be provided in the orders of the court, after the facts are made to appear. Had the court, in this case, entered a judgment against the garnishee for the amount of the funds in his

2. GARNISHMENT:
notice: principal defendant:
appearance: proceedings.

hands, and had thereby ignored the condition of the stipulation, the garnishee would have had just ground of complaint; but, as shown, no judgment was entered against the garnishee. The only order entered as to him was one of continuance, subject to the further orders of the court, and, as before stated, the garnishee can suffer no prejudice therefrom. If future orders be made which are prejudicial to it, it will be time enough to appeal from such. Even though the purpose of the court was to save its jurisdiction for a final order at the expiration of 10 years, we see no reason why this may not be done. Possibly the court might even now enter a conditional judgment, preserving the very conditions of the stipulation, and suspend execution until the expiration of the time provided in the stipulation. Possibly such form of order would require the exercise of equitable jurisdiction. If that be so, the creditor might have a right to seek the equitable remedy, in aid of his execution. But this, we do not determine.

We conclude, therefore, that the order of continuance was not error.

2. Appellants complain that no notice was served upon the principal defendant, as required by Section 3947, which provides that judgment against the garnishee shall not be entered until the principal defendant shall have had 10 days' notice of the garnishment proceedings, etc. This is the notice required to be served upon the principal defendant before the money can be condemned in the hands of the garnishee. A notice was served upon N. M. Norfolk, the principal defendant, in which said defendant was notified to appear and show cause why judgment condemning the property or debt in the hands of the garnishee should not be entered. There seems to have been some informality in the contents of this notice, but the Trust Company, garnishee, appeared, and answered without objection; and both it and N. M. Norfolk, the principal defendant, ap-

peared, and moved to correct and set aside the order; and they have both appealed to this court from the overruling thereof. If there is any doubt as to the sufficiency of such notice on the principal defendant, another can be served. A complete answer to this claim is the fact that no judgment has as yet been entered against the garnishee. A proper notice was given the principal defendant in the main action, and no claim is made that the judgment against the principal defendant, N. M. Norfolk, on the notes, is not valid.

There is no error, and the judgment and the ruling of the trial court are—*Affirmed*.

LADD, C. J., EVANS, SALINGER, and STEVENS, JJ., concur.

KATE B. PIERCE, Appellee, v. BEKINS VAN & STORAGE COMPANY, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Review

- 1 —Findings on Fact Final. Whether the death of decedent employee was caused by his intoxication or was occasioned by his willful misconduct, with intention to injure himself, is a fact question, and the findings thereon by the statute tribunals under the Workmen's Compensation Act are final, and will not be reviewed by the Supreme Court.

MASTER AND SERVANT: Workmen's Compensation Act—Con-

- 2 struction. The Workmen's Compensation Act is highly remedial, and should have a broad and liberal construction in aid of accomplishing the object of the enactment.

MASTER AND SERVANT: Workmen's Compensation Act—Con-

- 3 struction. No exception based on the place where the injury occurred is found in the language of the Workmen's Compensation Act, and the Supreme Court cannot supply an exception.

MASTER AND SERVANT: Workmen's Compensation Act—Con-

- 4 struction—Injuries Outside of State—Beneficial Object of Enactment. The Supreme Court is not precluded from holding that

the Workmen's Compensation Act covers injuries sustained in another state because the act does not, in terms, declare that the statute shall have such an effect; and where the language of the statute is broad enough to cover such injuries, and such a construction effects the broad, beneficial object of the enactment, the court may so find.

MASTER AND SERVANT: Workmen's Compensation Act—Construction—Extra-Territorial Effect. A hiring under the Workmen's Compensation Act is an enforceable contract to compensate for injuries sustained and arising out of the employment, whether sustained in this state or outside. Accordingly, *held* that an employee employed in Iowa, but injured in Nebraska, while driving a van in the line of his employment, would be entitled to recover under the provisions of the Iowa Act, Sections 2477-m, 2477-m2, 2477-m6, 2477-m7, 2477-m8, 2477-m11, 2477-m14, 2477-m19, 2477-m21, 2477-m29, 2477-m33, Code Supp., 1913.

MASTER AND SERVANT: Workmen's Compensation Act—Construction—Meetings at Place of Hiring, Where Injury Outside of State. That the meeting of the arbitration committee cannot be held at the place of injury, under the Workmen's Compensation Act, where the employee is injured in another state, and that the award cannot be returned to an Iowa district judge sitting *there*, does not deprive the employee of compensation under the act for injuries suffered in another state; as the act may be said to be reasonably satisfied by holding that the arbitration committee may meet at the place where the hiring was done, and the court may act at the place where the contract was entered into.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

MAY 6, 1919.

APPEAL from an action of the district court effectuating an award against appellant by a board of arbitration, sustained on review by the industrial commissioner.—*Affirmed.*

Sargent, Strong & Struble, for appellant.

George Kephart and Cass Brothers, for appellee.

SALINGER, J.—I. The first contention of the appellant is

that the accident which caused the death awarded for was occasioned by the willful misconduct of the employee, committed with intention to injure himself.

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Compensation
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findings on
fact final.

The second complaint is that, at the time of the injury, the employee was intoxicated, and that said intoxication was the proximate cause of his injury.

It is to be doubted whether there is any evidence of willful misconduct, or of such conduct with intent to inflict the injury. Be that as it may, it is perfectly clear that whether there was such misconduct, or such misconduct with such intent, is fairly a question of fact, and that, on the evidence, reasonable minds may differ as to whether or not there was such misconduct. The same situation exists as to the claim that there was intoxication which was the proximate cause of the injury. One of the vital purposes of the Compensation Act is to minimize litigation and expensive contests. In aid of this purpose, the decision of the statute tribunals on some things is made final. All findings of fact upon conflicting evidence, or upon evidence from which reasonable men may draw differing conclusions, are within that class. We agree with appellant that our decision at this point should not be controlled by *Fischer v. Priebe & Co.*, 178 Iowa 512, and we have held, in *Griffith v. Cole*, 183 Iowa 415, that the limitations placed by the *Priebe* case on the power of the district court are expressed in a dictum. None the less, the effect of the *Griffith* case is that we cannot review a finding of fact unless the transcript makes it appear, as matter of law, that such finding is not sustained by or is contrary to the evidence, and say in that connection that "the court may not go into a general fact controversy." We therefore hold that we may not interfere with the finding of the statute tribunals that there was no willful misconduct, no intention to inflict the injury, and that there was no intoxication which was the proximate cause of the

injury. See *Cushman v. Frankfort Gen. Ins. Co.*, 4 Mass. W. C. C. 714; *Miller v. Foreman*, 1 Md. W. C. C. 49; *Hanson v. Commercial Sash & Door Co.*, 1 Ill. W. C. C. 39.

We find nothing that is either held or cited with approval in *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245, inconsistent with our pronouncement at this point.

II. The appellant was in business in Sioux City, Iowa. It there employed one Pierce. In line with the employment, it directed Pierce to drive a moving van from Sioux City to the town of Homer, in Nebraska, for the purpose of conveying to Sioux City a lot of household goods. Pierce was injured while so employed, and in Nebraska. Appellant presents that the Workmen's Compensation Act of the state has no application where the injury occurs outside of the state of Iowa.

It is claimed that, in jurisdictions wherein it has been held that their act has no extra-territorial effect, the statute construed indicates an intent to limit itself to the state not more strongly than does the Iowa act; that provisions in our own statute for which it is claimed they show an intention to give no extra-territorial force, are not found in statutes that have been construed to have extra-territorial force; and that the cases urged by appellee are not applicable, because of the nature of the statute which these cases construe. Each party here contends the authorities relied on by the other are inapplicable, because of differences between our act and the statutes which these authorities construe. Both agree that the authorities are in decided conflict. We conclude that resort to the decisions in other jurisdictions would be of very doubtful value in interpreting the Iowa Act, and we shall refrain from so resorting. It is fortunate that there is no disagreement on the proposition that the state *can* give a compensation act extra-territorial effect. The ultimate question, then, is this: On application of approved canons of construction, should it be found that there was an inten-

'tion to limit the effect of the act to the state, or found that it was the intention that it shall be applicable where the contract of hiring is made in the state, and the employee is injured while in the course and because of his employment, no matter where the injury occurs?'

The statute is highly remedial, and is to be construed as such statutes are. Howsoever the cases may differ, there is no difference as to the rule that such statutes as this shall

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struction.

have a broad and liberal construction in aid of accomplishing the object of the enactment. See *Kennerson v. Thames Towboat Co.*, 89 Conn. 367 (94 Atl. 372). The title

to the act indicates the breadth and scope of the act. It has a declaration that it relates to the liability of the employer for personal injuries sustained "in line of duty." That it was not intended to limit recovery under

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Compensation
Act: con-
struction.

the act to injuries sustained while the employee was in the state, is to be found by an application of the reasoning upon which the rule *designatio unius est exclusio alterius* rests.

Section 2477-m, Subdivision d, Code Supplement, 1913, provides that every employer shall be conclusively presumed to have provided compensation according to the act "for injuries sustained arising out of and in the course of the employment." Section 2477-m2 (a) is to like effect; Section 2477-m, Code Supplement, 1913, that, unless the Act otherwise provides, the employer has elected to pay compensation according to the Act "for any and all personal injuries * * * arising out of and in the course of the employment." Where stated things are enumerated, things not named are excluded. On the same reasoning, where a statute declares that compensation under its terms is to be made for any and all injuries sustained, without limitation beyond that they shall occur in the course of and arise out

of the employment, it is the declared intention that compensation shall be made under the statute if the injury be of the class named in the statute—the only limitation is the relation of the injury to the duty. No exception based on the place where the injury occurs is found in the language, and if it is to be engrafted upon that language, it must be done by judicial legislation. It is no answer to say that it would have been wiser to have made the place of the injury a condition to recovery under the act. Had the legislature thought that desirable, it would have been easy to add to the words allowing a recovery for any and all injuries, some such words as “except where the injury is sustained elsewhere than in the state.” No matter how wise and beneficial such an addition may be assumed to be, the legislature saw fit not to make it. We have not the power to rewrite the statute to supply what, for the sake of the argument, should have been enacted, but was not.

So far, we have assumed that such an exception as the act does not contain would be beneficial. Whether it would be that, is quite debatable. For one thing, it would make

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impossible the accomplishment of the one purpose of such acts: to wit, to bring about speedy payment, by procedure at once simple and inexpensive. It would further tend to nullify another thing intended: to wit, that the employer shall be enabled to charge to the industry what injury to the employee engaged therein will cost. As to the first, compelling the employee to bring a common-law suit, and to apply to its decision the statutes of another state, is certainly not calculated to promote speedy payment by procedure simple and inexpensive. As to the second, the employer could fix no tax upon his business to meet expenditures for compensation, because he would not pay statute compensation where the injury occurred outside of the state,

and could not foretell what proportion of injuries to be compensated for would arise outside of the state. This, however, does not so much matter. Once grant the power to make the statute apply to injury sustained outside of the state, and that this has been done, and it becomes immaterial whether it would be injurious or beneficial to have limited the statute to the state.

It is provided in Subdivision e, Section 2477-m16, that:

"The words 'personal injury arising out of and in the course of such employment' shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business."

Appellant tells us that the only way every section of the statute may be given full force and effect is by adding to a provision dealing with services performed about the premises of the employer and "elsewhere in places where their employer's business requires their performance," the limiting words, "within the state." We shall presently attempt to show that, for the purposes of the present controversy, it is not essential that every provision of the act shall have effect. Be that as it may, we have found no argument that satisfies us that we have the right to add such a limitation.

Appellant cites cases which proceed on the reasoning that the courts may not construe such an act as this to have extra-territorial operation, unless authority for such construction is found in the act in "unequivocal language, or plain and unmistakable words." The case of *Kennerson v. Thames Towboat Co.*, 89 Conn. 367 (94 Atl. 372), is at least one respectable authority that holds to the contrary. We do not refer to it as a standard for construing the Iowa act.

but for its holding upon a broad, general principle of statute construction, and we agree with the rule of that case as to such construction. We concur in the holding of the *Kenner-son* case that only as to cases *in delicto* is it required that the statute shall say, in unmistakable words, that it is intended to operate extra-territorially. We hold that we are not precluded from finding that our own statute covers injuries sustained in another state because the act does not, in terms, declare that the statute shall have such effect, and that we may find it has such effect, because its language is broad enough to cover such injuries, and that to construe it as covering them effects the broad, beneficial object of the enactment.

III. It was said in *Gooding v. Ott*, 77 W. Va. 487 (87 S. E. 862), in approval of the text in 1 Bradbury on Workmen's Compensation (2d Ed.) 44 *et seq.*, that, when a com-

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pensation act is elective, a hiring amounts to a contract of employment into which the statute is to be read. Appellant seeks to distinguish this decision because, under the West Virginia statute, both parties contribute to the fund, and because practically every provision of our own statute claimed to indicate a purpose to limit the effect of the act to the state is not found in the West Virginia statute. Be that as it may, this does not make a distinction against the proposition that the contract of hiring under an elective compensation statute is, in effect, a contract of employment into which such statute is to be read. Appellant concedes that, whatever name may be given to the effect and purpose of such statutes, that the law of the place where a contract is made enters into and is part of the contract. It adds that "it is not a question of what the legislature can do in such a case, but what it has done;" that the question remains whether the legislature intended to restrict the statute to within the lines of the state, or to give

it an extra-territorial effect. In so far as this indicates an argument that, though the parties have entered into a contract of hiring into which the statute is to be read, it remains a controlling question whether the statute itself is intended to have extra-territorial effect, we think some confusion of thought is involved. In other words, it can be conceded that, *as a law*, the compensation statute is not to be effective in other states. But such concession will not meet the position that, even if the statute is not law in another state, yet, with the statute read into the contract, there is an enforceable contract to be paid according to the statute, though the injury be suffered outside of the state. And it will be found that, in cases wherein it is affirmed that there can be no recovery because the statute has no extra-territorial effect, the distinction was overlooked that a statute which is a law only within the state may be so read into a contract of hiring as that compensation according to the terms of the statute may be recovered though the injury was sustained in a jurisdiction in which said statute was not effective as a law. In other cases, denying recovery on the ground that the act had no force beyond the limits of the state, there was no contract between employer and employee. With the possible exception of contracts wherein it is intended that the same shall be performed wholly without the state, the courts will apply the domestic compensation law where the contract of employment was entered into within the state, on the theory that the obligation sought to be enforced is based on contract and not on tort. See Corpus Juris, Title Workmen's Compensation Acts, Div. IV, Conflict of Laws, Section 28.

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Upon what does the right to recover in this case rest? Subdivision d of Section 2477-m, Code Supplement, 1913, provides that the employer shall be conclusively presumed to have elected to pay compensation according to the provi-

sions of the act, unless he give a specified notice in writing to the contrary. Section 2477-m is to the same effect; Section 2477-m2 (a), that all employees affected by the act shall be conclusively presumed, in the absence of notice to the contrary, to have elected to take compensation in accordance with the act. These satisfy us that the contract of hiring at bar is an enforceable contract, and, by means of reading the statute into it, is a contract to compensate for injuries sustained in and arising out of the employment, no matter where such injury is sustained. Whether the statute itself has or does not have an extra-territorial effect, the legislature can enact that a contract of hiring made within the state shall have an extra-territorial effect, in the sense that payment is due according to the terms of the contract, though the injuries be suffered in another state.

Our statute is confessedly elective. We are told that no distinction in construction is to be based upon whether the act is compulsory or elective. That is true as to some provisions of Compensation Acts. But that the statute is elective has controlling bearing on one thing that is most highly important. Where the statute is elective as to both employer and employee, payment of compensation is not the performance of a statute duty, but the performance of conditions in the contract of hiring, which conditions are in the contract by means of reading the compensation statute into the contract. We agree with appellant that the state "can limit the operation of a contractual obligation just as authoritatively as it can a compulsory statute." But that, of course, is not a denial that, under an elective statute, payment of compensation is purely a discharge of a contract obligation. It follows, then, that it is quite unnecessary to make this case turn upon a holding that the statute itself is operative in Nebraska. It suffices if employer and employee contracted in Iowa that, if injury was sustained in Nebraska, compensation should be governed by the terms and

conditions found in the Iowa statute, to which, by law, such contract makes reference. It is not the question whether the Iowa act operates in another state. Parties in Iowa may contract that, if one be injured in Nebraska in course of the employment, that the method of settlement for the injury shall be a described part of the statute law of New Jersey; and, if such an injury does occur in Nebraska, settlement can be enforced in Iowa on the terms of the New Jersey statute, without a thought that the statute law of New Jersey is the law of Nebraska. We know of no reason why parties may not, by contract, fix standards of settlement to be any definitely contracted-for method, unless there be some statutory or constitutional objection to such an agreement. The entire structure of the Iowa act not only fails to prohibit such a contract, but, by being elective, creates a contractual relation under a contract providing for settlement on a standard fixed by the Iowa act. Such a contract is no more objectionable than one providing for a common-law arbitration. See *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245. Under such a contract, the employee could not refuse to obey, if the master directed him to leave the state to perform an act in the course of the employment. If he did obey, there is no reason why the master should be allowed to repudiate that part of the contract of employment which provided how compensation should be made if the servant suffered an injury while obeying this direction. Such a contract protects both, and defines the rights of both. The master is assured of the limitations of his liability. The servant is assured of definitely fixed compensation, mutually agreed upon as adequate, and that he will receive the same promptly, and without the vexation or expense of litigation.

We hold that the employee in this case has a valid contract, which allows him to recover compensation according to the terms of the statute for an injury suffered in Nebraska; that the case stands precisely as if it had been ex-

pressly contracted that, for an injury suffered outside of the state, the compensation due should be determined by the terms of the Iowa statute.

IV. What are the avoidances?

Subdivision b of Section 2477-m makes the act compulsory on both employer and employee, where the employer is a municipal corporation. It is suggested that, if we give our statute such effect as the employee here claims for it, the said provision of the statute would, in a sense, work class legislation, in that a large mass of employers and employees are relegated to the provisions of a compulsory statute, while as to another large class, the statute is merely elective. We are unable to see that this bears relevantly upon whether there may be a recovery for injuries suffered elsewhere than in the state. Be that as it may, if this is a good objection, its effect does not stop with destroying the enforceability of the statute as to injuries sustained in another state, but destroys the act *in toto*. If it be objectionable class legislation, it is as ineffectual where an injury is suffered in Iowa as if suffered in another state.

So of the argument that Section 2477-m21 indicates an intent to limit the operation of the act to the state. In effect, this provision makes the act inapplicable where, under certain conditions, the employment is in interstate commerce. Passing the question whether sending an employee from the business place of the employer in Sioux City across the state line to haul back a load of furniture in a moving van may be said to be an employment in interstate commerce, it remains true that one hired in Iowa to do work in Iowa may, while performing it, be engaged in interstate commerce. Therefore, this particular statute has no relevant bearing on whether the legislature intended to give the statute operation beyond the state line, and, so far as available, is just as available for some injuries sustained in Iowa as for those suffered in another state. It may properly be added

that nowhere in error point or brief point is there any claim that the Compensation Act is invalid either because it is class legislation or enters the field of regulating interstate commerce. The complaint is not that the statute is void, but that, while valid, it was not intended that it should be applied in a case like the one at bar.

Section 2477-m8 provides that failure to give notice within stated times provided shall work a bar to recovery; Section 2477-m11, that, on request, the employee must submit himself to medical examination, within a reasonable time. It is argued that these provisions indicate an intent to limit the scope of the statute to the state, because, if the injury were suffered at a great distance from the place of hiring in Iowa, the employee might be prevented from giving notice within the time required, and might be subjected to great hardship to submit to an examination at the place selected by the employer. If this argument is persuasive, it would be equally so as to many injuries that might be sustained within the state. In one set of circumstances, 90 days is allowed wherein to give notice. It is inconceivable, in the present state of facilities for communication, that distance from the residence of the employer would make it impossible to give him notice within 90 days. Be that as it may, it can well be conceived that it would be as, or more, difficult to give notice within the prescribed time of an injury suffered within the state as of one sustained beyond its boundaries. Certainly, an employer living in Sioux City may be notified of an injury sustained by his employee in Jefferson, South Dakota, as quickly as if the injury had been suffered in Keokuk. Certainly, where, in Texas, the employer resides in the northwest corner of the state, and the injury is suffered in the southeast corner, there might well be as much delay in getting notice to the employer as if the injury occurred four or five miles from where the employer resides, but just across the state line of Texas.

What we have said as to the relative inconvenience in conveying notice of injury applies equally to the right of the employer to require the employee to submit himself to a medical examination. It might well be easier for the employee to travel from a point in Nebraska to some point in Iowa for medical examination than, if injured in Keokuk, to go to Sioux City. It is not amiss to add that the difficulty suggested as to the possible inconvenience in submitting to such examination does not enter into the question at all, where both the place where the injury occurred and the death therefrom occurred in another state. The deceased employee cannot be required to submit himself to medical examination anywhere. We are of opinion that these two statute provisions do not overcome the evidence already adverted to that tends to prove the legislature intended that being injured outside of the state should not nullify a contract for compensation according to the statutes of the state.

4-a

Section 2477-m6 provides, in effect, that, under certain conditions, there may be subrogation to the rights of the employee to recover for injury. It seems to be the thought of appellant that the existence of this provision is an argument why the statute cannot have extra-territorial effect. We have already pointed out that, strictly speaking, the question is not whether the statute has or does not have such effect. We are unable to see how the existence of such a provision for subrogation furnishes any reason why an employee who sustains an injury in another state may not have compensation adjusted according to the terms of the Iowa statute.

4-b

Section 2477-m7 provides that no contract rule, regulation, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this act, except as the act provides. It seems to be the argument

at this point that, if an injury suffered in Nebraska may be compensated for according to the terms and conditions of the Iowa statute, it leaves no room for the application of this precautionary statute; that, where the employer has rejected the act, and where there is, therefore, no contractual relation in regard to paying, the employer could defend with some such contract rule, regulation, or device. Of course, the answer is, as said, that the parties here do sustain a contractual relation; that the statute must be read into the contract; and that, therefore, the employer would not be permitted to defend with any contract rule, regulation, or device tending to relieve the employer from liabilities created by the act. We are unable to agree that this precautionary protection of the employee against undermining the statute has any tendency to prove a legislative intention that, despite contract to pay for all injuries according to the terms of the Compensation Act, compensation according to that act cannot be demanded.

V. Section 2477-m2 (b) creates a limitation upon the defenses of the employer where he fails to furnish or maintain any safety device required by statute or rule, or violates any of the statutory provision or rules and regulations now or hereafter in force, relating to the safety of employees. And 2477-m19 empowers the Iowa industrial commissioner, in co-operation with the employer, to fix standards of safety for safety appliances or for places of employment. It is argued the statute does not require that the employer shall, in Nebraska, maintain safety devices required by Iowa statutes or rules, and that the commissioner has no power to fix what shall be standards of safety for safety appliances or for places of employment in Nebraska. Section 2477-m29

6. MASTER AND
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Workmen's
Compensation
Act: con-
struction:
meetings at
place of hiring,
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state.

provides, in effect, that the committee on arbitration shall hold its hearings in the city, town, or place where the injury occurred. Section 2477-m33 provides for presenting a certified copy of the decision by arbitration committee or commissioner to the district court of the county in which the injury occurred, and that, thereupon, said court shall render decree in accordance therewith. Section 2477-m14 authorizes a district judge, in certain conditions, to make an order commuting future payments to a lump sum. It is argued that, where the injury occurs in another state, the arbitration committee created by Iowa law cannot hold its meetings there; that, in such case, the award cannot be returned to the district judge sitting where the injury occurred, because no Iowa district judge does or can sit there. and that no such judge can order such commutation. That is all true. But is it at all relevant? Suppose there had been a written contract providing, in terms, that, for injuries sustained either within or without the state, compensation should be made on the terms, conditions, and schedules of the Iowa Workmen's Compensation Act. Suppose an injury in Nebraska. All that can be said in the supposed case is that some of the provisions of the Iowa act could not be carried out. The employee would be required to be content with the fact that he had suffered injury which he might possibly have avoided, had it been within the power of the Iowa authorities to fix standards of safety in the place where he was injured. Neither party can obtain a sitting of the arbitration committee in Nebraska. It would not be possible to return the award of the committee or commissioner to an Iowa district court or judge sitting at the place where the injury occurred. It would not be possible to have an Iowa judge sitting in that place order a commutation to a lump sum. But how does all this destroy the substantial

right to demand an adjustment without litigation, and on the terms fixed by the Iowa statute? Some things provided by that statute would respectively not be available to one or the other party. But how can that affect the right to obtain all that *is* available? Instead of taking away that which can be obtained because some other thing may not be, is it not more reasonable to say, in the language of *Kenner-son v. Thames Towboat Co.*, 89 Conn. 367 (94 Atl. 372), that:

"In legislative acts inaugurating a new system, not infrequently are found contradictory positions, and it becomes the duty of the court to reconcile them, so far as it can. It does this, whenever it is possible, in such way as to sustain the act and carry out its purposes."

Aside from the position that what is clearly available may not be lost because something else is not available, and despite the fact that, in passing this new legislation, it could well have been arranged that everything given by the act would always be available, safe ground as to this whole controversy can be reached by the one holding that it is fairly within the purpose, reason, and intendment of the act to construe it to enact that, as to provisions such as to where the arbitration committee shall sit, or as to presenting the award to the district judge, and the like, it is intended, where an injury otherwise within the act occurs without the state, "that place" means the place where the contract was entered into. It is no strain upon the manifest purpose of the statute to hold that, where one sustains an injury in another state that is within the provisions of the act, the arbitration committee may meet in the place where the hiring was done, and that, where action on part of a judge or a court is provided for, it shall mean a judge or court having jurisdiction in the place where the contract was entered into. As was said in *Kenner-son v. Thames Towboat Co.*, 89 Conn. 367 (94 Atl. 372):

"In a sense, the injury may be said to have been sus-

tained in the place of the contract; and if appeal is taken, in cases of injury occurring without the state, to the county of the contract, the terms of the act will be reasonably satisfied."

It is our judgment that the award and the action of the district court thereon should be—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

T. J. TURNER, Appellee, v. HARTFORD FIRE INSURANCE COMPANY, Appellant.

APPEAL AND ERROR: Matters Reviewable—Sufficiency of Record.

- 1 Complaints that certain things were done and others omitted cannot be considered on appeal, where record does not show them.

ARBITRATION AND AWARD: Submission—Notice of Meetings—

- 2 Introduction of Evidence. Under an agreement to submit to arbitrators the question as to the damage done under an insurance policy, under the provision that they should appraise and ascertain the actual cash value of loss by lightning, there was nothing involved but their personal investigation, and the parties were not entitled to notice of meeting, or to an opportunity to present evidence, nor were the arbitrators bound to hear evidence.

TRIAL: Review—Finding of Court—Applicability to Evidence. A

- 3 finding of the court that the appraisers, in arriving at award, did not take into consideration the condition of plastering, followed by the further statement that they made the award on the theory that lightning had nothing to do with the condition of the plastering, is not a finding that they failed to investigate the condition of the plastering, but rather that, on some consideration, they found that the condition of the plaster was not due to lightning.

ACTIONS: Arbitration and Award—Trial on Law Side—Defense of

- 4 Arbitration Award in Law Action. Where suit was brought at law by insured for damages on an insurance policy, and as a bar to his recovery the insurance company urged on the law side that there had been an accord and satisfaction by an award,

the law court could determine whether the award pleaded in the law action stood in the way of a recovery in that action.

TRIAL: Trial on Law Side—Waiver of Objections. Where, in an action brought at law by an insured for damages from lightning, the insurer urged on the law side that there had been an accord and satisfaction by award of arbitrators, and, upon the filing of insured's reply, the insurer knew that an attempt was being made to litigate the validity of award on the law side, and made no objection or challenge to the reply or its form, and made no motion to transfer to equity, he conceded that the said issue should be determined by a court not sitting as an equity court; and an objection made at the trial on insurer's part to testimony, that it could not be received because there had been a binding appraisalment, was an admission that it was competent for the court to determine whether or not the appraisalment and award were binding.

ARBITRATION AND AWARD: Setting Aside—Jurisdiction of Court—Gross Mistake. The award of arbitrators should not be set aside because the arbitrators ignored evidence or erred in honest judgment, or because the award found lacked sufficient evidence to support it; but gross mistake, strongly proved, will avoid an award of arbitrators, and this avoidance does not depend upon showing mistakes to the arbitrators on a rehearing before them, but can be found by the court.

PLEADING: Reply—Insufficiency—Waiver by Failure to Object. By failure to interpose any objection to reply of plaintiff that award of arbitrators was so grossly inadequate as to make said award null and void, defendant conceded in the trial court that, if it were duly proved that the award was inadequate, plaintiff would thereby avoid the award.

ARBITRATION AND AWARD: Setting Aside—Jurisdiction of Court—Gross Inadequacy—Partisan Arbitrators. A clearly proven gross inadequacy ordinarily gives power to the court to disregard the award of arbitrators, there being a presumption that the arbitrators were partisan; and it can be set aside for partiality.

APPEAL AND ERROR: Review—Sufficiency of Evidence—Inadequate Award of Arbitrators. In an action for insurance from loss by lightning, with defense of award by accord and satisfaction, evidence held sufficient to support finding of trial court that damages to the plaster of the building were in the sum of \$850, and that an award of arbitrators of \$150 damages to the whole building was grossly inadequate. Principle recognized

that, although every presumption will be indulged in favor of the award, on trial of a question on the law side, where the issue is properly before the court, its findings have the effect of a verdict of the jury, and every reasonable presumption is indulged for the action of the trial court thereon; and that, on review, the Supreme Court cannot disturb the action of the trial court below unless it can be said, as a matter of law, that the finding of the trial court lacks such support as the laws of evidence demand.

EVIDENCE: Reception of Evidence—Opinion Evidence—Value of

10 **Building—Restoration by Repairs.** It can fairly be said that a witness, asked to say how much a building was worth just before it was struck by lightning and how much it was worth just after it was struck, is called upon to base his answer on the cost of restoration; and, if the party against whom this evidence was put in has any doubt whether the opinion is based upon such cost, the remedy is not by objection, but by proper cross-examination.

APPEAL AND ERROR: Reception of Evidence—Harmless Error—

11 **Damage to Building—Cost of Restoration.** Even if the true rule of damages was the cost of restoration, it was harmless error to permit witnesses to testify as to the value of the building before and after it was struck by lightning, where the difference in value before and after being struck was not substantially different from the cost of restoration, as testified to by other witnesses.

Appeal from Appanoose District Court.—SENECA CORNELL,
Judge.

MAY 6, 1919.

SUIT at law on an insurance policy for damages alleged to have been done to a building by lightning. One defense was by pleading, in answer filed on the law side, that there had been a common-law arbitration; that the award resulting was conclusively binding on the parties; and that tender of the amount awarded had been duly made and kept good. A reply to this answer, also filed on the law side, urged various avoidances to said award, and made the ultimate claim that the same is null and void. The case was tried to the court without a jury. From judg-

ment on the policy for a sum larger than the amount fixed in the award, the defendant appeals.—*Affirmed.*

Parker, Parrish & Miller, for appellant.

Townsend & Miller, J. R. Price, and Porter & Greenleaf, for appellee.

SALINGER, J.—I. Many attacks upon the appraisement and the award are grounded upon assertions that certain things were done and others omitted. If it be assumed that doing and not doing these things would constitute valid objections, these attacks are futile, because the record does not show that these things were done or not done.

1. APPEAL AND
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record.

II. One attack is that no notice of the time and place of the meeting of the two original arbitrators was ever given to plaintiff. Another and related attack is that he was never given an opportunity to offer or present evidence to sustain his claim. Still another is that the arbitrators heard no evidence to enable them to arrive at any decision as to the amount of damage sustained by plaintiff. The agreement to submit to the appraisers provided that they

2. ARBITRATION
AND AWARD:
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tion of evi-
dence.

should appraise and ascertain actual cash value and direct loss by lightning. This invoked nothing but their personal investigation. They were not bound to take testimony, and it will not set the award aside that they did not give said notice, and failed to hear witnesses. See *Thornton v. McCormick*, 75 Iowa 285.

III. The plaintiff alleged that the award was void, among other reasons, because the arbitrators had wholly neglected to investigate whether the plaster in the building

3. TRIAL: review: finding of court: applicability to evidence.
- had been damaged by lightning, and had given that item of damages no consideration whatever. The main support for this contention is the argument that the court found there was such omission to consider.

It is recited in said finding "that the persons selected to appraise the damages did not take into consideration the condition of the plastering." If this were all, it would be a finding that the appraisers were guilty of the omission charged. But this is not all. It is immediately followed by the further statement that the appraisers "made the appraisal on the theory and believing that the lightning had nothing to do with the condition of the plaster." Taken altogether, this is not a finding that the appraisers neglected to investigate whether lightning had damaged the plaster, but that, on some consideration, they reached the conclusion that the condition of the plaster was not due to lightning.

IV. Was it error to try the validity of the award on the law side?

We said, in *Tomlinson v. Tomlinson*, 3 Iowa 575, that certain things urged will not avoid an award where "there are no circumstances of an equitable character to satisfy us that the parties should be again heard,"

4. ACTIONS: arbitration and award: trial on law side: defense of arbitration award in law action.
- and in *Burroughs v. David*, 7 Iowa 154, at 158, that courts have but little power over common-law arbitrators; that this is especially true of the courts of law, because "nearly all the authority which does exist in regard to them resides in courts of equity;" that it has been held, in many cases, that "evidence of mistakes in an award cannot be given in a court of law;" that, if certain matters are receivable to impeach the conduct of the arbitrators, these are available "perhaps only in equity," and are ordinarily not receivable in a court of law; and that,

"even where the courts have interposed, it has generally been by those which proceed upon the principles of equity, because the relief sought is usually obtainable only through the medium of these principles." In *Thornton v. McCormick*, 75 Iowa 285, we held that such an award as was made in that case must be held to be conclusive, unless, for one thing, "equitable grounds for setting it aside are shown;" and that, "when an award is questioned on equitable grounds, the pleading attacking it should allege facts as distinguished from legal conclusions which show that it should be set aside." Appellants may fairly claim that, at the time these decisions were made, this court was inclined to hold that, if the award might be avoided at all, it should be upon an exhibition of equitable circumstances justifying the setting aside of the award, and that relief on that ground was not to be had on the law side. Proceeding upon this premise, the appellants urge that, unless a fatal defect appears on the face of the award, an attempt to impeach same cannot be entertained on the law side, because such impeachment of an award is of equitable cognizance only. We are inclined to hold, on the authority of *In re Receivership of Magner*, 173 Iowa 299, Div. 3, beginning at page 315, that this position is not well taken. We there held that, since both the law and the chancery jurisdiction are exercised by the same court, that when, in an action properly begun at law, an emergent issue is presented which would be of equitable cognizance if presented by an original suit, the law court may settle such emergent issue without adjourning the hearing at law and having said issue presented to itself sitting as an equity court. The concrete situation is this: Plaintiff rightly brought his suit on the law side. As a bar to his recovering, the defendant urged on the law side that there had been accord and satisfaction by means of an award. We hold that, if it be assumed an original suit to set aside this award should

have been in equity, yet the law court could determine whether the award pleaded in the law action stood in the way of a recovery in the law action.

Be that as it may, appellant may not now urge that the avoidance of the award should have been tried out as an equitable issue. When plaintiff filed his reply, defendant

knew as well then as it knows now that an
 5. TRIAL: trial
 on law side:
 waiver of ob-
 jections.

attempt was being made to litigate the validity of the award on the law side. If that is objectionable now, it was objectionable then. The reply was in no manner challenged. No complaint of the forum was made, nor motion to transfer. It seems to us we must hold that, in these circumstances, the appellant conceded that the issue should be determined by a court which was not sitting as an equity court. Further support of this conclusion is afforded by the fact that, when plaintiff offered testimony tending to show what damage he had, in fact, sustained, one objection interposed was that such testimony should not be received, because there had been an appraisalment which was binding upon the parties. This amounted to a declaration on part of defendant that it was competent for the court to decide whether or not the appraisalment and award were binding. We conclude appellant may not now urge that the relief granted the appellee should not have been given on the law side.

V. This narrows the main contention on this appeal to the assertion that, even if the law court had power to act, it erred in using that power to nullify the award.

It may be conceded that the award
 6. ARBITRATION
 AND AWARD:
 setting aside:
 jurisdiction
 of court:
 gross mistake.

should not be set aside merely because the arbitrators ignored evidence; nor merely because it may be found it lacked sufficient evidence to support it; nor merely because the arbitrators fell into what is no more than honest error

in judgment. *Thornton v. McCormick*, 75 Iowa 285; *Burchell v. Marsh*, 17 How. (U. S.) 344, 349. It may be conceded that an attack upon the award may not, in effect, be an application for new trial, or an appeal. *Thornton v. McCormick*, 75 Iowa 285. It may further be conceded that, where both law and fact are submitted to the arbitrators, that their award is conclusive. *Thornton v. McCormick*, 75 Iowa 285. But it is a sufficient answer to say that the agreement to submit to arbitration which we have before us was not an agreement to submit both law and fact. The submission was limited to ascertaining and fixing the amount of the sound value and of the direct loss and damage by the lightning.

All these concessions made, does it follow that the award at bar is conclusive? The award was disregarded for mistake. The position of appellant is that no court may set aside an award for "mistake." It may be conceded the chancellor may not substitute his judgment for that of the judges chosen by the parties, and that the award should be the end of litigation, rather than its commencement (*Burchell v. Marsh*, 17 How. [U. S.] 344, 349); conceded that the "mistake" which will set aside the award is not made out by the fact that the court differs in opinion with the arbitrators (5 Corpus Juris 179). It is true the power to interfere with a common-law award has been much limited, and that strong proof is required. But with one exception, we have been unable to find any holding that *no* mistake shown on judicial review will avoid the award. In *Knox v. Symonds*, 1 Vesey 369, it is ruled that even gross mistake, clearly proved, will not avail unless such mistake is made out "to the satisfaction of the arbitrators." We think the weight of authority sustains the *Knox* case, in so far as it holds that gross mistake, strongly proved, will avoid an award, but that neither on reason or authority should relief for such mistake depend upon satisfying the

arbitrators of it on an application to them for a rehearing. We are satisfied that *some* material mistakes prejudicial to the party complaining will justify the court in disregarding the award. The *Thornton* case, 75 Iowa 285, goes at least as far as holding that an award may be avoided for "a material mistake which entered into" the award itself; or a mistake which naturally had a material influence in shaping the conclusions reached by the arbitrators. In *Thompson v. Blanchard*, 2 Iowa 44, the court rejected testimony tending to show that a material mistake had been made, and it seems to have acted on the theory that the award could not be impeached except for fraud. In reversing, we held that the impeachment was not limited to fraud, and that an award might be avoided if the arbitrators "shall commit such material errors or mistakes as prejudice either party." We added that it could no longer be doubted that this was the well-settled rule in this country. The case approved a declaration in *Greenleaf* to the effect that the award may be impeached if it be shown "there is a mistake in such an award." This position is given some support in *Adams v. New York F. Ins. Co.*, 85 Iowa 6. We further said, in *Tomlinson v. Tomlinson*, 3 Iowa 575, that "these cases must, for the most part, depend upon their own peculiar circumstances, and it is difficult to find any general rule by which they can be determined."

Concede, for the sake of argument, that gross inadequacy alone will not justify the interference of the court. What is to be done with the reply of the plaintiff, which was in no manner challenged? It asserts that no adequate examination was made by the arbitrators; that matters that should have been considered were not considered; and that matters which should not have been considered, were. This the pleader styles misconduct. Upon that basis, he asserts "that the award of said arbitra-

7. PLEADING:
reply: insufficiency: waiver by failure to object.

tors, because of the misconduct of said arbitrators, is so grossly inadequate as to make said award null and void." If gross inadequacy will not justify a disregard of the award, that was as much the law when plaintiff pleaded such inadequacy as one basis for disregarding the award as it is now, when we are reviewing the action of the trial court. By failure to interpose any objection to this plea, the appellants conceded in the trial court that, if it were duly proved the award was inadequate, plaintiff would thereby avoid the award. Without reference to this estop-

8. ARBITRATION
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setting aside:
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pel, it is thoroughly well settled that a clearly proved gross inadequacy ordinarily gives power to disregard the award. Where the award is grossly inadequate, a presumption is raised that the arbitrators were partisan, and that the award may be set aside

because of partiality. See *Thornton v. McCormick*, 75 Iowa 285, and *Vincent v. German Ins. Co.*, 120 Iowa 272, 277. In *Gorham v. Millard*, 50 Iowa 554, it is indicated that, if an ultimate finding is not fully justified by the evidence, and it be clearly proved that there is a gross mistake, the award will be subject to judicial review. While it is said, in *Burroughs v. David*, 7 Iowa 154, at 158, that the courts have little authority over common-law arbitrations and arbitrators, it is, to say the least, strongly indicated that, in some forum, the award may be avoided if it

9. APPEAL AND
ERROR: review:
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evidence: in-
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award of ar-
bitrators.

be shown that the arbitrators were guilty of gross partiality. Why should that not be so? In the case at bar, the allowance was \$150, all for items exclusive of injury to plaster. Suppose it were admitted that the plaster was damaged to the extent of \$1,000.

Would there be no power to interfere, where it was admitted that not a penny is awarded for that injury, and where, with damage amounting to \$1,000, the award is but

\$150, fixed at that sum by a captious failure to award anything for a damage of \$850? To be sure, there is here no such admission. But a finding on proper evidence that this \$850 is due is, for the purpose of settling whether there should be an interference, as potent as such admission would be. While there is no such admission as we have illustrated with, there is some evidence that there is gross inadequacy in disregard of what the arbitrators knew. Gallagher and Keys were the original arbitrators. Crisman was the umpire chosen by these two. Gallagher testified, without objection, that Crisman passed through the house and sounded the plastering, and, when the three had reached the second floor, Crisman said to the other two, in substance, that the plastering was cracked by lightning; that, as near as witness can state it, the substance of what Crisman said was that the cracking of those walls was due to the concussion or vibration of the lightning,—and yet no allowance for such injury was made.

We are of opinion that the court did not err in proceeding to determine from evidence whether the award ought to be avoided for mistake.

VI. This brings us to the question whether, though there was power to nullify the award for mistake, the evidence of mistake justifies the nullification. Involved is a consideration of the rules of law governing the degree of proof required to set aside an award. We held, in *Thompson v. Blanchard*, 2 Iowa 44, that "the whole burden of proof * * * is on the party who attacks the award. It is for him to clearly satisfy the jury of any mistake, as also that he was prejudiced thereby," and the defect must be shown "fully and clearly." This was adhered to in *Tomlinson v. Tomlinson*, 3 Iowa 575, and it was added, "that a party should not only make out the mistake clearly and fully, and that he was prejudiced thereby, but also show that, if it had not occurred, the award would have been different."

To the same effect is *Gorham v. Millard*, 50 Iowa 554, at 560. In *Vincent v. German Ins. Co.*, 120 Iowa 272, "clear and satisfactory evidence" is required to support the ground of impeachment. It must be "convincing evidence." *Barnard v. Lancashire Ins. Co.*, 101 Fed. 36. But what results from the existence of these rules of evidence is vitally affected by the nature of the appellate review permitted. If *de novo*, these rules control our weighing of the evidence. This is appreciated, for appellant insists the hearing here should be *de novo*. By holding that the law court was empowered to determine whether the award pleaded was or was not a bar to recovery on the policy, we have, in effect, decided that this question was and remains on the law side for all purposes. Assume the issue was of equitable cognizance. But as it was mutually tendered to the court sitting on the law side, and a jury waived, we are of opinion that review here is limited to such as is accorded a verdict. Now, that being so, what effect has it that clear, satisfactory, and convincing evidence is required? Such degree of proof is required because every reasonable presumption is entertained in favor of the determination of the arbitrators. *Tomlinson v. Hammond*, 8 Iowa 40, at 45; *Tank v. Rohweder*, 98 Iowa 154, at 156. But on the law side, there is precisely the same presumption in favor of the action of the trial court in setting aside the award, and we have held that, in reviewing the action of the court in sustaining the award, we are "not authorized to disturb the judgment, unless it is plainly and palpably unsupported by the evidence." *Foust v. Hastings*, 66 Iowa 522, at 526. The converse must be true. That is to say, if that is our limitation when the trial court sustains the award, the review cannot be broadened where that court, sitting as a jury, has avoided the award. The limits of review are also well indicated in *Thornton v. McCormick*, 75 Iowa 285. In *Seibert v. Germania F. Ins. Co.*, 132 Iowa 58, at 61, it was complained that the court was

not warranted in submitting whether one of the arbitrators had been a fair and impartial one. We there concede that every reasonable presumption will be indulged in favor of the award and the arbitrators. But we add that, in the case then before us, "the record discloses evidence sufficient to warrant the jury in finding, as a matter of fact, that the award should not stand," and that we will not discuss the evidence upon which our conclusion is based, because, among other reasons, it is not our practice to do this.

Formulating rules on what will authorize a jury to find a fact proven has little bearing when an appellate court reaches the question whether a finding made is sufficiently supported by such evidence as said rules demand. In every case, the jury is charged that one party or the other has the burden of proof, and may not prevail unless it has discharged that burden by a preponderance. On an indictment charging an assault with intent to inflict great bodily injury, there should be no conviction unless the jury may find that a specific intent to inflict a grave injury has been proved beyond reasonable doubt. When it comes to appellate review, however, we do not review *de novo* whether the party prevailing discharged the burden of proof or whether said specific intent was made out beyond reasonable doubt. It being the function of the jury to settle, as a question of fact, whether or not said specific intent existed, this carries with it the power to settle, as a question of fact, whether there was such proof of such intent as the law demands. Review here is not controlled by whether we, sitting as jurors, would have found that the prevailing party had such proof as the law requires, but whether we may say, as matter of law, that there was failure to adduce such proof. While it is true that every reasonable presumption is indulged for the award and the action of the arbitrators, it is equally true that every reasonable presumption is indulged for the action of the trial court in dealing with the award, either when it affirms it or avoids

it. Fully recognizing the degree of proof demanded, we yet held, in *Tomlinson v. Tomlinson*, 3 Iowa 575, that the question finally becomes whether we may hold the evidence was insufficient to set aside the finding; that there is no hard and fast rule involved; that such cases as these "must, for the most part, depend upon their own peculiar circumstances, and it is difficult to find any general rule by which they can be determined." Fully recognizing what degree of proof is required, we yet held, in *Vincent v. German Ins. Co.*, 120 Iowa 272, that the ultimate question for review was the ordinary one of whether the evidence sustained the action below. Here, then, we cannot disturb the action below unless it can be said, as matter of law, that the finding of the trial court lacks such support as the law of evidence demands.

6-a

Appellant argues there was no evidence that the plaster had been injured by the lightning; that the conclusion of the trial court that there was such damage was reached by reasoning, first, that the plastering was practically free from cracks before the stroke, second, that later the plastering was found cracked in every direction, third, the plastering was well mixed, and fourth, that, therefore, the damages to the plaster must have been by lightning; that, in effect, the finding is that, when plastering is well mixed, and is observed to be cracked in every direction, some time after lightning has struck the building, it follows that lightning has caused the condition of the plaster. The summary is that the argument of the trial judge is the alluring but illogical *post hoc ergo propter hoc*, and that it is a *non sequitur*. If we could so find, we should interfere. But treating the finding as a verdict, there is abundant evidence to sustain it. And there is full warrant for our saying it might in reason be found by the trier of the facts that the damage to the plaster could be caused by lightning, and that no other effective cause for the injury appearing was shown to have

existed. Where a cause is present which might produce a condition that has occurred, and there is no other adequate cause proved, the matter is not within the equipoise rule, and it may, under such conditions, be found that the only thing suggested by the evidence which could cause an effect found present, did cause it. See *George v. Iowa & S. W. R. Co.*, 183 Iowa 994. Appellant urges that the inspections of the house prior to the time when lightning struck it were casual, and that no inspection was made for four days after the stroke. It may be conceded that to this much is added, say by experts, from which the trial court could have found that lightning did not injure the plaster. But, of course, that this is so is of no avail on review of a verdict if the contrary, too, might, in reason, have been found. We shall not enter detail. It suffices to say that the testimony of Gallagher as to the statement by Crisman to his fellow arbitrators is one item that tends to sustain the decision below. So of other testimony by the same witness, and that of Huber, and that of Staley.

Our ultimate conclusion is, there is such substantial support in the evidence for the finding that lightning damaged the plaster in \$850 as that disregarding an award for but \$150 for injury other than to plaster may not be disturbed on this appeal.

VII. Complaint is made that witnesses were permitted to say what was the reasonable market value of the building immediately before the lightning struck it and immediately thereafter. It is argued that the true measure was what it would properly have cost to make restoration by repairs. We are inclined to the opinion that the testimony received was not objectionable, if it be conceded that the measure of damages is the cost of replacement by repair. It can fairly be said that, when a witness is asked to say how much a building was

10. EVIDENCE:
reception of:
evidence: opin-
ion evidence:
value of build-
ing: restora-
tion by
repairs.

worth just before it was struck by lightning, and how much it was worth just after being struck, this calls upon the witness to base his answer on the cost of restoration. If the party against whom this evidence is put in is in doubt on whether the opinion of the witness is based upon such cost, the remedy is not by objection to the question, but by proper cross-examination. *Farmers Merc. Co. v. Farmers Ins. Co.*, 161 Iowa 5, and perhaps *Millard v. City of Webster City*, 113 Iowa 220, afford some support to this position.

On the whole, too, it is fairly apparent from the record that in no view can the reception of this testimony have been prejudicial. There is testimony speaking directly to the cost

11. APPEAL AND
ERROR: re-
ception of
evidence:
harmless er-
ror: damage
to building:
cost of res-
toration.

of restoration. The amounts testified to as being necessary to that end do not differ substantially from the difference in value stated by the witnesses objected to. The allowance by the court does not differ substantially from the difference in value given by these witnesses; but, on the other hand, neither

does it differ substantially from the testimony concerning the cost of restoration and replacement. In this aspect, the case is fairly within the rule of *Schaeffer v. Anchor Mut. Ins. Co.*, 133 Iowa 205. It is not out of place to add that there was really no substantial conflict on the segregated question of how much injury was done the building. The controversy is over what caused the damage. That is to say, the appellant does not so much urge that the plaster was not damaged \$850, or that it would have cost less than \$1,000 to restore the building: its central position is that, no matter what the damage was, the award concluded that question, and that, if that were passed, it again does not matter how much damage was done, because the lightning did not cause such damage. We repeat that, in the light of all this, there should not be a reversal because witnesses were permitted to state the difference in value before and after.

We find no prejudicial error, and the judgment must be
—*Affirmed*.

LADD, C. J., EVANS and PRESTON, JJ., concur.

BASTIAN BROTHERS COMPANY, Appellee, v. GEORGE J. LOOMIS,
Appellant.

SALES: Retention of Defective Goods. Retention of palpably defective goods for an unreasonable time, and without complaint, bars rescission.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

FEBRUARY 17, 1919.

REHEARING DENIED MAY 8, 1919.

ACTION for the purchase price of goods ordered by the defendant and delivered by the plaintiff. The defense is that the goods delivered did not comply with the provisions of the contract. At the close of all the evidence, there was a directed verdict for the plaintiff for the amount of the contract price. The defendant appeals.—*Affirmed*.

Hughes, Rankin & Dolan, for appellant.

Hazen I. Sawyer, and *G. L. Norman*, for appellee.

EVANS, J.—The plaintiffs were manufacturers of novelties, resident in Rochester, New York. The defendant was a resident of Keokuk, Iowa. On April 23, 1913, the defendant signed a written order, addressed to the plaintiffs, for the delivery of 2,000 badges of a certain design. These badges were intended for resale by the plaintiff on the occasion of a celebration then in contemplation by the citizens of Keokuk. This celebration was to be in commemoration of the completion of the Keokuk dam across the Mississippi

River. The badges were to be of metal, and were to contain a suitable inscription, agreed on, and the date of the celebration. This order was signed by the defendant upon the solicitation of a traveling salesman. At the time the order was signed, the exact date of the celebration was not known to either party, and the salesman agreed to ascertain the date, which he accordingly did. This date was August 5, 1913. This date had been fixed upon by the committee in charge, on March 5, 1913, and publicity had been given thereto accordingly. Such date being thus furnished to the plaintiff, it was inscribed upon the badges in their manufacture. The complete order was delivered to the defendant on or about June 12, 1913. In the meantime, and on May 18th, the committee in charge of the celebration had changed the date thereof to August 26, 1913, and due publicity was given of such change of date. The defendant, having received the badges on or about June 12th, retained the same without objection or protest of any kind until August 23, 1913, on which date he shipped the same back to the plaintiffs, and at the same time wrote a letter, which, in effect, purported to rescind the contract and reject the goods, because of the mistake in the date. The shipment and letter reached the plaintiff on or about August 25th or 26th. The substance of the contention on behalf of the defendant is that the traveling salesman had represented that he would procure the true date, and that the goods in question were of no value except as the true date should be inscribed thereon. No fraud is charged against the plaintiff or its salesman. They never learned of the change of date until they received the defendant's letter. The defendant testified, also, that he never learned of the change of date until about August 5th. His only excuse for his failure in that regard is that he deemed it the business of the plaintiff to see that the correct date was inscribed. The trial court held, in substance, that, by receiving the goods and keeping the same

without objection or protest until August 23d, the defendant must be deemed to have waived all objection thereto. We think there is no gainsaying this holding. The defect complained of was manifest upon mere observation. The defendant could not have looked at one of the badges without discovering the date thereon. He was charged with the duty of discovering such defect within a reasonable time, and of making reasonably prompt objection thereto for the purpose of rescission. The order of the trial court is—*affirmed*.

LADD, C. J., SALINGER and STEVENS, JJ., concur.

P. V. BEAR, Appellant, v. R. F. SULLIVAN et al., Appellees.

APPEAL AND ERROR: Belated Certification of Evidence.

- 1 dence in equity causes, which involve issues of fact, is not preserved by a certification of the shorthand notes by the judge, long after the expiration of six months from the entry of final decree, even though accompanied by a statement by the judge that he signs the certification "as of a date" prior to the expiration of such six months.

JUDGMENT: Scope of Nunc Pro Tunc Entries.

- 2 The right to make *nunc pro tunc* entries does not embrace the right to make a belated entry state a fact as existing at a prior date when such fact did not, in fact, exist at such prior date.

APPEAL AND ERROR: Review De Novo on Part of Evidence.

- 3 *De novo* hearings may not be had, on appeal in equity causes involving issues of fact, unless *all* the evidence has been properly preserved by due certification, and is before the court. The appellate court will not, in the absence of part of the evidence, pass on the materiality of the mutually joined issues, or on the materiality of the absent evidence bearing thereon.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

FEBRUARY 17, 1919.

REHEARING DENIED MAY 8, 1919.

ACTION in equity, for the purpose of impressing a trust upon certain real estate, to establish a lien, and to foreclose the lien on the trust property for the purpose of discharging the lien thereon. After a full trial on the merits, the trial court held that the plaintiff had failed to show that he was entitled to any relief on the equitable issues, but gave judgment in his favor against Sullivan, for the amount of the note specified in the contract, and held that the property belonged to defendant Swan, free from any lien or claim on the part of plaintiff. Decree was entered accordingly, and the plaintiff appeals. The defendants, appellees, have filed a motion to strike the evidence from the abstract, and to affirm the decree, because the evidence was not properly certified and preserved by the trial court. The motion is well taken, and is sustained, and the decree is—*Affirmed*.

Boyd & McKinley, for appellant.

W. C. Howell, for appellees.

PRESTON, J.—1. The action is in equity, wherein issues of fact were joined, and appellant is claiming a hearing *de novo* and claims, too, that, even though the evidence of three witnesses who testified on the trial was not properly preserved, the case may still be tried *de novo* because there was an agreed statement of facts as to a part of the issues.

1. APPEAL AND
ERROR: belated
certification
of evidence.

The motion to strike, condensed as much as may be, is: That the evidence consisted of an agreed statement of facts, and the oral testimony of three witnesses, whose testimony was taken in shorthand by the reporter; that none of the evidence was certified by the judge who heard the case, within six months after the time the final decree was entered, and that it has never been certified by said judge; that no transcript of the evidence taken in shorthand by the reporter has ever been filed in the case; that no certificate of the judge to the reporter's notes, or to any transcript thereof, has ever been made or filed in the case. The final decree was entered

herein on October 24, 1917. It appears that, up to August 16, 1918, the day the motion to strike was filed in this court, neither the shorthand notes nor a transcript thereof had been certified by the trial judge. On October 22, 1917, a large envelope containing the shorthand notes of the evidence was filed in the office of the clerk. Attached to said notes was the certificate of the reporter, signed by him, and an unsigned judge's certificate. No other certificates were attached to said shorthand notes, and no other certificates of the evidence have been filed in the clerk's office. The judge's unsigned certificate to the shorthand notes ends in this wise:

"Witness my hand at Keokuk, Iowa, this 12th day of Oct. 1917.

"(Not signed)

"Judge, District Court."

After the motion to strike had been filed in this court, and on August 22, 1918, Judge Hamilton, who tried the case below, put his name to the then unsigned certificate attached to the shorthand notes, together with the following written statement, which appears thereon: "Actual date of signing, August 22, 1918, but signed as of date October 12, 1917." This was approximately ten months after the decree was entered. Code Section 3652, as amended in 1906, by the thirty-first general assembly, provides:

"In equitable actions wherein issues of fact are joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony, or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within six months after the entry of a final decree, and the evidence and certificate be made a part of the record, and go on appeal to the Supreme Court, which shall try the case anew. But this section shall be so construed as to include the evidence taken in short-

hand, when the reporter's notes of such evidence have been certified to by the judge and reporter within the time herein provided."

It is not claimed by appellant that the trial court certified any translation or transcript of the shorthand reporter's notes. The complete record has been certified, together with a transcript of the evidence. This transcript is endorsed, "Filed Aug. 24, 1918." There is no certificate of the trial judge thereto. The only certificate of any kind by the trial judge was to the shorthand notes on August 22, 1918, as hereinbefore stated. This could not be done after the expiration of the statutory time, there being no certification of the shorthand notes. *Howerton v. Augustine*, 153 Iowa 17, 19. The alleged certification of the shorthand notes was not a compliance with the statute, so that there was no bill of exceptions within the statutory time. *Howerton v. Augustine*, supra. The abstract, which is denied by appellees, recites that the shorthand notes were certified by the reporter and the court. Appellant cites authorities to the proposition that, where the judge's certificate to the shorthand notes shows that it was signed within the time required by the statute, the certificate cannot be disputed by a subsequent certificate of the judge's or otherwise; but that is not the situation in the instant case. Here, the certificate was not signed at all until August 22, 1918, but is dated back, and recites that it was signed as of a prior date. It is not a question of the court's signing it on October 12, 1917, and then seeking to contradict that by a recital that it was not signed until a later date. There is no basis for a claim that it was actually signed October 12, 1917.

2. JUDGMENT:
scope of *nunc*
pro tunc
entries.

and signed August 22, 1918, *nunc pro tunc*.
Indeed, it is not so claimed by appellant. In
First National Bank v. Redhead, etc., Co.

103 Iowa 421, it was said:

"That courts may order a correction of their records of

a prior date to conform to the facts as they existed at that date, is not disputed, but we do not find it to have ever been held that they may change the records so as to show that a fact existed on a prior date that did not then in truth exist. It is an undisputed fact that this transcript, duly certified, was not on file July 6th, and therefore we conclude that the order for filing it as of that date was unauthorized."

2. It appears that, for the purpose of expediting the trial, an agreed statement of facts was made and filed. This is signed by attorneys for the parties. It is next contended

3. APPEAL AND
ERROR: review
de novo on
part of evi-
dence.

by appellant that, even though the evidence was not properly certified by the trial judge, they are still entitled to a trial *de novo*, because of the agreed statement as to a part of the facts. Cases are cited to the point that, when an agreed statement of facts is signed and filed, it becomes a part of the record. But appellees contend that the agreed statement of facts must be identified by the certificate of the judge. This we do not determine, for the reason that the agreed statement of facts itself provides that, as to one issue, asserted by defendants and denied by plaintiff, it was agreed that "either party may offer evidence upon the trial of this case in support of this issue, which shall be determined by the court." It is shown that there were at least three witnesses who gave testimony in addition to the agreed statement. But appellant says that this is not a material issue, and claims that, conceding that the oral evidence was not properly certified, and claiming that it is not necessary to certify the evidence contained in the agreed statement of facts, we may ignore the issue which was supported by the oral testimony, and still have the case tried *de novo* on such evidence as remains in the stipulated facts.

The statute, Section 3652, provides that all the evidence taken shall be certified, etc. In *Co-Operative Bank v. Mel-drum*, 128 Iowa 694, counsel for appellants claimed that, as

the abstract filed by them made it appear that the case was submitted to the trial court upon an agreed statement of facts, reduced to writing, there was a substantial compliance with Section 3652 of the Code, and there was no occasion for the certificate of the trial judge. We said:

"One trouble with this contention is that the abstract of appellant makes it appear that, in addition to the agreed statement, the depositions of witnesses were taken and used upon the trial. The materiality of the evidence so taken is not material to the question we have to consider. Moreover, the agreed statement of facts submitted to the court amounted to no more than a matter of evidence, and as the same was not certified and proved, as required by law, and especially as the same does not appear to have been filed, we have no means of identifying the evidence, or of determining whether all thereof is properly before us."

It is quite clear to us that a part of the evidence, at least, has not been properly preserved; and, should it be admitted that the part covered by the agreed statement of facts could be considered, yet we may not try the case *de novo* with only a part of the evidence before us. It might be difficult sometimes to determine whether the evidence on one issue was or was not material, and its bearing on other issues and other evidence, when we do not have all the evidence. No questions are presented or argued which could be determined without the evidence. The motion to strike is well taken, at least as to a part of the testimony, and since there is nothing before us to consider on the merits of the appeal, it follows that the decree must be, and it is.—*Affirmed.*

LADD, C. J., EVANS and SALINGER, JJ., concur.

CHARLES J. DEACON, Appellee, v. FIDELITY MUTUAL LIFE INSURANCE COMPANY, Appellant.

INSURANCE: Deducting Loans. A certificate of loan, the amount
1 of which is made lienable on a policy, is deductible from any amount payable under the policy, when such certificate constitutes the means by which the insurer, the insured, and all other like policy holders, under a purported 20-payment life policy, *postdated 10 years, and without actual payment of the first ten premiums*, are placed in exactly the same position that they would have been placed in had the insured annually paid the first ten payments in cash, or had paid in cash and in a lump sum the equivalent of said ten payments, when the postdated policy was issued.

PRINCIPLE APPLIED: An assessment company reorganized as a legal reserve company, and took up a \$2,000 nonreserve assessment policy, which insured, then 57 years of age, had carried for 21 years, and, in consideration of the surrender thereof, issued a \$2,000 legal reserve policy, which purported to be a 20-payment policy, and which was computed on that basis. This last policy was postdated 10 years, and the premium, \$121.74, was the premium for an insured 47 years of age. The policy called for 20 payments, but, in fact, exacted only 10 actual annual payments subsequent to its issuance. The payments for the postdated period were not actually paid, but were represented by a certificate of loan, signed by insured, for \$876, with 6% interest from date to distribution period, 10 years hence, which principal amount was the amount which the company would have had in the form of a legal reserve, had the insured paid said first ten premiums in the usual way. Profits accruing on the policy were to be applied on said certificate, and the unpaid amount thereof was made perpetually lienable on the policy, and deductible from any amount payable thereunder. The policy promised certain "Guaranteed Additions," provided the insured died *within* the 10 years following the issuance of the policy, and these additions were so graduated that, when the amount of the loan was deducted, the beneficiary would receive at least \$2,000. At the end of the premium-paying period, 10 years, the insured, if living, was given the option to withdraw, "*subject to any existing indebtedness*," a cash surrender value of \$1,490, plus apportioned profits. The insured did survive said 10 years. The apportioned profits were then \$315.36. The certificate of loan then amounted to \$1,401.60. The insured contended that the loan was deductible only in those cases where

the insured died prior to termination of the premium-paying period. He demanded \$1,805.36. The company tendered \$403.76. *Held*, the company was correct in its contention.

INSURANCE: Loan Certificates. Agreements evidencing loans
2 upon a policy need not be attached to the policy, under Section 1741, Code, 1897.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

DECEMBER 14, 1918.

REHEARING DENIED MAY 8, 1919.

ACTION to recover withdrawal value of an insurance policy. The defendant insisted on the deduction of the amount of a certificate of loan, and tendered payment of the balance. On hearing, the court entered a decree allowing the plaintiff the withdrawal value of the policy, plus the accumulated profits. The defendant appeals.—*Modified and affirmed.*

Geo. H. Wilson and Tourtellot, Donnelly & Swab, for appellant.

Deacon, Good, Sargent & Spangler, for appellee.

LADD, J.—The Fidelity Mutual Aid Association was organized in 1878, and its name changed by inserting therein the word, "Life," in place of "Aid," in 1884. A certificate of membership was issued to the plaintiff, August 18, 1885, stipulating for the payment of an indemnity of \$2,000 to his beneficiary upon his death. This was to be raised by assessment on members, and no reserve fund was provided for. In 1899, the charter of the association was amended so as to enable the company to write legal reserve life insurance, or what is popularly known as "old line life insurance," and its name was changed to Fidelity Mutual Life Insurance Company. Plaintiff continued under his certificate of membership until 1906, when the company procured the

1. **INSURANCE:**
deducting
loans.

surrender of his certificates of membership and a policy of insurance. He had then paid on the certificate of membership, as dues and assessments, \$851.30, of which \$702.58 had been paid within the ten years previous. The last payment, or \$21.82, appears to have applied on the first premium of the new policy, which was \$121.74 annually. No other benefit appears to have been derived by him from assessments paid in obtaining the new policy, and manifestly no advantage accrued to the company therefrom, as there was no reserve. This policy, after reciting the insured's age as 47 years, stipulated for the payment of \$2,000 to the insured's wife upon his death, on due proofs of loss, subject to requirements, privileges, and provisions printed thereon, and provided that:

"In the event of the death of the insured within 20 years from the second day of April, 1896, and while this policy is in force, the amount payable hereunder will be increased by guaranteed additions, making the total amount payable as follows:

Year		Year	
1st	\$2082.00	11th	\$2956.00
2d	2166.00	12th	3024.00
3d	2248.00	13th	3086.00
4th	2332.00	14th	3158.00
5th	2414.00	15th	3242.00
6th	2516.00	16th	3324.00
7th	2610.00	17th	3408.00
8th	2714.00	18th	3490.00
9th	2796.00	19th	3572.00
10th	2876.00	20th	3656.00

"Executed at Philadelphia, Penn., June 11th, 1906.

"[Seal] Attest: W. S. Campbell, Secretary.

"L. G. Fouse, President.

"O. C. Bosbyshell, Treasurer.

"Examined by Poulterer, Kean.

"This insurance is granted as of date April 2, 1896, in consideration of the application herefor, which is made a part hereof, and of the surrender and cancellation of Policy No. 8132, issued by the Fidelity Mutual Life Insurance Association, now The Fidelity Mutual Life Insurance Company, and of the payment in advance of one hundred twenty-one and 74/100 dollars, and of the payment of a like amount on or before the second day of April, in every year thereafter, until premiums for twenty years have been duly paid, or until the prior death of the insured. The premium-paying period on this policy ends on the second day of April, 1916.

"The accumulation period of this policy ends on the second day of April, 1916, when it shall share in the surplus contributed by policies of its class, according to its contribution to such surplus, as determined by the company, and this policy may then be continued or surrendered by the insured, or assigns (subject to any existing indebtedness), under one of the following

"Options.

"(1) The withdrawal of a guaranteed cash value of fourteen hundred & ninety dollars (\$1,490.00), together with the profits apportioned hereto; or,

"(2) The conversion of the entire cash value (consisting of guaranteed cash value stated above, together with the profits) into a life annuity; or,

"(3) The withdrawal of profits in cash, and the continuation of the policy for its full amount as a paid-up participating life policy."

The application on which this policy was issued, after reciting that the plaintiff applied for insurance on his life, reads as follows:

"For \$2,000 on the 20-pay life G. A. plan, the premium as stated in the policy to be payable annually. I was born on the 21 day of May, 1849, and desire policy to be issued as of age 47. Premiums to be fully paid in ten years from

April 2, '06. Make policy payable to Sylvia M. Deacon, related to me as my wife. I select the ten-year accumulation period, and I hereby agree on behalf of myself, and of any person who shall have or claim any interest in the policy issued under this application, that in the matter of distribution of surplus or profits, or the apportionment of dividends the principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy which may be issued under this application shall be and hereby are ratified and accepted."

This was followed by the statement that, in consideration of this policy, the old certificate was surrendered. At the same time, June 11, 1906, and as a part of the same transaction, plaintiff signed and turned over what is designated a certificate of loan, in words following:

"This certifies that The Fidelity Mutual Life Insurance Company, of Philadelphia, Penn., has loaned on Policy No. 188119 the sum of eight hundred and seventy-six dollars, which, with any additional loan, shall be a lien on said policy until paid; simple interest at the rate of six per cent per annum from Apr. 2, '06, to be added thereto until the end of the distribution period of said policy, at which time the profits accruing to it shall be used toward the payment of said loan, and any excess paid in cash or used as set forth in the policy, at the option of the insured. Should the profits not fully pay the loan, the amount remaining unpaid at that time may be continued as a loan with interest as afore-said, and the dividends accruing on the policy, to be thereafter payable annually. In event of my death or failure to make any payment when due to said company before said loan is fully paid, the amount remaining unpaid shall become due and be deducted from the amount payable under said policy.

"Dated at Cedar Rapids, Iowa, June 11, 1906.

“[Signed] Charles J. Deacon, the insured.”

No copy of this certificate was attached to or endorsed on the policy, nor was this necessary. *Long v. Northwestern Nat. Ins. Co.*, 186 Iowa —. At the end of the

2. INSURANCE:
loan certifi-
cates.

accumulation period, April 2, 1916, the plaintiff elected to avail himself of the first option, under which he became entitled to the payment of \$1,490, together with the proportionate portion of the profits, which were \$315.36, or \$1,805.36. The company deducted the amount of the certificate of loan, \$1,401.60, and tendered the assured the difference, or \$403.76. The sole issue is whether, as contended by plaintiff, the certificate of loan was executed as security against the exaction of the guaranteed addition in event of death in the tenth year, under the policy amounting to \$876, or, as insisted by defendant, a 20-year payment policy was issued, with premiums fixed, as though it had been issued 10 years previous, plus earnings on guaranteed increase from date of policy and the difference in rates on such a policy, and merely a 10-year policy commencing where this was issued, with the stipulated options.

The actuaries computed these differences at \$796, and the expense involved in exchange and issuance of the new policy at \$80, and that the certificate of loan was taken to adjust this difference, and was equivalent to a cash payment of accrued premiums on the policy in the form issued. In other words, the insured was 57 years old in April, 1906. A 20-year payment policy was issued, on which payment of only 10 annual premiums of \$121.74 each was exacted thereafter. As the insured's expectancy was less at 57 years than when 47 years old, the premium stipulated would be less than had the premium been computed on a policy issued at 57 years. Moreover, the options in the policy were computed on the basis of 20 annual payments, rather than 10 payments. The fact, however, that the assured was alive and healthy would

tend to reduce the cash or time payment of accrued premiums on such a policy.

It appears that the company employed White & Layton, in 1906, to procure the surrender of certificates issued by the association and the acceptance of policies of insurance in the form of that issued to plaintiff, and that J. P. Jaquith acted for that firm in procuring the application and certificate of loan. The assured testified to a conversation with this agent, over objection that the agent's authority was not shown, and that it was an attempt to vary the terms of a written contract.

"A. Mr. Jaquith came to my office. He had with him a sample copy of a policy like the one Exhibit 2, and suggested or solicited a change, and surrender of the old policy, and that I make application for the new policy. I went over the policy and accepted his proposition, and signed an application for a policy,—this application, Exhibit 3. The policy that was submitted to me was like the policy that was shown to me, Exhibit 2. Q. Now in that conversation,—or do you recall, Mr. Deacon, what the amount of the premium on the new policy was to be? A. Yes, the premium was to be \$121.74 annually, but I was to be credited with the last payment on the old policy. The policy to be dated, or the premium payments thereafter to be made as to that date, April 2d. Q. And was, or was not, the last payment made by you on the old policy of \$21 and some cents credited by the company upon the first premium of \$121.74,—the premium for the year 1906? A. It was. I signed a promissory note at the same time that the application was taken. I signed this note that is in controversy here for \$876. Q. Now what, if anything, was said by Mr. Jaquith to you at that time as to the consideration for that \$876 note? A. Mr. Jaquith called my attention to the guaranteed additions in this policy, and to the fact that there was \$876 already accrued, and said that the company would require that that should be made good to

them. I don't remember just the exact conversation, but it was to the effect that the \$876 of accrued additions would have to be secured to the company. Referring to the policy, plaintiff's Exhibit 2, the Schedule of Guaranteed Additions, as they appear on the first page of the policy, is the guaranteed additions to which I refer. They are the same,—the sample shown me at that time was the same as these. The amount of the guaranteed additions in the tenth year, as shown by that schedule, was referred to in that conversation with Mr. Jaquith. My recollection is that the note for \$876 was signed by me on the same day that the application was signed; I am not able to state the exact date. It is the same document, I think, that is set forth in the pleading of the defendant, whatever it is,—a note or certificate of some kind."

The witness testified that there was no consideration other than referred to, and that:

"In the conversation with Mr. Jaquith, I don't recall any conversation with reference to the liability on that note after April, 1906. The only conversation that I can recall is with reference to the suggestion that that had already accrued. and would have to be made good to the company. I don't recall anything said about that note and the liability thereon after the liability of the company to me on these guaranteed additions had ceased. Of course, I assumed that that would terminate it, but I don't recall that Mr. Jaquith and I had any conversation with reference to that. * * * At the time I signed the note, I believed that I was signing it in order to protect the company against the amount of that guaranteed addition of \$876. Mr. Jaquith did not tell me that the note was being signed for any other purpose. I can't recollect what was said at that time with reference to the benefit or advantage I received by reason of having been a prior policy holder, further than this was the first time it had ever been suggested to me that the policy dated back."

This testimony is not contradicted, save as it appears to be inconsistent with the terms of the policy and the certificate of loan. The policy discloses that, by its terms, the guaranty for the tenth year was not available unless the insured died within ten years after the issuance of the policy; but if this had happened, then the increase of \$876 would be included in the amount of the increase payable the year of his death. Thus, had he departed this life in the nineteenth year of the policy, or the ninth after its issuance, the amount payable would have been \$3,572, or an increase of \$1,572; but included in this would have been the \$876, its guaranteed increase of the tenth year. This, then, was a legitimate item to be taken into account in computing the cash or time payment exacted in the issuance of this policy. But it does not follow, from the fact that the assured lived through the premium payment period, that no part of the cash or time payment should have been exacted. Others of the 3,500 persons to whom policies like that being considered were issued by this company at about the same date surely departed this life during the period these guaranteed increases became obligations of the company. To meet these, the assured was bound to contribute by the income earned on premiums paid, as well as increased premiums, if essential to meet the guaranteed death loss of those who died within the period of ten years following the issuance of those policies. In other words, the doctrine of averages is at the foundation of all insurance; and, in computing premiums which will enable the life companies to meet the indemnities, guaranties, and options stipulated to be paid, how long the particular individual insured actually lives is not determinative of the amount, but the average period of such a person's life, as ascertained by the life tables, demonstrated to be substantially correct by data and long experience, and the income likely to be earned from the investment of large sums of money, coming to the insurer in comparatively small

items. The mere fact, then, that the insured lived beyond the premium payment period did not indicate that the consideration of the certificate of loan had failed, nor that it could have been given only for security. As Jaquith remarked to the assured, the \$876 guaranteed increase for the 10 years prior to the issuance of the policy had accrued (in event of his death during the next 10 years), and "the company would require that that should be made good to them," or, in effect, that the \$876 of accrued additions would have to be secured to the company. Nothing appears to have been said as to whether other matters were taken into account in fixing the item of the cash or time advance premium. But other matters were involved, and among these were the difference between premiums exacted during the last 10 years of a 20-year policy issued at 47 years of age, and of a 10-year policy issued at the age of 57 years, and the difference required to enable the company to accord the insured the right to withdraw a guaranteed cash value of \$1,490 upon the collection of 20 annual premiums, and only the last 10 of these. It requires no argument to demonstrate that these matters were of the utmost importance in fixing the cash premium or its equivalent, the certificate of loan. Moreover, the language of this certificate is inconsistent with the theory of plaintiff. Profits are to be applied on its payment, and in the event that these are insufficient, the balance is to be continued as a loan, and, upon death of the assured, is to be deducted from the amount payable under the policy. This is utterly inconsistent with the theory that the certificate was merely collateral security for the guaranteed increase in event that the insured died within the 10 years following the issuance of the policy. If the assured construed the policy and the certificate of loan as contended (he read both), he was not warranted in so doing by anything the agent said, and we find difficulty in thinking that he relied on the

certificate's being merely collateral security, as claimed; for he was a lawyer of 40-odd years' experience at the bar. However this may be, we are inclined to accord to the certificate of loan its expressed meaning, and regard its object as that manifest from the circumstances shown and the instruments connected with the transaction. The testimony of the actuary of the company is in conformity with what we have said:

"In arriving at that figure of \$876, calculations were made for all the different ages that would be involved, and the reserve on the 20-payment policy at the end of the tenth year. The company was offering to give to these policy holders a 20-payment life policy, dated back ten years, and consequently with the premium payment period ending ten years later. To give such a policy in the place of an old assessment policy involved definite costs. These two propositions were not worth the same thing. If the company was giving to the old policy holders something much more valuable than the old policy, they would have to collect from him that excess value,—that difference in value. Now, a 20-payment life policy, as I have said before, is one under which premiums to insure the man for the whole of his life are to be paid within a specified period of 20 years. Under such a policy as that, it is necessary for the company to collect through those premiums considerable more than the current cost of protection, and that excess accumulates and forms a reserve which is necessary that the company should have in order that it can maintain that policy after the insured quits paying premiums. When one of these policies would be issued,—for instance when this policy in question, 188119, was issued,—it was reported to our state insurance department, for the purpose of their having to make a valuation of the policy in order to charge the company the proper liability under the policy. The liability with which the state department would charge the company would be the reserve at the end of the tenth policy year. In the case of a policy like

this, which was to be dated back ten years, the company couldn't issue and carry out a 20-payment life policy on the payment of simply the premiums for the last ten years. * * * The calculation was made to determine what would be the reserve on the 20-payment life policy at the end of the tenth year. * * * The reserve at the end of the tenth year would be \$796; but in all of these reserve loan cases, the larger amount was taken in order to cover the expenses of making the change, and the necessary expenses involved in carrying on the policy. The expense of making the exchange consists of general agents employed by the company for their services. * * * It was necessary that the company collect from Mr. Deacon what would enable them to fulfill the terms and conditions of the 20-payment life policy which they were proposing to give him. Now, the previous premiums for the first ten years under this 20-payment life policy had not been paid by Mr. Deacon, but the company couldn't issue and carry out a 20-payment life policy on the payment of ten premiums. That wouldn't have been a sufficient collection to enable the company to fulfill the contract. It was not, however, necessary that we collect from Mr. Deacon ten times the premium of \$121.74,—that is, collect from him \$1,217.40 on account of the dating back of the policy ten years,—for the reason that, during that period of time, Mr. Deacon had a policy with the company, under which policy he had paid the cost of protection, and paid his share of the expenses of operating the business, which, in any case, would have been paid out of the premium of \$121.74 per year. It was only necessary that we collect from Mr. Deacon what would put the company in just the same position as if he had originally taken the policy in 1896, and had paid the premiums during the ten years. That amount—the amount that was necessary to put the company in that position—was the reserve on the 20-payment life policy at the end of ten years: in other words, the amount which the

company would have had from him or any other policy holder at the same age who had taken a policy ten years before, and upon that basis. Q. A 20-payment life policy with guaranteed additions? A. Yes, this policy as it stands. This policy with guaranteed additions has a premium, a regular premium rate for the 20-payment life policy, plus the extra premium which is included in that \$121.74, to cover the extra term insurance included in the policy. In other words, the company didn't give Mr. Deacon or any similar policy holder this extra term insurance for nothing, but charged him the proper premium rate for it. Now, if the company had collected from Mr. Deacon only the premiums for the last ten years, \$121.74 per year, it couldn't have fulfilled the contract it made with him; but, by the collection of the reserve included in the reserve loan certificate, and collecting thereafter ten annual premiums, it was in a proper position to fulfill the contract in all particulars."

The witness then stated that the certificates of loan were deposited with the insurance department of Pennsylvania, as security for a reserve exacted as security of policy holders,—in this case, the amount of \$796; that the actual proportionate cost of insurance during the 10 years after the issuance of the policy was \$669.82; and that to pay the surrender value of the policy of \$1,490 from the premiums paid during that time would involve a loss of several hundred dollars; that, in 1906, at the age of 47, the premium on a 20-year payment policy was \$95.88 for \$2,000, and nearly \$200 on a 10-year payment policy; that, in his computation of the cash premium to be exacted from plaintiff, he added together the reserve for the 10-year period past, amounting to \$322.53 per \$1,000, and the reserve for the guaranteed increase, or \$75.06, making \$398 for \$1,000, or \$796 for the \$2,000; that the \$121.74 annual premium was made up of \$94.34 premium on the 20-year policy and \$23.40 as premium for the extra insurance or guaranteed additions or increase

on the policy during the period premiums were paid. We have set out the testimony somewhat fully; for it, as we think, leads to no conclusion other than we reach.

The certificate of loan and the annual premium were fixed in pursuance of the computation of the actuary, and, though the amount is the same as the amount of the additions for the first 10 years, this appears to have been a mere coincidence.

We are of opinion that the court should have deducted the amount of the certificate from the accrued profits, plus the withdrawal value under the option, and rendered judgment for the difference, or \$403.76. The judgment will be modified accordingly.—*Modified and affirmed.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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TO

ANIMALS

ABATEMENT AND REVIVAL.

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every presumption will be indulged in favor of the award,
on trial of a question on the law side, where the issue is
properly before the court, its findings have the effect of
a verdict of the jury, and every reasonable presumption
is indulged for the action of the trial court thereon; and
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43 may not contend for harmless error by reason of the great array of his testimony, when the error in question consists of a *vital omission* in the instruction of a proper guide to the jury in considering such testimony. So held where the court failed to define the statutory and technical term "properly insulated," as applied to electric transmission lines. *Wells v. Chamberlain*, 185—264.

Presence of Facts Justifies Exclusion of Opinion. Receiving an
44 opinion from one party on a certain matter and rejecting the opinion of the other party on the same matter is harmless error, when the illuminating facts bearing on the matter in controversy are fully before the jury. So held as to whether a party had his team under control. *Miller v. City of Eldon*, 185—307.

Reception of Evidence—Damage to Building. Even if the true
45 rule of damages was the cost of restoration, it was harmless error to permit witnesses to testify as to the value of the building before and after it was struck by lightning, where the difference in value before and after being struck was not substantially different from the cost of restoration, as testified to by other witnesses. *Turner v. Hartford F. Ins. Co.*, 185—1363.

Exclusion of Evidence as to Mental Pain. The jury having
46 found, in an action for slander, that there was no substantial injury to plaintiff's reputation, exclusion of evidence as to mental suffering was harmless. *Greenlee v. Coffman*, 185—1092.

APPEAL AND ERROR CONTINUED TO APPEARANCE

Consolidation of Actions. The consolidation of a cause of action brought by an administrator to recover money, in which action an equitable defense was set up, and where the administrator had no cause of action, with an action by heirs, asking that a deed given by decedent be set aside, held not prejudicial error. *Baadte v. Walgenbach*, 185—773.

Right to Directed Verdict. Where one was, under the issues, entitled to a directed verdict in his favor, and secured a verdict from the jury, error in instructions held nonprejudicial. *Mulroney Mfg. Co. v. Weeks*, 185—714.

Right to Peremptory Instruction. Where the trial court could have peremptorily instructed the jury that the plaintiff was entitled to recover, errors in the instructions in not defining the issues were without prejudice to the defendant. *Monaghan v. Bowers*, 185—708.

REVIEW—SUBSEQUENT APPEALS.

Law of the Case—Subsequent Trial. The rule that whatever was decided on the prior appeal is the law of the case on the subsequent trial, in no way affects matters first put in issue subsequent to the remand. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

REVERSAL.

Proceedings after Reversal. A reversal for directing a verdict decides only that appellant has at least a case for the jury, and does not decide that either party has or has not a case, as a matter of law. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

APPEARANCE.

Procedure under Special Appearance. A special appearance for the purpose of attacking the jurisdiction of the court may be made through the medium of a motion, duly supported by affidavits, to quash the service. *State v. Bitter Root Val. Ir. Co.*, 185—60.

APPEARANCE CONTINUED TO ARBITRATION AND AWARD

Who May Make Special Appearance. A foreign corporation
2 which has not taken out a permit to do business in this
state may make special appearance in order to plead to the
jurisdiction of the court. (See Sec. 1638, Code, 1897.)
State v. Bitter Root Val. Ir. Co., 185—60.

What Constitutes General Appearance. One who enters a spe-
3 cial appearance, in order to attack the jurisdiction of the
court, will not necessarily be held to have abandoned his
special appearance and to have made a general appearance,
by the fact that he makes an allegation which apparently
goes to the *merits of the action*. State v. Bitter Root Val.
Ir. Co., 185—60.

ARBITRATION AND AWARD.

Submission—Notice of Meetings—Introduction of Evidence. Un-
1 der an agreement to submit to arbitrators the question as
to the damage done under an insurance policy, under the pro-
vision that they should appraise and ascertain the actual
cash value of loss by lightning, there was nothing involved
but their personal investigation, and the parties were not
entitled to notice of meeting, or to an opportunity to present
evidence, nor were the arbitrators bound to hear evidence.
Turner v. Hartford F. Ins. Co., 185—1363.

Setting Aside—Jurisdiction of Court—Gross Mistake. The award
2 of arbitrators should not be set aside because the arbitrators
ignored evidence or erred in honest judgment, or because
the award found lacked sufficient evidence to support it;
but gross mistake, strongly proved, will avoid an award of
arbitrators, and this avoidance does not depend upon show-
ing mistakes to the arbitrators on a rehearing before them,
but can be found by the court. Turner v. Hartford F. Ins.
Co., 185—1363.

Setting Aside—Jurisdiction of Court—Gross Inadequacy—Partisan
3 **Arbitrators.** A clearly proven gross inadequacy ordinarily
gives power to the court to disregard the award of arbi-
trators, there being a presumption that the arbitrators were
partisan; and it can be set aside for partiality. Turner v.
Hartford F. Ins. Co., 185—1363.

ASSAULT AND BATTERY

TO

ATTORNEY AND CLIENT

ASSAULT AND BATTERY.

Injury from Fright. A simple assault is actionable (a) when
1 willfully committed, (b) when accompanied by violent conduct evincing an intention to carry the assault to the point of a battery, and (c) when some physical injury results, *even from fright only*, to the one assaulted. *Holdorf v. Holdorf*, 185—338.

Great Bodily Injury. Assault with intent to inflict great bodily
2 injury cannot be charged, unless the pleader in some manner specifically charges that the assault was made with the intent to inflict such an injury. *State v. Steinke*, 185—481.

Permissible Force. "No more force than a reasonably prudent
3 man under the circumstances would think necessary," and "only such force as reasonably appears to defendant to be necessary," are practically identical in meaning. *Beck v. Scott*, 185—401.

Offensive Language as Justification. Offensive language will not
4 justify an assault. *Beck v. Scott*, 185—401.

ASSIGNMENTS.

Land Purchase Contracts. A contract for the purchase of land on monthly payments is assignable. *Bull v. Weisbrod*, 185—318.

ATTORNEY AND CLIENT. See **APPEAL AND ERROR**, 13.

Employment of Attorney—Ratification by Making Expenditures
1 in Suit. After the board of directors knew that an attorney was rendering services in a suit purported to be brought for the company, said board authorized a director to investigate and pay for services of a stenographer furnished in said suit, and payment was made by the directors to said stenographer. *Held* to make a question for the jury, in suit by attorney to recover against company for services, as to whether his employment had been ratified. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

ATTORNEY AND CLIENT CONTINUED TO

BANKRUPTCY

Employment of Attorney—Notice to Discontinue Appeal as Ad-
 2 **mission of Authority to Act.** The serving of notice on an attorney to discontinue an appeal perfected by him in action purporting to be brought for the company *held* to make a question for the jury, in suit by attorney to recover against the company for services, as to whether it was an admission that he had authority to act. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

Employment of Attorney—Records—Evidence. Employment of
 3 attorney can be shown to have been authorized by the board of directors, by evidence other than a recorded resolution of said board. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

BANKRUPTCY.

Liens Not Affected by Discharge. Bona-fide mortgage liens which
 1 antedate the filing of a petition in bankruptcy by four months are not affected by a discharge in bankruptcy. *Bisby v. Walker*, 185—743.

Liens and Priorities—Unrecorded Conditional Sales. An assignee
 2 or trustee is not a *purchaser*, within Sec. 2906, Code, 1897, providing that, to be valid against execution and attaching creditors and *purchasers* without notice, conditional sales contracts must be recorded; and the claim of a vendor under an unrecorded conditional sales contract is superior to that of the assignee, or the trustee in bankruptcy, both under the state law and the Federal Bankruptcy Act. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

Liens and Priorities—Conditional Sales—Notice of Trustee from
 3 **Schedules.** Where the bankrupt, in his schedules filed, listed property as being secured by conditional sale contract, a trustee thereafter appointed could not be heard to profess ignorance or assert a claim superior to the contract because of the absence of actual or constructive notice of the contract. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

Ownership of Property—Securing Goods by False Pretenses—Re-
 4 **scission of Sale.** The seller of goods to an insolvent buyer who obtained possession of the same by giving a false

BANKRUPTCY CONTINUED

TO

BILLS AND NOTES

check has the right, upon nonpayment of the check, to rescind the sale and recover the goods, and can enforce such right against the buyer's trustee in bankruptcy; and a demand upon buyer's assignee for benefit of creditors, who was a former employee of the buyer's, *held* a sufficient election to rescind; and such a recovery does not work a preference under the Bankruptcy Act. *Mulroney Mfg. Co. v. Weeks*, 185—714.

BANKS AND BANKING. See PARTIES, 3.**Deposits—Right of Bank to Offset Indebtedness—General Deposit.**

A bank holding a matured indebtedness due it from a depositor has the right to offset its indebtedness against the balance due the depositor; and where the bank did not know that a deposit was made for the purpose of paying a check, to be drawn later, to pay for automobiles, the deposit was general, and not special, and the bank had a right to offset its matured indebtedness against such deposit. *Porter Auto Co. v. First Nat. Bank*, 185—844.

BASTARDS.

Paternity—Declarations of Putative Father. The reception, without objection, in a will contest, of declarations of a testator at the time of executing his will, to the effect that he had doubts whether he was the father of one who was ignored in the will, presents no issue on the paternity of such person, when such paternity was, at the trial in question, fully conceded. In *re Estate of Osborn*, 185—1307.

BILLS AND NOTES. See ABATEMENT AND REVIVAL, 2; BANKRUPTCY, 4; CORPORATIONS, 4; CRIMINAL LAW, 1; FALSE PRETENSES, 2; GUARANTY; INTOXICATING LIQUORS, 3; LIMITATION OF ACTIONS, 5, 6; PRINCIPAL AND SURETY, 2.

Signing in Representative Capacity. Promissory note signers
1 who are acting solely in a representative capacity, and desire to escape all personal liability, must, *as to one whose*

BILLS AND NOTES CONTINUED

TO

BROKERS

knowledge is limited to what the face of the note reveals, see to it that the principal is disclosed by the face of the note. Held that a signature, "Trustees of the Second Christian Church, I. S. Ervin, R. C. Moulton, Chairman, M. L. Everett," personally bound the individual signers. Schul- ing v. Ervin, 185—1.

Indefinite Extension of Time of Payment. An agreement for
2 an extension of time of payment of a matured promissory note until the happening of a specified contingency may not, when the contingency is discovered to be wholly uncertain, be construed into an agreement for an extension "for a reasonable time." Goodman Mfg. Co. v. Mammoth V. C. Co., 185—253.

BOUNDARIES.

Navigable Waters—High-Water Mark. The boundary line of
1 property bordering on a navigable river is the high-water mark of the river. Billick v. Davidson, 185—801.

Acquiescence — Non-Applicability to Public. The doctrine of
2 acquiescence may not be invoked against the public. Her- rick v. Moore, 185—828.

BROKERS.

Compensation and Lien—Finding Purchaser on Stated Terms. A
1 broker employed to find a purchaser on stated terms must, in order to earn his commission, where no sale is made, (a) take from his proposed purchaser a binding obligation to buy on such stated terms, or (b) bring the proposed purchaser and owner together, or into such relation with each other that the *owner* can exact such binding obligation. Sanden & Huso v. Ausenhus, 185—389.

Compensation and Lien—Sale on Terms Different from Those Ex-
2 **acted of Broker.** A broker whose sole authority is to find a purchaser on definitely stated terms may not recover a commission for finding a purchaser to whom the property is in good faith sold, on terms materially different from those specified in the broker's contract. Sanden & Huso v. Ausenhus, 185—389.

BROKERS CONTINUED

TO

CARRIERS

Compensation and Lien—Burden of Proof as to Fraudulent Sale.

- 3 A broker has the burden to show that the seller, in order to avoid the payment of a commission, fraudulently sold the property to the purchaser whom the broker produced, on terms materially different from those exacted of the broker. *Sanden & Huso v. Ausenhus*, 185—389.

Duties of Brokers—Bad Faith of Agent. An agent who was

- 4 employed by the owner of a moving picture machine, and who, by his false statements, induced the purchaser found by the owner to abandon the deal which would otherwise have been made, is liable for any damages resulting therefrom to the owner. *Zeck v. Bowers*, 185—1267.

Duties of Brokers—Prevention of Sale—Slander of Title—Malice.

- 5 Where an agent employed to find a buyer for a moving picture machine is sued by the owner on the alleged grounds that the agent prevented a sale to a purchaser, by false statements that the owner was not able to give the purchaser a good title, it is immaterial whether the agent was actuated by malice, or whether the alleged false representations would be technically sufficient to sustain an action for slander of title. *Zeck v. Bowers*, 185—1267.

CARRIERS. See **CONTRACTS**, 13.**CARRIAGE OF GOODS.****Facilities Furnished—Discriminations—Allowing Use of Spur**

- 1 **Track by Shipper.** Where a railway company has constructed a spur track for the convenience of shippers, it cannot grant to a particular shipper, as against other shippers, the exclusive right to use such track, as the same would be in violation of Section 2125, Code Supp., 1913, forbidding discriminations; and such a contract, when made, is void. *Northern Grav. Co. v. Muscatine, N. & S. R. Co.*, 185—1259.

Furnishing of Equipment—Special Contracts—Cooperage of Cars.

- 2 Where there were no provisions for cooperating of cars in the tariff schedule filed by a carrier relating to intrastate shipments, and said schedule did provide that "suitable

CARRIERS CONTINUED

boards will be furnished at all loading stations for use in cooping cars," a shipper could not recover for labor performed and nails furnished which were reasonably necessary to put cars in condition to transport sand and gravel; for, while it is the duty of the carrier to furnish suitable cars, under Section 2116, Code Supp., 1913, the statute does not make the carrier liable for such matters, and it is the duty of the shipper, in such a case, to refuse to accept the cars; and any allowance to the shipper, outside of that for lumber, would be an unjust discrimination, prohibited by Section 2128, Code, 1897. *Hawarden Sand & Grav. Co. v. Chicago & N. W. R. Co.*, 185—1168.

CARRIAGE OF LIVE STOCK.

Delay by Initial Carrier. In an action by shipper for damage to
3 shipment of horses, due to delay, against the initial and connecting carriers, where the negligence of the initial carrier contributed to the delay, although the greater part of delay was on the line of the connecting carrier, it could not be held, as a matter of law, that there was no liability on the part of the initial carrier. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Twenty-Eight Hour Law—Evidence. Where an initial carrier
4 had in its possession a shipment of horses less than 28 hours, it was error to submit to the jury, as against it, the issue of negligence in not unloading the shipment as required under the 28-hour law. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Shipping Contract—With Reasonable Dispatch—Evidence. Where
5 the shipping contract provided that the carrier was not required to transport shipment of horses on any particular train, or for any particular market, or otherwise than with *reasonable dispatch*, the statement of the carrier's agent as to the time when the shipment would reach its destination, not offered or admitted as tending to show any *other contract*, was competent and material, as bearing upon the question whether the shipment had been carried *with reasonable dispatch*, and was not inadmissible as tending to show a promise of special facilities, or as varying the

CARRIERS CONTINUED

terms of a written contract. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Twenty-Eight Hour Law—Duty Not Dependent on Demand of
6 **Caretaker.** The duty of the carrier to unload a shipment of live stock under the 28-hour law is not in any way affected by the fact that the caretaker with the horses fails to demand that they be unloaded. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Knowledge of Time in Carriage over Other Line—Carrying with
7 **Due Dispatch.** Where the connecting carrier, to whom a shipment of horses was transferred by an initial carrier, knew, at the time of their delivery to it, that the shipment had been in the course of carriage for 24 hours, it should have realized that reasonable care for the carriage over the remainder of the route required that the car be picked up and forwarded with all due dispatch. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Delay in Shipment—Sufficiency of Evidence. Evidence reviewed,
8 and held sufficient to sustain finding that delay of connecting carrier was the proximate cause of injury to horses, in an action for damages due to delay in shipment of horses. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

Evidence of Damage—Inconsistent Claims as to Damages. In an
9 action against a railroad for damages to horses from watering them prematurely, held that the evidence of the shipper as to the extent of damages was of such an exaggerated, inconsistent, and unsatisfying nature that the jury was justified in disregarding it. *Cogley v. Chicago, B. & Q. R. Co.*, 185—1080.

Evidence of Damage—Withdrawal—Guess and Conjecture. An
10 item of damage to a shipment of horses was properly withdrawn by the court, when the only evidence in support of it was a mere guess. *Cogley v. Chicago, B. & Q. R. Co.*, 185—1080.

Evidence of Damage—Verdict for One Dollar Equivalent to a
11 **Finding of No Damage.** In an action by a shipper against a railroad for damage to a shipment of horses by watering

CARRIERS CONTINUED

TO

CONSTITUTIONAL LAW

them prematurely after unloading, *held* that a verdict for one dollar was the equivalent of a finding by the jury that no substantial damage had been proved, and that it was substantiated by the evidence. *Cogley v. Chicago, B. & Q. R. Co.*, 185—1080.

CERTIORARI.

Right of Appeal—Effect. The right of appeal from a wholly unauthorized proceeding does not exclude certiorari. So held where certiorari was held to lie to review a finding by a board of arbitration under the Workmen's Compensation Act, in a case where both employer and employee were engaged in interstate commerce at the time of injury. *Des Moines U. R. Co., v. Funk*, 185—330.

CONSPIRACY.

Civil Liability—Evidence. On a charge that, at the funeral of plaintiff's husband, the defendants conspired to accuse plaintiff of having caused the death of deceased by criminal means, evidence is admissible to show that such accusation was made; that said accusation was made by all, or by certain of the defendants; that defendants requested that public officials be consulted, prior to going on with the funeral; and that such officials were consulted, etc. *Yocum v. Husted*, 185—119.

CONSTITUTIONAL LAW.**LEGISLATIVE PROCEEDINGS.**

Title of Act—Sufficiency. The title to the act which enacted
1 Section 2421-b, Code Suppl. Supp., 1915, relating to the record to be kept by common carriers *in re* shipment of intoxicating liquors, is held to amply meet all constitutional requirements. *Stajcar v. Dickinson*, 185—49.

LEGISLATIVE DEPARTMENT.

Mandatory Purposes—Legislature Must Obey. The provisions
2 of the Iowa Constitution are mandatory and binding upon

CONSTITUTIONAL LAW CONTINUED TO

CONTRACTS

the state legislature, which is but one of the agencies of the government. *Taft Co. v. Alber*, 185—1069.

PERSONAL, CIVIL, AND POLITICAL RIGHTS.

Taxation—Cigarette Law. The provisions of Section 5007, Code, 3 1897, providing for the assessment of a tax of \$300 against persons selling cigarettes, and places where cigarettes are sold, are not for the purpose of securing revenue, but to aid in the enforcement of the inhibitions of Section 5006, Code, 1897, against such illegal traffic, and therefore do not violate Article 7, Section 7, of the Constitution of Iowa. *Taft Co. v. Alber*, 185—1069.

EQUAL PROTECTION OF LAW.

Classifications—Anti-Tipping Law. Section 5028-u, Code Supplemental Supplement, 1915, is void as applied to an employee of a barber shop, being in violation of Article 1, Section 6, of the Constitution of Iowa, prohibiting the granting of special privileges and immunities; as, under the said law, the employee is prohibited from accepting or soliciting a tip, but his employer, engaged in the same services, is not prohibited from doing so, there being nothing in the situation of such an employer to justify discrimination in his favor, when engaged in the same pursuit as the employee. *Dunahoo v. Huber*, 185—753.

CONTRACTS. See **ASSIGNMENTS**; **BANKRUPTCY**, 2, 3; **CUSTOMS AND USAGES**; **DEEDS**, 15; **DRAINS**, 1, 2; **EQUITY**; **ESTOPPEL**, 5; **EVIDENCE**, 2, 3, 6; **FRAUDS**, **STATUTE OF**, 2; **GUARDIAN AND WARD**, 3—7; **MASTER AND SERVANT**, 8; **MUNICIPAL CORPORATIONS**, 4; **PRINCIPAL AND AGENT**, 2, 3, 8; **SALES**, 3, 12; **TAXATION**, 3, 4; **VENDOR AND PURCHASER**; **WILLS**, 4.

MUTUALITY.

Mutuality Not Destroyed by Privileges to One Party. Contracts 1 are not deprived of mutuality simply because one party

CONTRACTS CONTINUED

thereto is granted privileges not given to the other, as their obligations need not be mutual. *Neola Elev. Co. v. Kruckman*, 185—1254.

CONSIDERATION.

Extension of Time of Payment. Consideration for agreement
2 to forbear, for a stated time, suit on a note, is shown when it appears that the maker obligated himself to incur, and did incur, added expense in carrying out the terms of the agreement. *Goodman Mfg. Co. v. Mammoth V. C. Co.*, 185—253.

Forbearing Suit on Note. The relinquishment, by the maker
3 of a note, of a good-faith asserted claim of invalidity in the note, in return for an agreement by the payee to forbear suit on the note for a stated time, is supported by a sufficient consideration. So held where the invalidity was on the point that the president of a corporation executed the note without authority. *Goodman Mfg. Co. v. Mammoth V. C. Co.*, 185—253.

Contracts with Promoter—Acceptance of Check. Where a com-
4 pany purchased from a promoter a packing plant, and, under the agreement, delivered a check for a cash payment, to be paid under the contract to the promoter, which was the same as was to be received by the selling company, and the said check was thereafter delivered to the seller under its agreement of sale to the promoter, the acceptance of the check by the seller was based upon consideration. *Arney v. Brittain & Co.*, 185—1114.

LEGALITY OF OBJECT AND CONSIDERATION.

Consideration—Mutuality. An agreement in writing, by the
5 terms of which one party buys and the other sells a definite quantity of corn, to be delivered at a certain place before a specific date, signed by the parties to be bound, is supported by a good consideration, and is not void for want of mutuality. *Neola Elev. Co. v. Kruckman*, 185—1254.

CONTRACTS CONTINUED

Restraint of Trade—Assignability. An agreement, in part consideration for the sale of a business, that the vendor will
6 not, for a stated time, enter into business in the same locality, in competition with the vendee, is *incident* to the property and business sold, and is *assignable* by the vendee, along with a re-sale of the business, and is enforceable by such latter assignee. *Sickles v. Lauman*, 185—37.

Restraint of Trade, Etc. An agreement by a physician not to
7 practice his profession for ten years in a named county is not legally objectionable, either as to the element of *time* or *territory*, or because of the fact that no *tangible* property is in any wise covered by the contract. *Rowe v. Toon*, 185—848.

CONSTRUCTION AND OPERATION.

Indefinite Extensions of Time of Payment. A contract, though
8 on adequate consideration, for an extension, to an *indefinite and uncertain date*, of the time of payment of a matured obligation is non-enforceable. *Goodman Mfg. Co. v. Mammoth V. C. Co.*, 185—253.

Agreed Interpreter of Contract. Parties may validly agree that
9 a named party shall interpret the intent and meaning of a contract, and in such case, the interpreter's bona-fide decision, confirmed by the parties, is beyond recall. *Nishnabotna Drain. Dist. v. Iowa Cons. Co.*, 185—368.

Equitable Reduction of Contract Right. The right of a lessee of
10 land to receive from the lessor's estate the value of permanent improvements placed on the land by lessee, *provided lessee is not made a devisee of the land by lessor*, may not be reduced because lessee is made such devisee of *other* lands of lessor, but will be *equitably* reduced in case lessee becomes a devisee of *part* of the leased land,—a *ratable* reduction which will not necessarily be in the proportion that the acreage devised bears to the acreage leased. *Parnham v. Weeks*, 185—455.

Combined Contract of Sale and Lease. A contract in the dual
11 form of a contract (1) of sale of lands, and (2) of a lease of the premises at a stipulated rental per month, will be

CONTRACTS CONTINUED

construed as applying the rent payments to the purchase price, when such is the purpose of the contract when construed as a whole. *Hildenbrand v. Curtis*, 185—430.

Sale by Councilman to City—Recovery for Value of Goods. Where

12 the councilman of a city voted to purchase merchandise from a company in which he was a stockholder, director, and manager, the contract was contrary to public policy, under Section 668, Subdiv. 14, Code Supp., 1913; but *held*, there being no fraud or concealment in the sale, that the company could recover the actual value of the merchandise from the city. *Town of Hartley v. Floete Lbr. Co.*, 185—861.

Violation of Statute. Contracts which contemplate and require

13 a violation of statute law are absolutely void. So held as to a bill of lading covering a prohibited shipment of intoxicating liquors for the private consumption of the consignee. *Stajcar v. Dickinson*, 185—49.

MODIFICATION AND MERGER.

Oral Followed by Written Contract. An oral contract of sale

14 of a certain subject-matter is wholly merged by a subsequent written contract of sale of the same subject-matter, and such merger excludes all oral evidence of such former contract. *Farmers Elev. Co. v. Reddix*, 185—425.

PERFORMANCE OR BREACH.

Forfeitable Land Contracts. Forfeitures of land contracts for

15 breach of contract conditions must be worked out through the 30-day notice provided by Sec. 4299, Code Supp., 1913. *Bull v. Weisbrod*, 185—318.

Forfeiture—Inconsistent Conduct. A party to a contract may

16 not demand and receive the amounts due under a contract, and later, without any change of condition intervening, claim that the contract has been forfeited. *Bull v. Weisbrod*, 185—318.

CONTRACTS CONTINUED

TO

CORPORATIONS

ACTION FOR BREACH.

Services Not Payable in Money—Wrongful Discharge. One who
17 contracts to render personal service to another during the
life of such other, and to receive for such services a home
for life, may, on breach of the contract, recover, in money,
the reasonable value of the services rendered. *Scott v.*
Wilson, 185—464.

CORPORATIONS. See APPEARANCE, 2.**CAPITAL STOCK, ETC.**

Stock Issued for Other than Money. Stock issued for property
1 other than money, and without permission of the executive
council, is not absolutely null and void, but voidable only.
(See Sec. 1641-b, Code Supp., 1913.) *Sherman v. Smith*,
185—654.

OFFICERS AND AGENTS.

Authority of Bookkeepers, Etc. There is no presumption that
2 bookkeepers, assistant treasurers, or cashiers have author-
ity, through any act of their own, and merely because they
know that the rights of the corporation have been invaded,
to release the wrongdoer from liability created by such in-
vasion. *Garland Corp. v. Waterloo L. & T. Co.*, 185—190.

Officers De Facto—Dealings with Third Persons. Where a third
3 person in good faith deals with a corporation through pur-
ported officers, who are acting as such openly and without
challenge, such officers will be deemed *de facto* officers, and
the corporation will be bound by their acts within the
scope of the functions of the office. *Arney v. Brittain &*
Co., 185—1114.

Execution of Promissory Notes. Principle recognized that the
4 position of *president* of a corporation does not, of itself,
carry authority to execute the promissory notes of the
corporation, even though the president does hold practically
all the corporate stock. *Goodman Mfg. Co. v. Mammoth V.*
C. Co., 185—253.

CORPORATIONS CONTINUED

Employment of Attorney—Ratification of Whole of Stipulation

5 **by Ratifying Part.** Where a number of the stockholders of the corporation entered into a stipulation under which a certain person was to be elected a director of the company, and a suit then pending was to be prosecuted to a termination, and the employment of an attorney therein was to continue, the action of the stockholders of the company, at a meeting held thereafter, in accepting part of the stipulation by electing said director, *held* to have ratified the entire stipulation, and constituted a ratification of the employment of said attorney, and supplied any want of original authority in his employment. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

Employment of Attorney—Knowledge of Directors of Rendition

6 **of Services as a Ratification.** While a corporation cannot be bound by the individual knowledge or action of its board of directors, yet the failure of such board to take any action disavowing the services of an attorney, in a suit purporting to be brought for the company, or attempting to stop such litigation, when the board knew for a long time that he was serving as counsel in said suit, presents a jury question, in suit brought against the company for his services, as to whether his services were accepted and his employment ratified. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

Proceedings of Directors—Special Meetings—Notice. Proceedings

7 of the board of directors at a special meeting, of which notice has been given, are valid if all the members are present; and, when he has once appeared, the departure of one of the members, who was one of the defendants in the suit in which it was proposed to employ counsel, would not affect the validity of the action of the other members in employing such counsel. *Ney v. Eastern Iowa Tel. Co.*, 185—610.

Fiduciary Relation in Purchase of Stock. The managing officer

8 of a corporation who buys a stockholder's stock through the stockholder's duly authorized agent is under no duty to disclose to such agent the financial condition of the corporation as bearing on the value of the stock, *when the knowledge of the agent as to the value of the stock is as*

CORPORATIONS CONTINUED TO COUNTIES

ample as the knowledge of the officer who is proposing to buy. Birks v. McNeill, 185—1123.

CORPORATE PROPERTY.

Equitable Ownership of Property. Property purchased by an officer of a corporation in his own name, with funds paid him by the corporation as compensation for official services, does not equitably belong to the corporation, simply because no formal contract existed as to what compensation should be paid for such services. Schuster Bros. v. Davis Bros., 185—143.

COSTS.

Witness Fees—Taxation—Absence of Subpoena. In the absence of a clear showing in support of the claim, courts will not allow fees for attendance or mileage of witnesses who are neither subpoenaed, sworn, nor examined on the trial. In re Estate of Hulme, 185—1219.

Witness Fees—Taxation—Mileage Outside State. The allowance of mileage fees to witness for more than 70 miles is discretionary with the court, but any allowance must be confined to the necessary and proper travel of witness in the state, as allowance without the state would give to the statute extra-territorial effect. In re Estate of Hulme, 185—1219.

Cost of Transcript. No authority exists for the making of a transcript of the evidence during the trial and taxing the cost thereof as costs in the case and making such costs a lien on the property involved. Hildenbrand v. Curtis, 185—430.

COUNTIES.

Division into Civil Townships. It will be presumed that a county has been divided into civil townships by the board of supervisors, as commanded by law. In re Appeal of Trustees, 185—434.

CRIMINAL LAW

CRIMINAL LAW.

EVIDENCE.

Other Offenses Bearing on Intent, Etc. On the issue whether
 1 worthless notes had been negotiated under the pretense
 that they were valuable, evidence is admissible tending
 to show that accused had had other notes of the same
 makers, and had negotiated them under circumstances sim-
 ilar to the ones charged. *State v. Waterbury*, 185—87.

TRIAL—COURSE AND CONDUCT IN GENERAL.

Right of Accused to Confront Witness. An accused who has been
 2 confronted by a witness on one trial may not, on a retrial,
 when the personal presence of the witness cannot be had,
 successfully contest the introduction of a transcript of the
 witness' testimony. (Sec. 245-a, Code Supp., 1913.) *State*
v. Nagel, 185—1038.

CONDUCT OF COUNSEL.

Asking Objectionable Questions. Prejudicial error does not nec-
 3 essarily result from the mere asking of an objectionable
 question, without intent or purpose to insinuate prejudice
 against the accused. *State v. Moss*, 185—158.

Argument Aside Record. Argument reviewed, as to remarks
 4 alleged to be outside the record, and, in view of the with-
 drawal of the statement, held not to justify a presump-
 tion of prejudice. *State v. Moss*, 185—158.

Non-Prejudicial Opening Statement. It is not reversible error
 5 for the county attorney to assert, in his opening statement
 in the trial of a charge of perjury, that the accused had
 been indicted for a certain other offense which was in-
 volved in the transaction out of which the perjury charge
 grew. *State v. Nagel*, 185—1038.

Improper Argument Cured by Withdrawal. An unwarranted
 6 deduction, drawn by the county attorney in argument from

CRIMINAL LAW CONTINUED

what he claimed the defendant's attorney had said to the jury in argument, to the effect that defendant's counsel knew that his client was guilty, is non-prejudicial when it appears that the unwarranted statement was promptly condemned by the court and promptly withdrawn by the county attorney. *State v. Nagel*, 185—1038.

INSTRUCTIONS.

Curing Error. The full withdrawal of non-inflammatory testimony, followed by ample admonition to the jury to wholly disregard the same, cures any error in its original reception. *State v. Brennan*, 185—73.

Oral Instructions. Evidence may be withdrawn from the jury by an oral instruction,—even when given during the deliberations of the jury. *State v. Brennan*, 185—73.

Circumstantial Evidence. It is not necessarily error for the court to tell the jury that guilt is generally shown by circumstantial evidence. Instruction reviewed, and held not to disparage defendant's direct denial of guilt. *State v. Moss*, 185—158.

APPEAL.

Suspicion Only. No verdict of guilt will be permitted to rest solely on a conjecture of guilt. *State v. Taylor*, 185—82.

First Objection on Appeal. Objection to part of an opening statement cannot be made for the first time on appeal. *State v. Killgren*, 185—791.

Remarks of Counsel—Failure to Prove Claims Made in Opening Statement. Failure of the State to prove the claim made in good faith by the county attorney in his opening statement to the jury, that the State expected to prove that the defendant had in his possession liquor, a few days before the sale for which he was on trial, did not constitute reversible error. *State v. Killgren*, 185—791.

CRIMINAL LAW CONTINUED

TO

DEDICATION

Verdicts Unsustained by Evidence. Verdicts in criminal cases, 13 even though having some support in the evidence, will be reversed if they are clearly against the clear weight of the evidence, the judgment of the trial court to the contrary notwithstanding. *State v. Carson*, 185—568.

CUSTOMS AND USAGES.

Contradiction of Contract. Contracts may not be contradicted by evidence of a custom. *Cavers Elev. Co. v. Droge Elev. Co.*, 185—1075.

DAMAGES. See ABATEMENT AND REVIVAL; INTEREST; INTOXICATING LIQUORS, 1; SALES, 6.

Exemplary Damages—Non-Absolute Right. Recovery of exemplary damages is a matter of grace, not of absolute right. *Stricklen v. Pearson Cons. Co.*, 185—95.

Services Rendered by Unlicensed Practitioner. One injured by actionable negligence may recover of the wrongdoer such reasonable sum as has, in good faith, been paid for necessary medical services, *even though the practitioner was unlicensed*, and therefore practicing in violation of law. *Miller v. City of Eldon*, 185—307.

Speculative Damages—Evidence. Evidence reviewed, in an action wherein recovery was sought for commissions lost by reason of the wrongful discharge of an agent, and held to be fatally lacking in certainty. *Cohn, Baer & Berman v. Bromberg*, 185—298.

DEDICATION.

Conclusive Intent. Intent on the part of an owner of land to dedicate the same for a public highway will not be *conclusively* presumed on a record showing:

1. That, for at least 20 years, the public had continuously and generally used, as a public highway, a well-defined railway grade, which had been abandoned for switching purposes.

2. That, during said time, the public authorities improved said way as a public highway.

DEDICATION CONTINUED

TO

DEEDS

3. That, until about the end of said time, the railway company maintained a crossing where said abandoned grade touched its main line, but then removed said crossing, owing to the fencing of said way by the presumed owner thereof. *Wensel v. Chicago, M. & St. P. R. Co.*, 185—680.

DEEDS. See EVIDENCE, 5; REFORMATION OF INSTRUMENTS.**CONSIDERATION.**

Presumption. It cannot be said that a deed was without full
1 consideration, when, in addition to the presumption of consideration, the deed recites a valuable consideration, and there is no evidence conflicting therewith. In re *Estate of Orwig*, 185—913.

DELIVERY.

Conditional Delivery. No legal and effective delivery of a deed
2 exists until the grantor makes such a delivery that it may be said therefrom that he fully and unreservedly intended to irrevocably dispossess himself of all title. So held as to a transaction where grantor, on two occasions, manually handed a deed of gift to the grantee, his brother, with directions to record the deed if he (grantor) did not survive, in one case, a trip to a distant place, and in another case, a severe sickness, the grantor in each case having subsequently, and without controversy with the grantee, repossessed himself of the deed, and having died in possession of the land and of the deed. *Dolph v. Wortman*, 185—630.

Delivery Presumed from Possession. *Possession* by a grantee,
3 prior to and subsequent to grantor's death, of an unqualified conveyance of property to grantee, creates a presumption of proper and legal *delivery*, with consequent burden of proof on him to allege the contrary. *Potter v. Potter*, 185—559.

ACCEPTANCE.

Passing of Title. An acceptance of a deed by the grantee is
4 as essential to the passing of title as the transfer of the deed. *Hayes P. & P. Co. v. Sears*, 185—589.

DEEDS CONTINUED

VALIDITY.

Undue Influence—Insufficiency of Evidence. Evidence reviewed, 5 and held insufficient to show undue influence in obtaining a deed. *Bradley v. Bradley*, 185—1272.

Undue Influence—Incompetency of Evidence—Statements of
6 **Grantor.** Testimony of a witness that the grantor in a deed stated "that they tortured him so, they wanted him to sign a will and sign over everything to them," was incompetent, and entitled to no weight as evidence of undue influence, in an action to declare a deed void. *Bradley v. Bradley*, 185—1272.

Presumptions—Confidential Relations. The mere fact that the
7 grantor and the grantee were brothers is insufficient to raise any presumption of fraud or undue influence, in an action to set aside a deed. *Bradley v. Bradley*, 185—1272.

Unsound Mind—Sufficiency of Evidence. Evidence reviewed, in
8 an action to set aside a deed, and held sufficient to show that grantor was of sound mind. *Bradley v. Bradley*, 185—1272.

Undue Influence—Presumptions. Evidence that an aged and
9 very infirm grantor executed to her daughter and son-in-law a deed, the consideration for which was an alleged indebtedness for board and lodging for 13 years, acknowledged in a contract executed at the same time as the deed, is, under a review of the record, held sufficient to make a prima-facie case of fraud and undue influence, and to cast upon the grantee the burden of proving the contrary. *Jacobson v. Byrd*, 185—1107.

Interest Sufficient to Set Aside Conveyance. One who conveyed
10 to the grantee real estate, in consideration of a promissory note and of a promise made in a will for the payment of said note, and who was also the legatee of an undivided one-half interest in said real estate, which had been reconveyed by the said grantee, held to have sufficient interest to have said conveyance set aside for fraud and undue Influence, and to have established against said real estate her

DEEDS CONTINUED

claim for the value of the note. *Jacobson v. Byrd*, 185—1107.

Mental Incapacity—Evidence. Evidence reviewed, and held to
11 sustain finding that grantor, at the time of executing deeds to his wife, was of unsound mind, and incapable of comprehending the nature and effect of the conveyances executed. *Taggart v. Burgin*, 185—937.

CONSTRUCTION AND OPERATION.

Definite Description of Land—Explanatory Descriptions—Effect.

12 *Definite* descriptions in a deed of the property conveyed will prevail over added clauses which are simply attempts to *explain* that which the definite description has already made plain. So held where the deed first described the land by its platted *lot number*, and then added, "*commonly known as No. 1210 Pleasant St.*" It being held that the entire lot was conveyed, and not that part only which constituted No. 1210 Pleasant St. In re Estate of Orwig, 185—913.

Estates and Interests Conveyed—Qualification by Habendum

13 **Clause.** The granting clause in a deed, "do hereby sell and convey unto Sarah Gruwell and Ben Gruwell," was sufficient in form to have conferred on the grantees full fee title; but, as it contained no words of inheritance, it was subject to the qualification in the habendum clause, providing that the premises were to be held by either grantee surviving, until death of survivor, when title should vest in grantees' legal heirs. *Gruwell v. Gruwell*, 185—581.

Estates and Interests Conveyed—Joint Tenancy. Under Section

14 2923, Code, 1897, a deed providing, "do hereby sell and convey" to two grantees, the premises to be held by the survivor *undivided* until the death of survivor, when title was to vest in grantees' legal heirs, held not to create a *joint* tenancy in the grantees. *Gruwell v. Gruwell*, 185—581.

Ipso Facto Assignment of Outstanding Contract. A general, un-

15 restricted warranty deed, on full and valuable consideration, *ipso facto* carries to the grantee the *ownership* of, and *obligation to perform*, an outstanding contract of the grant-

DEEDS CONTINUED

or wherein such grantor had agreed to convey a portion of said property to a third person upon the payment by said third party of a stipulated sum, said grantee having notice of such contract when he accepted his deed. In re Estate of Orwig, 185—913.

Delivery Before Alteration of Name of Grantee. The title of
16 the original grantee in a deed, delivered before the alteration of the name of the grantee, is not affected by such alteration. Hayes P. & P. Co. v. Sears, 185—589.

Alteration of Name of Grantee—Passing of Title. Where a son
17 had made a contract under which, for the transfer to him of certain real estate, he was to make a payment in cash, and deliver certain personal property, and it was thereafter agreed between him and his mother that she was to take the title to said land, in consideration of her making the necessary cash payment, and extinguishing a debt due to her from him, and, before the deed was delivered in which he was named as the grantee, an objection was made that it should be in her name as grantee, and thereupon, the name of the grantee therein was changed to her name, and thereafter, the deed was delivered and accepted, *held* that the mother took the title to the land, and that judgment creditors of the son acquired no liens on the land. Hayes P. & P. Co. v. Sears, 185—589.

Non-Conflicting Habendum and Granting Clauses. A habendum
18 clause which provides:

(a) That the conveyance shall be nullified as to a grantee who sells the premises prior to the death of grantor;

(b) That the grantor retains the income, use, control, and possession during his lifetime; and

(c) That a named sum shall be a charge on the land and payable to a named person by grantee after grantor's death,—is not irreconcilable with or repugnant to a general granting clause which makes no pretense of defining the estate granted. Glenn v. Gross, 185—546.

Presumptions Attending Joint Conveyance. The presumption
19 that joint grantees in a deed to land take *equal* interest is overthrown by a showing that such grantees paid *unequal* portions of the purchase price. Lowell v. Lowell, 185—508.

DEEDS CONTINUED

Presumption of Title—Sufficiency of Evidence to Overcome. The
20 presumption ordinarily obtaining, that the beneficial ownership is in the holder of the legal title, *held*, in a suit to declare a deed void, to have been clearly overcome by the evidence. *Bradley v. Bradley*, 185—1272.

Deposit for Delivery after Death—Title Not to Pass during Life.
21 A provision in a deed that title to land is not to pass while the grantor lives, was not equivalent to a declaration that the grantee should have “no interest” during the life of the grantor. *Held* that, under all the provisions of the deed and the circumstances under which it was made and deposited for delivery after the death of the grantor, the deed took effect by relation as of the date of such deposit. *Bradley v. Bradley*, 185—1272.

Deed Effective after Death of Grantor—Acceptance. A deposited
22 instrument was, in all essential features, a deed of conveyance, subject only to the postponement of its completed delivery until the death of the grantor, and the grantee acquired an interest therein which would ripen into a legal title upon the termination of the grantor's life; and, where the deed stated in terms that it was given in consideration of \$2.00 and care and support while grantor lived, and that its delivery to the grantee was in lieu of no charge for any care and support, and where such support was given the grantor, *held* that the acceptance by the grantee, after the death of the grantor, of the benefits of such conveyance was the legal equivalent of an express acceptance of the same at the date of the deed. *Bradley v. Bradley*, 185—1272.

ESTATES AND INTERESTS CREATED.

Rule in Shelley's Case. Rule in Shelley's Case discussed; and
23 *held* that, even if a wife, under the provisions of a deed, would, as a survivor of a joint tenancy, have taken the fee, under the Rule in Shelley's Case, she would have taken the fee, not from her husband, her predeceased cotenant, but from the original grantor. *Gruwell v. Gruwell*, 185—581.

Estates and Interests Conveyed—Determination of Interests.
24 Where a deed recited that premises were sold and conveyed

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to grantees, who were husband and wife, to be held by either husband or wife, whichever survived, and to be held by the survivor *undivided* until death of said survivor, and then title to vest in the legal heirs of the grantee, and the husband died before the wife, *held* that title to said premises passed as follows:

1. That, upon his death, the husband died seized of an undivided one-half interest in the property, subject to the life estate of his wife therein, and she was also entitled to take her distributive share, as his widow, of one third in said one-half interest.

2. That, upon the death of the widow, the heirs of the husband were entitled to a one-third interest, and the heirs of the widow were entitled to a two-thirds interest in the fee title to the entire premises. *Gruwell v. Gruwell*, 185—581.

Deposit to Take Effect after Death—Vesting of a Present Interest. A deed deposited to be held until the death of the grantor shows a purpose to clothe the grantee with a perfected title upon the death of the grantor, and is sufficient to invest grantee with a present interest in the land, and constitutes a valid interest, in law and in equity. *Bradley v. Bradley*, 185—1272.

DESCENT AND DISTRIBUTION. See **DEEDS**, 24; **EXECUTORS AND ADMINISTRATORS**, 8.

DIVORCE.

GROUND.

Cruelty—Evidence—Sufficiency. Evidence reviewed, and held
1 sufficient to sustain the finding of the court in granting the wife a divorce on the ground of cruel and inhuman treatment, and in dismissing husband's cross-petition on the ground of adultery. *Butts v. Butts*, 185—954.

Desertion—Proof. Although parties may not live together in
2 the usual way as husband and wife, there can be desertion such as to be grounds for a divorce under Section 3174, Code, 1897. *Love v. Love*, 185—930.

DIVORCE CONTINUED

Desertion—Sufficiency of Evidence. Evidence reviewed, and held
3 insufficient to sustain finding by court of desertion by husband. *Love v. Love*, 185—930.

ALIMONY.

Modification of Decree—Fraud or Mistake. Alimony is allowed
4 in lieu of dower and prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree. *Carr v. Carr*, 185—1205.

Agreements—Decree Settles All Property Rights. Stipulations
5 and agreements between the parties to a divorce suit will, where proper and just, be carried out in the decree awarding alimony; and ordinarily, a decree of divorce settles all property rights and interests of the parties in each other's property. *Carr v. Carr*, 185—1205.

Modification of Decree—Grounds—Extravagant and Improvident
6 **Habits of Life.** Where a husband seeks to modify a divorce decree based upon a property settlement, and does not allege that he was induced to enter into the stipulation for the property settlement by mistake or inadvertence, nor that the decree did not express the real intentions of the parties at the time it was filed, he being under no further duty of supporting the wife, he cannot, on the ground that she has extravagant and improvident habits, enjoin a trustee of the property from conveying to her the said property, to which she has become entitled under the terms of the agreement. *Carr v. Carr*, 185—1205.

Alimony Made Subject to Invalid Mortgage. The court, in
7 awarding a homestead to a wife as alimony, may make such homestead subject to a mortgage in favor of the creditor of the husband, even though such mortgage was invalid because not signed by the wife, and especially may the wife not question the foreclosure of such mortgage when she has never questioned the decree which awarded her the property. *Williamson v. Williamson*, 185—909.

DRAINS

DRAINS.

Engineer as Interpreter of Contract. A mutual agreement between the parties to a contract for the excavation of a public drainage improvement that the engineer shall interpret the intent and meaning of the contract and accompanying specifications, and issue estimates accordingly, is binding, and payments made under estimates furnished by the engineer, in accordance with his bona-fide and permissible understanding of the contract, especially when confirmed by the public authorities, are final and non-recoverable, even though, under another permissible construction, the payments largely overpaid the contractor. *Nishnabotna Drain. Dist. v. Lana Cons. Co.*, 185—368.

Impeaching Acceptance of Contractor's Work. The acceptance, by the public authorities, and in the manner provided by law, of the work of the contractor as a full performance of the contract, poisoned by no fraud of the contractor's, is a finality. *Nishnabotna Drain. Dist. v. Lana Cons. Co.*, 185—368.

Reversing Order of Establishment. An order establishing a drainage district, the wisdom of which has been vouched for by both the board of supervisors and the district court, will not be disturbed on appeal, in the absence of a very clear showing by appellant that due consideration has not been given to the proved facts and circumstances, even though the drainage proposed may not, in some minor respects, be a complete success. *Shay v. Board of Supervisors*, 185—282.

Assessment of Benefits—Reduction of Assessments. Evidence reviewed, and held that assessments made against landowner for the drainage ditch were inequitable, and should be reduced. *Sorenson v. Wright County*, 185—721.

Assessments—Failure to Object to Improvement. Where a landowner in a drainage district was notified that the purpose of including his drainage district in a new district was for the improvement of outlet, and the plan and estimate of the cost of the outlet were made known in advance, and he made no objection at time of inclusion, he

DRAINS CONTINUED

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cannot, as to the assessments made, object that he received no benefit, or that the proposed cost of the new improvement was greater than the proposed benefit to the entire district. *Read v. Board of Supervisors*, 185—718.

Assessments—Sufficiency of Evidence as to Benefits.

6 Evidence reviewed, and held that a drainage district was benefited by improvement of its outlet through establishment of another district, and that assessment of benefits against lands of owner was moderate, and not disproportionate to the other assessments made. *Read v. Board of Supervisors*, 185—718.

EASEMENTS.**Installation of Steam, Water, and Sewer Pipes—Sufficiency of Evi-**

1 dence to Show License. Evidence reviewed, and held sufficient to sustain finding that the installation of steam, water, and sewer systems of a permanent and expensive nature by the owner of the third story of a building, in connection with pipes of the owner of the lot and of the first two stories of the building, had been made by mutual agreement, and with the knowledge and consent of the owner of the lot and the first two stories. *Green v. Crain*, 185—1086.

Installation of Steam, Water, and Sewer Pipes—Executed Parol

2 License. The installation of steam, water, and sewer systems at a heavy expense by the owner of a third story of a building, under a fully executed parol license from the owner of the lot and the first two stories of the building, constituted an irrevocable license, and the owner of the lot and first two stories could not move from the building any of his pipes, the removal of which would materially interfere with the efficiency of the systems belonging to the owner of the third story. *Green v. Crain*, 185—1086.

ELECTRICITY.

Insulation—Statutory Command—Evidence. On the issue whether electric transmission lines were "*properly insulated*," as required by statute (Sec. 1527-c, Code Supp., 1913), it may be shown that no material had ever been discovered that will, when *wrapped* around high voltage wires, prevent the escape of electricity. *Wells v. Chamberlain*, 185—264.

EQUITY

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ESTOPPEL

EQUITY.

Abrogation of Contracts. Equity may not arbitrarily abrogate contracts. *Parnham v. Weeks*, 185—455.

ESTOPPEL. See **HIGHWAYS**, 1.

Subsequently Acquired Title. A *contingent* remainderman who
1 mortgages the lands in question with warranty of title and seizin, or mortgages the lands without such warranty, but with the asserted intent in the mortgage to convey a fee, is estopped to deny that the subsequently acquired vested remainder inures to the benefit of the mortgagee, even though, after the execution of the mortgage, and prior to the vesting of said remainder, the mortgagor had been discharged in bankruptcy. *Bisby v. Walker*, 185—743.

Estoppel to Deny Presumption. The fact that two joint grantees
2 of land shared equally in the proceeds of their joint labor in the operation of the farm, does not necessarily estop one grantee from insisting that he owns more than one half of the land, because of having paid more than one half of the purchase price. *Lowell v. Lowell*, 185—508.

Equitable Estoppel—Non-Change of Pleading, Etc. One is not
3 estopped to assert the existence of a fact, when his antagonist (a) has not pleaded an estoppel, (b) has in no wise changed his position, and when the pleadings of the one sought to be estopped have always been consistent with the existence of the fact in question. *Dolph v. Wortman*, 185—630.

Denying Validity of Assessment. One who actively encourages
4 the construction of a public improvement for which his property may be assessed, has full knowledge of the proposed cost, makes no suggestion that such costs would exceed the benefits, and informs the public authorities that he "approves of the construction and consents to the usual statutory and legal assessment," estops himself to assert, after the improvement is completed, that the fair cost thereof is in excess of the special benefits which his property, as a whole, will receive. *North View Land Co. v. City of Cedar Rapids*, 185—1032.

ESTOPPEL CONTINUED

TO

EVIDENCE

Sale of Homestead—Inconsistent Conduct of Wife. The conduct
5 of a wife who has not joined in her husband's contract
for the sale of the homestead may work an estoppel which
will be equal to a statutory conveyance by her. *Townsend*
v. Woodworth, 185—99.

Sale of Lien-Incumbered Property. A landlord is not estopped
6 to assert his right to his rent share of the tenant's crop,
nor is a mortgagee of the tenant's share of the crop estopped
to assert his lien, by consenting to or authorizing a sale
which was never consummated. Such consent or author-
ization cannot be held to attach to a subsequent, unau-
thorized, and unknown sale by the tenant, and especially
so when the contract governing such subsequent sale was
quite indefinite as to its subject-matter. *Farmers Elev. Co.*
v. Reddix, 185—425.

EVIDENCE. See APPEAL AND ERROR, 11; EXECUTORS AND
ADMINISTRATORS, 5; LIBEL AND SLANDER.

JUDICIAL NOTICE.

Judicial Proceedings and Evidence Reviewed. The court, on the
1 hearing on a *petition* for new trial, under Sec. 4091, Code,
1897, cannot take judicial notice of evidence introduced in
the trial of the cause at a time *when the defendant in*
said petition was not a party to the action, even though such
evidence was duly preserved and made of record in the
cause by the filing of the shorthand notes, with proper cer-
tificate thereto. *Pyle v. Herring*, 185—646.

BURDEN OF PROOF.

Illegality of Contract in Restraint of Trade. He who claims
2 that an apparently unobjectionable contract in restraint of
trade is violative of public policy, by reason of matters
dehors the contract, must assume the burden to so show.
Rowe v. Toon, 185—848.

Negative Conditions. He who so draws his contract as to as-
3 sume both a general liability and a special but lesser li-

EVIDENCE CONTINUED

bility dependent on a negative condition precedent, has the burden, in order to escape with the lesser liability, to prove that the exempting conditions did not exist. *Ward v. Interstate B. M. Acc. Assn.*, 185—674.

Allegation of Governmental Capacity. A municipality which
4 pleads that its officers, at the time in question, were acting in a governmental capacity, has the burden to so prove. *Jones v. City of Sioux City*, 185—1178.

Confidential Relations—Presumptions. That the grantee in a
5 deed was the daughter of the grantor and the wife of grantor's confidential agent does not show such a relation of special trust and confidence as to charge her with the burden of rebutting a presumption of constructive fraud. *Baadte v. Walgenbach*, 185—773.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Custom—Grain Sold but Not Delivered within Time Agreed. Where
6 a written contract for purchase of grain was made, subject to Omaha weights and inspection, and provided that, "if contract is not filled at maturity, buyer reserves the right to cancel or to extend or to fill here (Omaha) or elsewhere at our option, any loss resulting therefrom to be payable by seller," and where both parties were regular dealers on said market, it was admissible, for the purpose of construing said provision, to show that the general custom obtaining in the Omaha market, and the rules of the Omaha Grain Exchange, provided that, "where grain is bought to arrive Omaha terms," and is not shipped or delivered within time of contract, it shall be considered open for both parties until filled or canceled by written notice. *Held* that, under the said rules and provisions of the contract, the purchaser continued to be bound to receive the undelivered grain at the contract price, until terminated by the stipulated notice. *Cavers Elev. Co. v. Droge Elev. Co.*, 185—1075.

Correction of Testimony on Rebuttal. It is competent for a wit-
7 ness to correct his testimony, even though done in rebuttal. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

EVIDENCE CONTINUED

8 "Supposed to Use Sand on Rails." Evidence of the engineer, operating the train that injured the plaintiff, as to what he was *supposed* to do in using sand on the rails, in trying to stop the train, held to have been properly stricken. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

9 **Issue on Capacity in Which Employee Acted.** On the issue whether an employee of a city was engaged in a ministerial or a governmental capacity, while employing a city-owned automobile to convey policemen to their beats, evidence is admissible that, at prior non-remote times, the said employee had employed said car in a ministerial capacity for the city. *Jones v. City of Sioux City*, 185—1178.

SIMILAR FACTS AND TRANSACTIONS.

10 **Experiments.** Experiments made under circumstances and conditions materially different from those existing at the time at issue have no probative force. So held as to experiments which were intended to show how far one on a railway track might be seen by an approaching train. *Bowery v. Wabash R. Co.*, 185—288.

BEST AND SECONDARY.

11 **Interpreting X-Ray.** An expert witness may not testify what an X-ray photograph shows, even though objector's own witness had so testified, but without objection. *Lang v. Marshalltown L. P. & R. Co.*, 185—940.

ADMISSIONS.

12 **Acquiescence or Silence.** Failure of a party (under circumstances which, in reason, call upon him to assert the truth of a material fact) to either deny or affirm the truth of material and relevant statements attributed to him by a stranger to the litigation, is admissible as an implied admission. *Yocum v. Husted*, 185—119.

EVIDENCE CONTINUED

DECLARATIONS.

Res Gestae—Declaration of Ownership of Bank Passbooks. Where,
13 in an action brought by decedent's administrator, for bank deposits made by decedent, against one claiming ownership thereof under alleged gift from decedent, plaintiff introduced evidence of declarations of the alleged donee inconsistent with her claim of ownership, *held* that evidence offered by said claimant of declarations made by her before decedent's death, and while in possession of his bank passbooks, were admissible, (a) as being in the nature of *res gestae*, and (b) as showing the animus and intent attending possession, and (c) as rebutting plaintiff's evidence tending to show that claimant had not made such claim during decedent's lifetime. *Stevens v. Peoples Sav. Bank*, 185—619.

DOCUMENTARY.

Memorandum Entries in re Material Facts. Memorandum en-
14 tries of material facts are admissible (a) whenever it appears that such entries so stimulate the memory that the witness is enabled to recall the facts recited therein, independently of the entries, or (b) whenever they are insufficient to so stimulate the memory, but the witness knows that, when he made the entries, he possessed the truth concerning them, and made the entries in accordance with such truth. *State v. Easter*, 185—476.

Compelling Production. The court may refuse an order for
15 the production of books and papers. (Sec. 4654, Code, 1897.) *State v. Bitter Root Val. Ir. Co.*, 185—60.

PAROL AS AFFECTING WRITING.

Subsequent and Independent Agreement. The rule that parol
16 evidence is inadmissible to vary, etc., the terms of a valid written instrument, is not violated by evidence that, subsequent to the execution of a note, an independent oral agreement on a new consideration was entered into, under which the payee agreed to forbear suit for a named time, and agreed to accept payment in a manner different from that

EVIDENCE CONTINUED

provided in the note. *Goodman Mfg. Co. v. Mammoth V. C. Co.*, 185—253.

Disclosing Principal on Note. Whether parol evidence is ad-
17 missible to show that the signer of a promissory note
intended solely to bind some principal who is *undisclosed*
on the face of the instrument, *quaere*. *Schuling v. Ervin*,
185—1.

OPINION EVIDENCE.

Value of Building—Restoration by Repairs. It can fairly be
18 said that a witness, asked to say how much a building
was worth just before it was struck by lightning and how
much it was worth just after it was struck, is called upon
to base his answer on the cost of restoration; and, if the
party against whom this evidence was put in has any
doubt whether the opinion is based upon such cost, the
remedy is not by objection, but by proper cross-examina-
tion. *Turner v. Hartford F. Ins. Co.*, 185—1363.

Sufficient Time to Get Off Track. Whether an employee who was
19 struck by a train while operating a mower on the railway
right of way, had sufficient time between the warning given
by a co-employee and the time the train struck him, to
have stepped out of the way, is properly excluded, as call-
ing for an opinion and as being argumentative. *King v.*
Chicago, R. I. & P. R. Co., 185—1227.

Market Value. A witness who was a dealer in cereal beverages,
20 and had inspected 80 half barrels of a cereal beverage,
was qualified to testify as to the reasonable market value
of said beverage. *Omaha Bev. Co. v. Temp Brew Co.*,
185—1189.

Whether Object Moved Slowly or Rapidly. A witness may not,
21 in the absence of some basis for intelligent comparison, com-
petently give his opinion as to whether an object was mov-
ing *slowly* or *rapidly*, nor may he, when the basis for com-
parison appears, make the comparison for the jury. *Seager*
v. Foster, 185—32.

EVIDENCE CONTINUED

Testamentary Capacity—Discretion of Court. Testimony to the
 22 effect that the decedent was very nervous, physically weak, and was slow in answering questions, and that decedent had said to the witness that she (decedent) did not know what she wanted to do with her property, is sufficient upon which to base an opinion that the testator was of unsound mind, the principle being recognized that the trial court has some discretion in admitting such testimony. *Haddock v. Jacobs*, 185—1057.

Hypothetical Question—Assumption of Facts. Evidence in a will
 23 contest reviewed, and held to prove matters upon which hypothetical questions were based, the question whether such facts had been established being for the jury. *Haddock v. Jacobs*, 185—1057.

Unallowable Basis. Uncontradicted expert testimony as to the
 24 extent of benefits afforded to a lot by a public improvement is not persuasive, when such testimony reveals the fact that it is based on the unallowable assumption that no lot, under any circumstances, can be benefited by any such improvement in excess of a named arbitrary sum. *North View Land Co. v. City of Cedar Rapids*, 185—1032.

Improper Basis for Opinion. Expert evidence, descriptive of the
 25 nature and extent of personal injuries, may not be wholly stricken on the ground that it appeared, on cross-examination, that, subsequent to the personal examination by the witness, he viewed an X-ray photograph made by another party, and testified that such photograph confirmed his former diagnosis. *Hearn v. City of Waterloo*, 185—995.

WEIGHT AND SUFFICIENCY.

When Satisfactory. Evidence is always of a high character when
 26 it produces in the mind an abiding conviction of the truth of the matter at issue. *Stutsman v. Crain*, 185—514.

Positive and Negative Testimony. Positive testimony that the
 27 statutory bell and whistle signals were given at a railway crossing, met by testimony that such signals were not heard by those *not in a position and mental attitude to have*

EVIDENCE CONTINUED TO EXECUTORS AND ADMINISTRATORS

1 *heard them, had they been given*, presents no conflict of evidence, and, consequently, no jury question. *Bowery v. Wabash R. Co.*, 185—288.

EXECUTION.

Redemption by Execution Debtor. Principle recognized that a redemption of land from execution sale, by the execution debtor, exposes the land to a lien for any deficiency in the judgment. *Davis v. Davis*, 185—179.

EXECUTORS AND ADMINISTRATORS. See EVIDENCE, 13.**APPOINTMENT.**

Jurisdiction of Court—Residence. Evidence reviewed, and held
1 to sustain finding of trial court that decedent, at the time of his death, was a resident of the county in which administrator of his estate was appointed. *Stevens v. Peoples Sav. Bank*, 185—619.

COLLECTION AND MANAGEMENT OF ESTATE.

Property Disposed of Before Decedent's Death—Payment to Per-
2 **sons Entitled to Funds.** Where decedent delivered to his daughter certain funds, to be paid upon his death to his heirs in certain designated proportions, and the same had been so paid by her, the administrator of decedent could not recover from her said funds, for the reasons that (a) said money so deposited constituted a trust fund which she was to distribute to designated beneficiaries, and title thereto did not pass to the administrator, and any rights as to enforcement of the trust accrued to the beneficiaries, and not to the administrator; and (b) even if the administrator could maintain an action therefor, there being no rights of creditors or third persons involved, the payment by the daughter to the persons ultimately entitled thereto would be a defense. *Baadt v. Walgenbach*, 185—773.

Order to Hold Funds—Interest—Discretion of Court. An order
3 of the court directing an executor to hold in his pos-

EXECUTORS AND ADMINISTRATORS CONT'D

session, until a certain time, property of legatees, was not a direction that he was to hold it in his own bank without interest; and as long as he could have placed it in another bank that would allow interest, if his own bank would not, the court could, in its discretion, find that he should have made some income on the property, and charge him with interest thereon. In re Estate of Lackie, 185—1101.

Instructions by Court. A probate court has authority to determine whether an administrator, etc., has any interest, legal or equitable, in property, and to direct its said officer accordingly. In re Estate of Orwig, 185—918.

ALLOWANCE AND PAYMENT OF CLAIMS.

Good Faith of Executor. Testimony by executor that a brother of claimant's had made statements to him that decedent, the mother of claimant, had said that she wanted the claimant to put in a claim after her death, was competent, not as establishing the claim, but as bearing upon the good faith of the executor in allowing said claim, and as negating a charge of fraud and collusion. In re Estate of Newton, 185—1223.

ACCOUNTING AND SETTLEMENT.

Allowance of Interest against Executor. The district court has jurisdiction, upon exception to the executor's report, to make allowance of interest in favor of a legatee, against the executor. In re Estate of Lackie, 185—1101.

Interest on Funds. Where a will directs that money be paid from time to time to legatees, interest may, in response to a demand made by the legatee, be charged against the executor on funds which he has in his hands, and which he retains by means of a false denial of their payment to him. In re Estate of Lackie, 185—1101.

Interest on Funds—Receipt without Claim of Interest—Res Adjudicata. Where a widow, making demand for the funds due her under a will, alleged that the executor had collected

EXECUTORS AND ADMINISTRATORS 'CONT'D TO

FALSE PRETENSES

certain funds, but made no mention of interest, her acceptance of the amount ordered by the court to be paid her by the executor did not conclude her from making a claim for interest, nor act as *res adjudicata* thereon, as she was not required to combine the claim for money due with the claim for interest. In re Estate of Lackie, 185—1101.

Mistakes in Settlement—Correction—Interest on Funds. Under 9 Section 3398, Code, 1897, mistakes in settlement of the accounts of an executor may be corrected at any time before the final settlement and discharge, and no adjudication was worked as to interest where the legatees asked for the payment of money in the hands of the executor, but asked for no interest. In re Estate of Lackie, 185—1101.

Interest on Funds—Non-Application of Legatees for Investment. 10 The executor was properly charged with interest on funds, over his objection that the legatees were advised of the condition of the estate by reports, and made no application for payment or for investment of funds. In re Estate of Lackie, 185—1101.

EXEMPTIONS. See TAXATION, 6, 7.

Debtor's Interest in Partnership Property. A partner, though a resident head of a family, may not claim his interest in partnership personal property exempt from levy and sale under execution to satisfy partnership debts. Jensen v. Wiersma, 185—551.

FALSE PRETENSES.

Immateriality. One charged with obtaining property by means 1 of false pretenses may not show that, subsequent to the consummation of the entire deal, part of the property received by him was taken from him by the vendor's creditors. State v. Waterbury, 185—87.

Elements of Offense—Check without Funds for Property. The 2 delivery of a check in payment of goods was a representation that it was good, and would be paid on presentation; and where the buyer securing possession of the goods knew

FALSE PRETENSES CONTINUED

TO

FRAUD

that the check was false, and that there were no funds to pay the same, he was guilty of the crime of cheating by false pretenses. *Mulroney Mfg. Co. v. Weeks*, 185—714.

FENCES. See **ANIMALS.**

FIXTURES.

Intention and Manner of Construction. Improvements are not
1 trade fixtures, but a part of the realty, when added by a tenant with intention to permanently annex them to the realty, or when, with a contrary intent, he so constructs them that they may be removed only by doing substantial injury to the realty. *Winnike v. Heyman*, 185—114.

Innocent Purchasers. Purchasers of realty which is in the pos-
2 session of a tenant, take title to improvements placed thereon by the tenant, when such improvements appear to be a permanent part of the realty, and no fact suggests any inquiry to the contrary. *Winnike v. Heyman*, 185—114.

FORCIBLE ENTRY AND DETAINER.

Right of Action—Against One Claiming Possession as Purchaser.

- 1 The action of forcible entry and detainer will lie against one claiming possession, if he is unlawfully in possession. *Waterman v. Wood*, 185—897.

Right of Action—Tenant at Will. A person who takes wrongful

- 2 possession of property may become a tenant at will by being permitted to remain there 30 days or more, making it necessary to terminate his tenancy by statutory notice; but, his tenancy being so terminated, he is liable to eviction by summary proceedings. *Waterman v. Wood*, 185—897.

FRAUD. See **DEEDS**, 7, 9, 10; **LIMITATION OF ACTIONS**, 2; **RELEASE**, 4; **VENDOR AND PURCHASER**, 7-9.

Fraudulent Representations—Value and Acreage of Land. Evi-

- 1 dence reviewed, and held to sustain finding of misrepres-

FRAUD CONTINUED TO FRAUDS, STATUTE OF

sentation by defendant of the number of acres and the value of land transferred to plaintiff. *Billick v. Davidson*, 185—801.

Unpleaded but Proved Fraud. Unpleaded fraud, though proved, 2 affords no ground for relief. *Ellison v. Stockton*, 185—979.

Examination as Excluding Reliance on Fraud. An unobstructed 3 examination of property by a prospective vendee, prior to purchase, does not necessarily exclude reliance on fraudulent representations. *Ellison v. Stockton*, 185—979.

Fact and Opinion. Representations that a company had built 4 up a good business and was making money are, if knowingly false, actionable; otherwise as to a representation that a purchaser would be able, in a short time, to pay for the business out of the profits. *Sherman v. Smith*, 185—654.

Fraudulent Representations—Defenses—Evidence. That, in the 5 exchange of properties, plaintiff misrepresented the value of his property, would not have any tendency to show that defendant did not misrepresent his property to the plaintiff. *Billick v. Davidson*, 185—801.

Damages—False Representations as to Sale of Joint Property. 6 Where one owning property jointly with another was induced by the latter's false representations as to the price being received to join in a sale of the same, he was entitled to one half of the amount for which the property was sold. *Monaghan v. Bowers*, 185—708.

FRAUDS, STATUTE OF.

Promise to Pay Debts of Old Partnership. The oral promise of 1 an incoming partner, on a consideration personal to himself, to pay the debts of the old partnership, is not within the statute of frauds. *Cuttill v. Harrington*, 185—537.

Sale of Personal Property—Oral Modification of Written Contract. 2 An oral agreement extending the time of delivery of corn under a written contract, without modifying or altering

FRAUDS, STATUTE OF CONTINUED TO

GARNISHMENT

the written contract or interfering with its enforcement, does not involve any question of the statute of frauds. *Neola Elev. Co. v. Kruckman*, 185—1254.

FRAUDULENT CONVEYANCES.

Reliance on Representation. One may not predicate reliance on a representation which is contradicted by an authorized public record, of which he is charged with notice, and by his own personal knowledge. *Schuster Bros. v. Davis Bros.*, 185—143.

GARNISHMENT.

Contingent Rights—Property Subject to Garnishment. Where,
1 after the holder of a beneficiary insurance certificate disappeared, and was presumed to be dead, the insurer and the beneficiary under the policy contracted that the money due on the policy should be deposited in the bank by the insurer, to be paid to the beneficiary at the end of 10 years thereafter, unless the insurer could prove that the insured was alive, the beneficiary had an existing contingent beneficial property right in the funds held by the bank, and this was a vested interest, subject to the subsequent condition provided for in the contract, and one which was subject to garnishment for the debts of the beneficiary; and, in a garnishment action thereon, the court could continue the garnishment proceedings, subject to the further order of the court, until it was seen whether the defeasance provisions resulted, and whether the funds went to the beneficiary. *Ottumwa Nat. Bk. v. Norfolk*, 185—1334.

Notice—Principal Defendant—Appearance—Proceedings. Where
2 there is an informality in the service of notice of garnishment upon the principal defendant, and both he and the garnishee appear, and, making no objection, move to cancel and set aside an order continuing the proceedings for further orders as to the garnished funds, and where, if the notice was wrong, another one could be served, and where no judgment has been rendered as yet against the garnishee, the garnishee and the debtor cannot object that no notice of the garnishment has been served on the debtor, as re-

GARNISHMENT CONTINUED

TO

GUARDIAN AND WARD

quired under Section 3947, Code Supp., 1913. Ottumwa Nat. Bk. v. Norfolk, 185—1334.

GIFTS. See EVIDENCE, 13.

Failure to Consummate—Mistake—Effect. A failure to *fully* consummate an intended gift *inter vivos*, during the lifetime of the donor, even though such failure is the result of a manifest mistake on the part of the donor, absolutely nullifies the intended gift. Dolph v. Wortman, 185—630.

GUARANTY.

Discharge of Guarantor—Secondary Liability. Under Section 3060-a192, Code Supplement, 1913, the guarantor on a note is only secondarily liable, and therefore under Section 3060-a120, Code Supplement, 1913, he is discharged by the discharge of the principal, or prior party. First Nat. Bank v. Drake, 185—879.

Limitation of Actions—Nonresident Guarantor. A cause of action which is barred by the statute of limitations as against the maker of a note is, by reason thereof, barred against the guarantor on the same note, although the guarantor is a nonresident of the state, and otherwise there would be no such bar as to him. First Nat. Bank v. Drake, 185—879.

GUARDIAN AND WARD.

Former Incompetency as Bearing on Present Incompetency. On the issue whether a guardian should be appointed, the real test is incompetency *at the time of trial*; but evidence of incompetency prior thereto may carry a presumption of incompetency down to and at the time of trial. Evidence reviewed, and held to fully overthrow the presumption. Miller v. Paulson, 185—218.

Defendant as a Testifying Exhibit. A jury finding of incompetency is not necessarily conclusive on the appellate court by reason of the fact that the jury had the advantage of personally observing the alleged incompetent while she was a witness. Miller v. Paulson, 185—218.

GUARDIAN AND WARD CONTINUED TO HEALTH

Insane Persons—Contracts for Necessaries—Statutes. The liability on their contracts or for necessities of the insane or spendthrift under guardianship, is not affected or governed by the provisions of Section 3189, Code, 1897, notwithstanding the general provision of Section 3223, Code, 1897, that, so far as the same are applicable, Sections 3192 to 3228, Code, 1897, and other laws relating to minors, shall apply to the insane, spendthrifts, and habitual drunkards, and their guardians. *Reeves v. Hunter*, 185—958.

Contracts of Ward—Constructive Notice of Disability from Guardianship. Every person dealing with one under permanent guardianship is charged with constructive notice of the judgment of disability. *Reeves v. Hunter*, 185—958.

Estate of Ward—Contracts for Necessaries—Jurisdiction of Court. Neither the guardian nor the insane person can make a valid contract, even for necessities, without the approval of the district court sitting in probate; and one furnishing a ward necessities must present his claim therefor for approval, to the court having jurisdiction of the ward's estate. *Reeves v. Hunter*, 185—958.

Estate of Ward—Contracts for Necessaries. The disability of a person under guardianship is such that there can be no obligation on his part to restore property secured by him under contract, yet this disability does not prevent the other party from retaking it; and while the court, upon refusing approval of claim for necessities furnished the ward, has full power to order whatever restoration is practicable, yet its right to refuse approval is not dependent upon its ordering restoration. *Reeves v. Hunter*, 185—958.

Estate of Ward—Contracts—Jurisdiction of Court. A person who is under guardianship is under the protection of the court, and cannot make a contract which is obligatory upon him. *Reeves v. Hunter*, 185—958.

HEALTH.

Compulsory Detention and Examination of Persons. In the absence of a clear and definite statute so authorizing, state and local boards of health may not, on mere suspicion that

HEALTH CONTINUED

TO

HIGHWAYS

a person is afflicted with, or has been exposed to, a venereal disease, cause such person to be compulsorily detained and physically examined by withdrawing blood from the veins and pus smear from the urethra, for the purpose of determining the existence of such disease in such person, even though such examination, while painful, is not dangerous to life. *Wragg v. Griffin*, 185—243.

HIGHWAYS. See MUNICIPAL CORPORATIONS, 13; NEGLIGENCE, 2; STATUTES, 2.

Estoppel Against Public in re Obstructions. Estoppels against

- 1 the public to demand the removal of valuable buildings or other like improvements which are within the public highways, rest essentially on the fact of prior express or implied consent by the public authorities to the erection of such improvements. Ten years' maintenance of such improvements (in analogy to the statute of limitations) *ipso facto* establishes such consent. In the absence of such ten years' maintenance, the owner must show that he had such consent *when the improvements were erected*. *Herrick v. Moore*, 185—828.

Law of Road—Automobiles—Duty of Driver to Turn to Right—

- 2 Negligence. It is the duty of an automobile driver, in meeting with another automobile, to turn to the right, if he can, and his failure in this respect is negligence. *Hamilton v. Young*, 185—1160.

Dedication by Conduct. Conduct on the part of an owner of

- 3 land, when relied on to show a *conclusive* intent to dedicate the land for highway purposes, must be unequivocal. So held where the record showed travel and public improvement for many years, but revealed uncertainty (a) as to the ownership of the land during part of the time, and (b) as to the extent and nature of the original right in the land. *Wensel v. Chicago, M. & St. P. R. Co.*, 185—680.

Negligence by Not Yielding Right of Way. The driver of a

- 4 vehicle who fails to yield the right of way to another vehicle at an intersecting crossing, when he has ample time, and is under legal obligation to so do, is guilty of negligence. *Seager v. Foster*, 185—32.

HIGHWAYS CONTINUED

TO

HUSBAND AND WIFE

Where All Parties Consent and Request. An unqualified written request to the board of supervisors to establish a specified highway, signed by all the owners of land which will be taken for the highway, empowers the board to proceed to the establishment of the highway without the appointment of a commissioner, without the service of notice on anyone, and without regard to undisclosed claims for damages in favor of any petitioner. *Swift v. Board of Supervisors*, 185—488.

HOMESTEAD. See DIVORCE, 7.

Undivided Interest Held in Common. A homestead may consist of the owner's undivided interest in lands held in common. So held where the interest was an undivided one fourth of 120 acres. *Livasy v. State Bk. of Redfield*, 185—442.

Failure of Wife to Join in Sale Contract—Estoppel. A wife who does not sign the husband's contract for the sale of the homestead, but intentionally furthers the sale by correctly pointing out the boundaries, in accordance with said contract, and then abandons all homestead interest in the property, and, when the consideration is paid, joins with her husband in a deed, is estopped to prevent such reformation of the deed as will cause it to speak the mutual intention of all the parties. *Townsend v. Woodworth*, 185—99.

HUSBAND AND WIFE. See DEEDS, 23, 24; DIVORCE; ESTOPPEL, 5; MARRIAGE; WITNESSES, 1, 3.

Antenuptial Contracts—Family Expenses. A clause of an antenuptial contract which provides that each party "agrees to contribute to the family expenses" in a named proportion, is not effective in favor of the wife after the death of the husband. *In re Estate of Mansfield*, 185—339.

Life Maintenance to Wife. Principle recognized that a wife may not, on the death of the husband, demand support and maintenance from the husband's estate, independent of and supplemental to the rights given to her by statute. *In re Estate of Mansfield*, 185—339.

INFANTS

TO

INJUNCTION

INFANTS.

Actions—Defense Without Guardian—Default. Where default judgment was entered against a minor, without the making of any defense, and without the appointment of a guardian *ad litem*, the judgment was irregular. (Sec. 3482, Code, 1897.) *Nels v. Rider*, 185—781.

INJUNCTION.

Status Quo on Proposed Increase of Utility Rates. A paper showing, by a public utility corporation (which proposes to increase existing rates for electric light, in opposition to the terms of an admitted ordinance), that existing rates are non-compensatory, furnishes sufficient basis for the dissolution of a temporary injunction against such threatened increase, when viewed in the light of the established principles of law (1) that the power to fix such rates is an exercise of the police power, (2) that such power is purely legislative, (3) that such power cannot be the subject of contract, in the absence of unmistakable grant, and that such grant has been withheld in this state, (4) that all such rates must be compensatory,—in short, that no contract, ordinance, or estoppel can stand in the way of a proper increase of non-compensatory rates,—and when it is further made to appear that such dissolution will more clearly maintain the *status quo*, pending the final hearing on such proposed increase, than would be accomplished by a continuance of the injunction. *Town of Williams v. Iowa Falls Elec. Co.*, 185—493.

Violation of Contract in Trade Restraint. Injunction will lie to prevent the breach of an enforceable contract in restraint of trade. *Rowe v. Toon*, 185—848.

Temporary Injunction—Grounds for Continuing—Probable Injury.
3 The right to have a temporary injunction continued until a hearing can be had on the merits of the petition depends upon whether petitioner has a probable right to the relief sought and will suffer probable injury to such right if the writ be dissolved. *Carr v. Carr*, 185—1205.

INSANE PERSONS

TO

INSURANCE

INSANE PERSONS. See LIBEL AND SLANDER, 1.

Contracts—When Voidable Restoration of Status Quo. A contract of an incompetent, entered into innocently by the other party, is voidable, and not void; and, if fair and reasonable, and if both parties cannot be placed in *statu quo*, it may be enforced; and, where set aside as being voidable, the innocent party is entitled to be restored to the *status quo* or its equivalent. *Reeves v. Hunter*, 185—958.

Explaining Unequal Distribution of Property. Inferences of incompetency, arising from the fact that the one sought to be placed under guardianship had made a very unequal distribution of her property among her children, may be explained by evidence showing that the distribution was, under the circumstances, eminently fit, reasonable, and proper. *Miller v. Paulson*, 185—218.

Adjudication Excludes Court Action on Indictment. An adjudication of insanity by the commissioners of insanity precludes the district court from proceeding with the trial of a subsequently returned indictment against the same person, until his reason is restored. (Sec. 2279, Code, 1897.) *Quaintance v. Lamb*, 185—237.

Notice and Personal Presence. Proceedings to determine the sanity of a person may be legally had before the commissioners of insanity, without the presence of, and without notice to, the person under investigation; and in such case it will be presumed that notice would have accomplished no purpose, and that the personal presence of such person would have been injurious to such person. *Corcoran v. Jerrel*, 185—532.

INSURANCE. See APPEAL AND ERROR, 39, 40; ARBITRATION AND AWARD; 1; TRIAL, 3, 4.

AGENTS.

Authority of Agents. The authority of an insurance agent, so far as the public is concerned, must be measured, not so much by the terms of his employment or by the terms of

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the policies, *as by the things which the principal permits him to do*. Evidence held to show that the agent in question was a "general" agent. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

CONSTRUCTION AND OPERATION OF POLICY.

Life Insurance—Right to Insurance under Loan Value—Failure

- 2 to Present Policy for Endorsement. Where an insurance policy provided that, after the payment of three premiums, the policy would, upon presentation for endorsement, be extended for such length of time as the loan value would buy extended insurance, the failure of the insured to present the same for such endorsement did not prevent the extension of the policy, where such payments had been made, and the policy was extended, and continued effective without such endorsement. *Highland v. Iowa L. Ins. Co.*, 185—1001.

Prohibited Waivers by Agents. A policy condition which is

- 3 for the sole benefit of the insurer may be waived by any agent who has authority to act in reference thereto, *even though the policy provides to the contrary*. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

Provisions Governing Notices. A policy provision that notices to

- 4 the insured shall be sent to a designated address has reference solely to notices which give *effect* to the terms of the contract,—not to notices as to which the law requires *actual* notice, and which could not have been contemplated by the parties when the policy was issued. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

Reduced Indemnity—Burden of Proof. A policy which provides

- 5 (1) for a general stated indemnity in case of death from accident, but (2) for a reduced indemnity in case the death results from a particular kind of accident, *unless specified exculpatory circumstances attend such latter accident*, imposes the obligation on the insurer, in order to escape by payment of such reduced indemnity, to allege and prove that the specified exculpatory circumstances did not exist. *Ward v. Interstate B. M. Acc. Assn.*, 185—674.

INSURANCE CONTINUED

Deducting Loans. A certificate of loan, the amount of which
6 is made lienable on a policy, is deductible from any amount payable under the policy, when such certificate constitutes the means by which the insurer, the insured and all other like policyholders, under a purported 20-payment life policy, *postdated 10 years and without actual payment of the first ten premiums*, are placed in exactly the same position that they would have been placed in had the insured annually paid the first ten payments in cash, or had paid in cash and in a lump sum the equivalent of said ten payments, when the postdated policy was issued. *Deacon v. Fidelity Mut. Life Ins. Co.*, 185—1387.

Loan Certificates. Agreements evidencing loans upon a policy
7 need not be attached to the policy, under Section 1741, Code, 1897. *Deacon v. Fidelity Mut. Life Ins. Co.*, 185—1387.

PREMIUMS, DUES, AND ASSESSMENTS.

Life Insurance—Note as Part Payment of Premium. The mere
8 giving of a note for a premium due on life insurance will not work the payment of the premium, but the insurer may so treat it as being the equivalent of cash, and so deal with the insured as to waive the right to deny that the note at maturity worked an actual payment, although not paid. *Highland v. Iowa L. Ins. Co.*, 185—1001.

Retention of Delinquent Premium. An insurance company ir-
9 revocably waives its right to declare a forfeiture of a policy because of the failure of the insured to pay the premium on or before the maturity date, when it receives and unreasonably retains the delinquent premium, with knowledge that it was paid by the insured in the reasonable belief, *induced by an unauthorized agent*, that he (the insured) might make such payment after said maturity date, and that such payment would preserve the life of his policy. To avoid such a result on the plea that the company retained the money on the condition that the insured should reinstate his forfeited policy by furnishing a certificate of continued good health, the company must affirmatively show that, upon receipt of the money, it *promptly and actually* brought home to the insured its in-

INSURANCE CONTINUED

tention to so hold the money, and thereby gave the insured an opportunity to consent to its new and self-created condition. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

Reinstating Waived Right. An insurance company which, by
10 unduly retaining a delinquent premium, has waived its right to declare a forfeiture of the policy, may not reinstate its said right by returning the premium to the insured and causing him to retain it at a time *when he is mentally incompetent to transact business*. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

FORFEITURE OF POLICY.

Life Insurance—Evidence—Sufficiency. Evidence reviewed, and
11 held sufficient to sustain the finding of the court that an insurance company which had accepted a note for part of the third premium on life insurance, and retained the note and demanded payment after it became due, waived its right to claim a forfeiture of the policy. *Highland v. Iowa L. Ins. Co.*, 185—1001.

FRATERNAL BENEFICIARY INSURANCE.

Collection of Premiums—Deposits in Bank. The power of the
12 secretary of a local fraternal lodge to collect premiums for life insurance carries with it the power to make reasonable arrangements as to the method of receiving such premiums, and a payment to a clerk authorized by him would be a payment to him, and he could arrange with the bank that payments could be made to him there by a deposit to his credit. *Hartman v. Fraternal Bankers Res. Soc.*, 185—1163.

Collection of Premiums—Unreasonable Requirements. Where the
13 secretary of a fraternal lodge arranged with a bank that, as to premiums paid there to his credit by an insured, the bank should enter such payment on a receipt slip, placed in the pocket of a book furnished to the insured, and the tender of the premium was refused by the bank wholly on the ground of failure to produce the book, which had been mislaid, the tender of the premium as made was good. *Hartman v. Fraternal Bankers Res. Soc.*, 185—1163.

INSURANCE CONTINUED

TO

INTOXICATING LIQUORS

Collection of Premiums—Payment to Bank—Waiver of Rule to
14 Produce Book. Where the secretary of a fraternal lodge had arranged that payments of premiums on insurance could be made by deposits of the same to his credit, upon production of a book for entries therein, and the bank refused a payment on the ground that the book, which had been mislaid, was not presented, the secretary's direction to receive the same waived the requirements of the production of the book for the evidencing of the payment. *Hartman v. Fraternal Bankers Res. Soc.*, 185—1163.

INTEREST. See EXECUTORS AND ADMINISTRATORS, 3, 6—10.

Past, Present, and Future Accruing Claims. Interest may not be allowed from the *date of an injury*, when the verdict represents past, present, and future accruing damages: i. e., past, present, and future pain, suffering, and humiliation arising from an injury. *Carter v. Marshall Oil Co.*, 185—416.

INTERSTATE COMMERCE. See MASTER AND SERVANT, 12.

INTOXICATING LIQUORS. See CONSTITUTIONAL LAW, 1; PRINCIPAL AND SURETY, 6; WITNESSES, 10.

Interstate Shipments for Private Consumption. Interstate shipments of intoxicating liquors which are for the *private consumption* of the consignee are, since the passage of the Webb-Kenyon Act, violative of Sec. 2419, Code, 1897, and damages may not be recovered for the loss of such a shipment. *Stajcar v. Dickinson*, 185—49.

Construction of Statutes—Instructions. Instruction of the court to the jury that the liquor statutes should be so construed by the courts and jurors as to prevent evasion, held correct, under Sec. 2431, Code, 1897. *State v. Snyder*, 185—728.

Promissory Note for Liquors Sold. In an action on a promissory note for intoxicating liquors sold under the Mulct Act, plaintiff need only show that he had, prior to said sale,

INTOXICATING LIQUORS CONTINUED

complied with all those requirements which are conditions precedent to the opening of a place for such sale. *Dougherty v. French*, 185—975.

Presumption Attending Consent, Findings, Etc. A consent petition for the sale of intoxicating liquors, duly found to be sufficient, carries a presumption of continuance until its revocation or expiration is made to appear. *Dougherty v. French*, 185—975.

Sales by Druggist. Evidence reviewed, and held sufficient to sustain a finding that a druggist sold intoxicating liquors as a beverage. *State v. Snyder*, 185—728.

Presumptions—Registered Pharmacist. An instruction that the presumption arising from the finding of intoxicating liquors in the place of business of a druggist, who was a registered pharmacist, was that the same were kept for the purpose of illegal sale, held correct, when taken in connection with other instructions that (a) the jury should take into consideration the evidence, if any, of sales, and that (b) the jury could not convict the defendant unless they found that he used said building for the purpose of selling intoxicating liquors therein, or kept intoxicating liquors in said building for the purpose of sale. *State v. Snyder*, 185—728.

Burden of Proof as to Registered Pharmacist. While, under Section 2385, Code, 1897, a registered pharmacist can purchase intoxicating liquors other than malt, for the purpose of compounding medicines that cannot be used as a beverage, yet he is not authorized to manufacture or sell any compound that may be used as a beverage, and the burden is upon him to show that intoxicating liquors found in his place of business are kept for a lawful purpose. *State v. Snyder*, 185—728.

Contempt—Clear Preponderance of Evidence Sufficient. Conviction upon charge of contempt in violation of liquor injunction does not require proof beyond a reasonable doubt. A clear preponderance is sufficient. *State v. Mullan*, 185—794.

INTOXICATING LIQUORS CONTINUED TO

JUDGMENT

Contempt—Certiorari—Rules of Review. On certiorari to review
 9 finding by trial court upon charge of contempt in violation
 of liquor injunction, the finding of the trial court is not
 final or conclusive upon the question whether the injunction
 has been violated, and the Supreme Court will look into
 the evidence; and if, in its judgment, after due considera-
 tion of the conclusion reached by the trial court, the con-
 tempt is clearly and satisfactorily established, it will not
 hesitate to reverse an acquittal. *State v. Mullan*, 185—
 794.

Intoxicating Liquors—Contempt—Evidence. Evidence reviewed,
 10 and held to show, by a clear preponderance of the evidence,
 that defendant was guilty of contempt in violating liquor
 injunction. *State v. Mullan*, 185—794.

JUDGMENT. See DEEDS, 17; INFANTS; PRINCIPAL AND
 SURETY, 4.

DEFAULT.

Notice of Time and Place of Holding Court. A party must take
 1 notice of the time and place of holding court and of the
 position of his case on the calendar and the state of the
 calendar. *Dollister v. Pilkington*, 185—815.

Negligence of Party. Where a party knew that, in reply to his
 2 motion, a cost bond had been filed, and knew that his at-
 torney had withdrawn from the case and had turned over
 the papers to him, and employed no counsel, took no ac-
 tion, did nothing to protect his interests thereafter, and
 had no reason to expect further courtesy to him by op-
 posing counsel, *held* that he was not entitled to have a de-
 fault judgment set aside, entered 31 days after the filing
 of said cost bond. *Dollister v. Pilkington*, 185—815.

Filing of Answer Within Time Given by Court. On the day
 3 after the day on which the court, upon overruling his mo-
 tion for change of venue, had given him five days within
 which to file answer, the defendant was not in default for
 failure to file answer. *Burke v. Dunlap*, 185—949.

Discretion of Court. Where counsel, on information from the
 4 clerk of the courts, had reason to believe that court would

JUDGMENT CONTINUED

be adjourned *sine die*, on account of no judge's being assigned to hold court, in the absence of the regular judge, and left the county seat on business, and, upon arrival of the judge, default was entered in a case in which said counsel was interested, *held* that the court did not abuse its discretion in setting aside the default. *Nels v. Rider*, 185—781.

CONFORMITY TO PROCESS, PLEADINGS, ETC.

Absence of Prayer. Prayer for relief is just as essential as
5 plea and proof. So held where personal judgment was erroneously entered in the absence of any prayer therefor. *Schuster Bros. v. Davis Bros.*, 185—143.

AMENDMENT AND CORRECTION.

Scope of Nunc Pro Tunc Entries. The right to make *nunc pro*
6 *tunc* entries does not embrace the right to make a belated entry state a fact as existing at a prior date, when such fact did not, in fact, exist at such prior date. *Bear v. Sullivan*, 185—1381.

OPENING AND VACATING.

Showing of Merits. The court has no discretion as to setting
7 aside a judgment *improperly* entered against a party, and such a party, on moving to set aside such a default, is not required to make a showing of merits. *Burke v. Dunlap*, 185—949.

CONCLUSIVENESS OF ADJUDICATION.

Foreign Judgment—Defense. A judgment defendant, sued in
8 this state on a judgment rendered against him by a court of competent jurisdiction in another state, by confession upon a warrant of attorney, may show that, prior to the rendition of such judgment, he and the plaintiff in said judgment *canceled said warrant of attorney* by mutually adjusting and settling all existing claims between them. *Cohn. Baer & Berman v. Bromberg*, 185—298.

JURY

TO

LANDLORD AND TENANT

JURY.**Examination of Juror—Association with Insurance Company.**

The trial court is within its discretion, in a personal injury case, in allowing prospective jurors to be examined in regard to their being associated with insurance companies insuring against personal injuries; and, where objection to the question was sustained, there was no prejudice. *Mortrude v. Martin*, 185—1319.

LANDLORD AND TENANT. See **CONTRACTS**, 10, 11;
ESTOPPEL, 6; **FIXTURES**; **FORCIBLE ENTRY AND DETAINER**, 2.

Construction of Lease—Cancellation—Damages—Evidence. Where

- 1 a lease of farm lands provided that, if lessor sold the property, the lessee agreed to move off the premises "by the lessor giving the lessee one year's notice or otherwise as may be agreed upon the payment of \$500 in cash by the lessor," held that the evidence sustained the finding of the trial court that the parties interpreted the contract in accordance with the claim of the lessee that he was to receive \$500 as damages if the lessor sold the farm, or if he was required to move off without a sale, and not that he could only receive damages if he did not have a year's notice before he was required to move. *Swanson v. Seelander*, 185—735.

Construction of Lease—Damages from Dangerous Condition. A

- 2 provision in a lease whereby the tenant waived claims for damages from the construction of an additional story to a building referred only to damages received from proper construction, and did not cover damages for negligence in constructing the additional story, and did not release the landlord from his acts in creating a dangerous condition. *Mortrude v. Martin*, 185—1319.

Untenantable Condition as Terminating Rent. A lease of certain

- 3 lands and all buildings thereon "owned by the lessor," with right in lessee to erect building on the premises, with proviso that rent should cease in case said premises became untenantable by reason of fire, through no fault of the

LANDLORD AND TENANT CONTINUED TO. LIMITATION OF ACTIONS

tenant, does not absolve the tenant from payment of rent in case the tenant's own buildings are destroyed by fire without his fault. *O'Neal v. Hawkeye Lbr. Co.*, 185—452.

Rent—Option of Share Crop. A tenant who has an option to
4 pay share rent on the happening of a named contingency must exercise his election within a reasonable time after the happening of the contingency, or right to exercise the election will be waived, and especially so where his conduct is inconsistent with the exercise of such election. *Weatherill v. Weaver*, 185—1201.

LIBEL AND SLANDER. See PLEADING, 11.

Testimony Before Commissioners of Insanity. Nonmalicious tes-
1 timony by a physician before the commissioners of insanity, touching the insanity of a person under investigation, is privileged. *Corcoran v. Jerrel*, 185—532.

Evidence—Mental Pain—Accusation Made in Presence of Third
2 **Person.** Where the accusation was made in the presence of a third person, an objection was properly sustained to a question asking the plaintiff what mental pain he suffered from the accusation, as the same should have been confined to what mental pain he suffered from the third person's having heard the accusation. *Greenlee v. Coffman*, 185—1092.

Evidence—Defamatory Sense of Words. The understanding of
3 people as to the sense in which words were spoken is admissible on the issue whether the words were spoken in a defamatory sense. *Yocum v. Husted*, 185—119.

LIMITATION OF ACTIONS. See GUARANTY; PLEADING, 6.**APPLICABILITY OF STATUTE.**

Non-Applicability to Public. The statute of limitations may
1 not be invoked against the public. *Herrick v. Moore*, 185—828.

LIMITATION OF ACTIONS CONT'D.

FRAUD.

Concealing Fraud Not Solely Cognizable in Equity. Frauds which
 2 *must* be redressed at law, and frauds which may be redressed *either* at law or in equity, start the running of the statute of limitations when the fraud is perpetrated, irrespective of the injured party's knowledge of the fraud, except in those cases where the fraud-doer, by some affirmative and fraudulent conduct, prevents the injured party from obtaining knowledge of the fraud. But mere silence,—mere failure on the part of the fraud-doer to reveal his wrong, when he occupies no fiduciary relation,—is not such fraudulent concealment as will toll the statute. *Birks v. McNeill*, 185—1123.

COMPUTATION OF PERIOD.

Setting Aside Probate of Will. Action to set aside a will is
 3 barred in five years from the time the same is duly filed for probate and notice thereof is given. *Birks v. McNeill*, 185—1123.

Continuous Services. Claims for continuous services under a
 4 continuous contract accrue on the date of the last item of services. *Scott v. Wilson*, 185—464.

Revival of Cause of Action—Evidence—Sufficiency of Written
 5 **Admission.** A writing, to constitute a revival of a cause of action, under Section 3456, Code, 1897, must, by its terms, either admit or promise to pay some indebtedness of the writer; and a promise to pay may be implied from an admission of the indebtedness; but the writing need not specifically identify the indebtedness as that upon which suit is based, as that may be established by extrinsic evidence. *Bakey v. Moeller*, 185—946.

Revival of Cause of Action—Insufficiency of Writing. A letter
 6 stating, "I think you have been negligent in waiting so long, but you need not worry about it, I will see to it and make it all right," was insufficient, under Section 3456, Code, 1897, to revive an indebtedness on a note barred by the statute of limitations, as it did not contain a direct or

LIMITATION OF ACTIONS CONT'D. TO

MARRIAGE

certain reference to the note in question, or to indebtedness in any other form. *Bakey v. Moeller*, 185—946.

PLEADING.

Waiver of Plea. One may not complain that his plea of the
7 statute of limitations was ignored by the court when he himself ignored said plea throughout the trial, and until the filing of his motion for new trial. Especially is this true when, on a hearing with reference to the lost return of service, it appears that the notice was filed with the sheriff in proper time. *Hearn v. City of Waterloo*, 185—995.

MALICIOUS MISCHIEF.

Evidence—Sufficiency. Evidence reviewed, and held sufficient to
1 justify the jury in finding that the accused, and not a third party, was guilty of the act charged. *State v. Moss*, 185—158.

Elements—Injury to Dwelling House—Terrorizing Inhabitants.

2 Malice is a necessary element of the act of injuring a dwelling house and terrorizing the inhabitants thereof, as defined in Sec. 4799, Code, 1897, and such element may be shown by evidence which enlightens the jury as to former difficulties, etc., between the accused and the injured party. *State v. Moss*, 185—158.

MARRIAGE.

Common-Law Marriage — Essentials — Agreement Followed by

1 **Consummation.** If the parties are capable of contracting, and mutually agree that they are husband and wife, with present intention of becoming such, and this is followed by consummation of the marriage relation, the contract of marriage, under Section 3139, Code, 1897, is complete, and does not depend upon cohabitation for a period of time. *Love v. Love*, 185—930.

Common-Law Marriage—Continued Cohabitation. Proof of con-

2 tinued cohabitation between parties who have held them-

MARRIAGE CONTINUED TO MASTER AND SERVANT

selves out to the public as husband and wife, justifies the inference that they are married. *Love v. Love*, 185—930.
Common-Law Marriage—Sufficiency of Evidence. Evidence re-
 3 viewed, and held to sustain finding of common-law marriage. *Love v. Love*, 185—930.

MASTER AND SERVANT. See CONSTITUTIONAL LAW, 4.

DUTIES AND LIABILITIES OF MASTER.

Hidden and Lurking Dangers. The "safe-place-to-work" rule is
 1 violated by the failure of the master to warn his servant of a lurking and hidden danger, *which is not ordinarily incident to the carrying on of the work*, of which danger the master had knowledge, and of which danger the servant did not have knowledge. *Garren v. Ottumwa Gas Co.*, 185—1142.

Non-Delegable Duty. The master may not delegate his duty to
 2 provide the servant with a safe place in which to work. *Wangen v. Upper Iowa Power Co.*, 185—110.

INDEPENDENT CONTRACTORS.

Contractor (?) or Employee (?) One who, in pursuit of his reg-
 3 ular occupation, contracts to remove a stated number of trees from the land of another, for a stated price, plus the wood derived from such trees, and performs the work solely by his own labor, in his own time, and with his own tools, is a "contractor." *Storm v. Thompson*, 185—309.

WORKMEN'S COMPENSATION ACT.

Review—Findings on Fact Final. Whether the death of decedent
 4 employee was caused by his intoxication or was occasioned by his willful misconduct, with intention to injure himself, is a fact question, and the findings thereon by the statute tribunals under the Workmen's Compensation Act are final, and will not be reviewed by the Supreme Court. *Pierce v. Bekins V. & S. Co.*, 185—1346.

Construction. The Workmen's Compensation Act is highly re-
 5 medial, and should have a broad and liberal construction in

MASTER AND SERVANT CONTINUED

aid of accomplishing the object of the enactment. *Pierce v. Bekins V. & S. Co.*, 185—1346.

Construction. No exception based on the place where the injury occurred is found in the language of the Workmen's Compensation Act, and the Supreme Court cannot supply an exception. *Pierce v. Bekins V. & S. Co.*, 185—1346.

Construction—Injuries Outside of State. The Supreme Court is not precluded from holding that the Workmen's Compensation Act covers injuries sustained in another state because the act does not, in terms, declare that the statute shall have such an effect; and where the language of the statute is broad enough to cover such injuries, and such a construction effects the broad, beneficial object of the enactment, the court may so find. *Pierce v. Bekins V. & S. Co.*, 185—1346.

Construction—Extra-territorial Effect. A hiring under the Workmen's Compensation Act is an enforceable contract to compensate for injuries sustained and arising out of the employment, whether sustained in this state or outside. Accordingly, *held* that an employee employed in Iowa, but injured in Nebraska, while driving a van in the line of his employment, would be entitled to recover under the provisions of the Iowa Act, Sections 2477-m, 2477-m2, 2477-m6, 2477-m7, 2477-m8, 2477-m11, 2477-m14, 2477-m19, 2477-m21, 2477-m29, 2477-m33, Code Supp. 1913. *Pierce v. Bekins V. & S. Co.*, 185—1346.

Construction—Meetings at Place of Hiring, Where Injury Outside of State. That the meeting of the arbitration committee cannot be held at the place of injury, under the Workmen's Compensation Act, where the employee is injured in another state, and that the award cannot be returned to an Iowa district judge sitting there, does not deprive the employee of compensation under the act for injuries suffered in another state; as the act may be said to be reasonably satisfied by holding that the arbitration committee may meet at the place where the hiring was done, and the court may act at the place where the contract was entered into. *Pierce v. Bekins V. & S. Co.*, 185—1346.

MASTER AND SERVANT CONTINUED TO MUNICIPAL CORPORATIONS

Exemplary Damages. Acceptance of compensation under the
10 Workmen's Compensation Act forecloses all opportunity to
recover exemplary damages of the master. Stricklen v.
Pearson Cons. Co., 185—95.

Standards of Safety. A master is not deprived of the benefit
11 of the Workmen's Compensation Act by failing to initiate
proceedings for the establishment of "standards of safety,"
as provided by Section 2477-m19, Code Supp., 1913. Stricklen
v. Pearson Cons. Co., 185—95.

Interstate Commerce. A servant injured at a time when he is
12 engaged in interstate commerce must resort to the Fed-
eral Employers' Liability Act,—may not resort to the state
Workmen's Compensation Act. Des Moines U. R. Co. v.
Funk, 185—330.

MORTGAGES. See BANKRUPTCY, 1; ESTOPPEL, 1, 6; RE-
MAINDERS; TENANCY IN COMMON.

VALIDITY.

Bona-Fide Assignee. Evidence reviewed, and held sufficient to
1 show that plaintiff was a bona-fide purchaser of a mortgage.
Bank of Wayland v. Staldley, 185—1286.

FORECLOSURE AND REDEMPTION.

Marshaling of Assets. A mortgagee who is entitled to satis-
2 faction from either of two tracts of land shall not so exer-
cise his election as to exclude another and subsequent mort-
gagee who is entitled to resort to only one of said tracts.
Bisby v. Walker, 185—743.

MUNICIPAL CORPORATIONS. See CONTRACTS, 12; IN-
JUNCTION, 1; PARTIES, 1.

ORDINANCES.

Improper Mode of Performance of Powers. Courts cannot in-
1 terfere with the acts of a city under a power clearly con-

MUNICIPAL CORPORATIONS CONTINUED

ferred by the legislature, but may interfere to prevent the arbitrary and unreasonable or oppressive mode or manner of performing what the city council, in its legislative discretion, may order or require. *Central L. A. Soc. v. City of Des Moines*, 185—573.

OFFICERS, AGENTS, AND EMPLOYEES.

Arbitrary and Oppressive Acts of City Council. Where certain

- 2 powers are conferred on the city council, and the manner or mode of performance has not been directed by the legislature, such manner or mode ought not to be arbitrary or oppressive; and when this is attempted, the courts may interfere, and prevent an unreasonable course on the part of the city in carrying out what the city council has enacted. *Central L. A. Soc. v. City of Des Moines*, 185—573.

Arbitrary and Unreasonable Acts—Reducing Width of Sidewalks.

- 3 Allegations of a petition that the city council acted arbitrarily and unreasonably in passing a resolution reducing the sidewalks to five feet in front of plaintiff's office building held insufficient to justify the interference of the courts, the petition failing to show that the street was not similarly narrowed on other portions of the street other than opposite plaintiff's building, and that the width of the street may not have been apportioned between pedestrians and the general traffic in strict conformity to the necessities of each; and *held* that the facts alleged in the petition were not sufficient to show that the acts complained of were arbitrary, unreasonable, and oppressive, or to overcome the presumption that the city council had not acted otherwise than legally and in good faith. *Central L. A. Soc. v. City of Des Moines*, 185—573.

PUBLIC IMPROVEMENTS.

Contract to Illegal Bidder. A contract, entered into in good faith

- 4 for the construction of a public sewer, and fully executed, will not be declared illegal because the same was let on a bid which was, in part illegal, and consequently in excess of other bids, (1) when the illegality in such bid might have been eliminated by the council in letting the contract,

MUNICIPAL CORPORATIONS CONTINUED

(2) when the excess cost resulting from such illegality in the bid is, after the completion of the work, accurately ascertainable, and is eliminated in the making of assessments, and (3) when such latter elimination reduces the cost below all offered bids. *North View Land Co. v. City of Cedar Rapids*, 185—1032.

Notice of Intention to Construct Sewer. A notice of intention
5 to construct a sewer, which fails to give the *location* of the sewer and the *kind* of materials which will be used in the construction, is fatally defective, even though the notice makes reference to the engineer's plat where such information is set forth. (Sec. 965, Code Supp., 1913.) *Davenport Loco. Works v. City of Davenport*, 185—151.

ASSESSMENT OF BENEFITS.

Conflicting Statutes in re Special Assessments. Section 817, Code,
6 1897, in so far as it provides for levy of special assessments in proportion to lineal frontage, was impliedly repealed by Section 792-a, Code Supplement, 1913, which provides for such levy in proportion to benefits. *Dickinson v. Incorporated Town of Guthrie Center*, 185—541.

Presumption from Assessment. He who appeals from a special
7 assessment must overcome the presumption of legality and equitableness which attends such assessment. *Dickinson v. Incorporated Town of Guthrie Center*, 185—541.

Adjacent Property. The property of a railway company, when
8 situated within 300 feet of a paved street, though not abutting thereon, may be specially assessed for the cost of paving, even though such property does not lie between the paved street and any other street. *Dickinson v. Incorporated Town of Guthrie Center*, 185—541.

STREETS AND ALLEYS.

Equitable Action to Remove Street Obstruction. A municipality
9 may proceed in equity for the removal of a privately maintained obstruction in the public street: e. g., platform scales. *Incorporated Town of Polk City v. Gemricher*, 185—278.

MUNICIPAL CORPORATIONS CONTINUED

Notice of Defect in Highway. The existence for two weeks of
10 an obvious defect in a public street carries constructive notice thereof to the municipality. *Hearn v. City of Waterloo*, 185—995.

Obstructions by Reason of Repairs. A city, in repairing its
11 streets, may, in so far as reasonably necessary, place *plainly visible* obstructions therein, and is not liable for injury to a pedestrian who, in full possession of sight, on a clear day, and, with no diversion of mind except such as is purely voluntary, falls thereover. So held where the obstruction was an ordinary fire hose laid on a smooth walk. *Cutshall v. City of Keokuk*, 185—808.

Right of Way at Intersections. A city may validly determine
12 by ordinance which of two vehicles, traveling on different intersecting streets without change of direction, shall have the right of way in crossing such intersection. (Sec. 755, Code, 1897.) *Seager v. Foster*, 185—32.

Speed of Automobiles. Municipalities may not validly regulate,
13 by penal ordinances, the speed of automobiles on the public streets, unless warning signs are first erected at points where the corporate line crosses public highways, *with an arrow on, or in connection with such signs*, pointing in the direction where the speed is to be reduced or changed. (Sec. 1571-m20, Code Supp., 1913.) *Incorporated Town of Decatur v. Gould*, 185—203.

Obstructions—Abutting Property Owners. Abutting property
14 owners have the right, for appropriate purposes, to make reasonable temporary obstructions of the streets. *Jones v. City of Fort Dodge*, 185—600.

Obstruction by Housing Over Sidewalk. The placing of hous-
15 ing over the sidewalk in front of a building by the abutting owner while he is reconstructing the building, where no other part of the street other than in front of the building is used, and where it is, in effect, a proper barricade, is not unlawful, and does not constitute a nuisance or negligence either on his part or the part of the city. *Jones v. City of Fort Dodge*, 185—600.

MUNICIPAL CORPORATIONS, CONTINUED

Plenary Power of Legislature—Delegation of Authority to Cities

16 **and Towns.** The legislature has plenary power over the streets and highways, and may delegate such authority to the cities and towns within which the streets are located; and the power to control, improve, and repair the streets is conferred on cities and towns under Section 753, Code, 1897, and Sections 751 and 792, Code Supp., 1913, without any prescription as to the manner of so doing. *Central L. A. Soc. v. City of Des Moines*, 185—573.

TORTS—ACTS OR OMISSIONS OF OFFICERS.

Non-Governmental Acts. The act of an employee of the city, 17 while in the course of his employment, in conveying policemen to their beats, in an automobile owned by the city, is not, *in and of itself*, a governmental act. It follows that the city is liable in such case for the proximate negligence of the employee. *Jones v. City of Sioux City*, 185—1178.

Ministerial and Governmental Negligence. A city which is prox- 18 imately negligent in an act which is clearly non-governmental is none the less liable because such negligence became proximate while the city was doing a governmental act. *Jones v. City of Sioux City*, 185—1178.

TAXATION.

Municipal Water Plant. Under Sections 724, 747-a, 748, and 894, 19 Subdiv. 5, Code Supplement, 1913, and Sections 749, 750, Code, 1897, the duty and power of the waterworks trustees is not alone confined to the fixing of rental rates, but also extends to the estimating the deficit, if any, to be provided for by the tax; and upon the performance of this duty by the trustees, the city council is obliged to levy the tax therefor, provided the trustees have not transcended the provisions of the statutes; and this obligation of the city and its agencies is not optional nor discretionary, but is mandatory, that a sufficient sum total be provided for the maintenance of the plant. *Jensen v. Zurmuehlen*, 185—593.

Municipal Water Plant—Levy to Produce Surplus. The allega- 20 tions of answer, that the levy sought to be made in a suit

MUNICIPAL CORPORATIONS CONTINUED

Notice of Defect in Highway. The existence for two weeks of
10 an obvious defect in a public street carries constructive notice thereof to the municipality. *Hearn v. City of Waterloo*, 185—995.

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MUNICIPAL CORPORATIONS CONTINUED

Plenary Power of Legislature—Delegation of Authority to Cities
 16 and Towns. The legislature has plenary power over the streets and highways, and may delegate such authority to the cities and towns within which the streets are located; and the power to control, improve, and repair the streets is conferred on cities and towns under Section 753, Code, 1897, and Sections 751 and 792, Code Supp., 1913, without any prescription as to the manner of so doing. Central L. A. Soc. v. City of Des Moines, 185—573.

TORTS—ACTS OR OMISSIONS OF OFFICERS.

Non-Governmental Acts. The act of an employee of the city,
 17 while in the course of his employment, in conveying policemen to their beats, in an automobile owned by the city, is not, *in and of itself*, a governmental act. It follows that the city is liable in such case for the proximate negligence of the employee. Jones v. City of Sioux City, 185—1178.

Ministerial and Governmental Negligence. A city which is prox-
 18 imately negligent in an act which is clearly non-governmental is none the less liable because such negligence became proximate while the city was doing a governmental act. Jones v. City of Sioux City, 185—1178.

TAXATION.

Municipal Water Plant. Under Sections 724, 747-a, 748, and 894,
 19 Subdiv. 5, Code Supplement, 1913, and Sections 749, 760, Code, 1897, the duty and power of the waterworks trustees is not alone confined to the fixing of rental rates, but also extends to the estimating the deficit, if any, to be provided for by the tax; and upon the performance of this duty by the trustees, the city council is obliged to levy the tax therefor, provided the trustees have not transcended the provisions of the statutes; and this obligation of the city and its agencies is not optional nor discretionary, but is mandatory, that a sufficient sum total be provided for the maintenance of the plant. Jensen v. Zurmuehlen, 185—593.

Municipal Water Plant—Levy to Produce Surplus. The allega-
 20 tions of answer, that the levy sought to be made in a suit

MUNICIPAL CORPORATIONS CONTINUED TO NEGLIGENCE

of waterworks trustees against a city council would only increase a surplus, held good on demurrer, as trustees have no statutory duty to accumulate a surplus. *Jensen v. Zurmuehlen*, 185—593.

Agricultural Lands—Electric Light System. Lands within city
21 limits, occupied and used in good faith for agricultural purposes, and not divided into parcels of 10 acres or less, are exempted, under Section 616, Code Supp., 1913, from all city taxes except for road purposes, and cannot be taxed for electric lighting purposes, under Section 894, Subdiv. 6, Code Supp., 1913. *Huddleston v. City of Webster City*, 185—706.

NAVIGABLE WATERS. See BOUNDARIES, 1.

NEGLECTANCE. See HIGHWAYS, 2, 4; MUNICIPAL CORPORATIONS, 18; PRINCIPAL AND AGENT, 1; RAILROADS; SALES, 8.

PERSONAL CONDUCT IN GENERAL.

Landlord and Tenant—Injuries of Employee of Tenant—Suffi-
1 **ciency of Evidence.** Evidence reviewed, and held sufficient to present a jury question, and to sustain a verdict, on the ground that the defendants were negligent in permitting water to leak from the ceiling, where an employee of the tenant was injured by the fall of plaster from the ceiling, during construction work being carried on above by the landlord. *Mortrude v. Martin*, 185—1319.

Speed of Automobile. The speed of an automobile creates a
2 *presumption* of negligence only in case the speed exceeds 25 miles per hour, but a driver may be negligent in driving at a lower speed, and, under proper evidence, it is error to fail to submit such latter issue. *Shaffer v. Miller*, 185—472.

Performing Act in Ordinary Way. It is not negligence to per-
3 form an act in the manner in which such an act is ordinarily performed. *O'Brecht v. Cedar Rapids Oil Co.*, 185—553.

NEGLIGENCE CONTINUED

PROXIMATE CAUSE.

Non-Causative Connection. Negligence without causative connection with injury becomes immaterial. So held as to an explosion of inflammable oil. *O'Brecht v. Cedar Rapids Oil Co.*, 185—553.

Operation of Automobile. Where a boy who was on the street was, on account of the construction of housing constructed over the sidewalk, struck and injured by an automobile which was being negligently operated, held that the negligence of the driver of the automobile, and not the housing, was the proximate cause of the boy's injury. *Jones v. City of Fort Dodge*, 185—600.

Condition of Street. Evidence reviewed, and held quite insufficient to show that the alleged negligent condition of a street was the proximate cause of an accident. *Kimler v. People's G. & E. Co.*, 185—439.

Absence of Warning Signals. One who has full knowledge of the presence of a train in ample time to avoid all injury may not predicate proximate cause on the absence of warning signals. *Frush v. Waterloo, C. F. & N. R. Co.*, 185—156.

Last Clear Chance—Sufficiency of Evidence—Employee on Railway Right of Way. Evidence reviewed, and held sufficient to justify the submission to the jury of the case on the theory of last fair chance, where a railroad employee operating a mower on the railway right of way was struck by a train. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

Last Clear Chance and Actual Knowledge. Actual knowledge of the negligence of an injured party is essential to the application of the doctrine of "last clear chance,"—not reasonable ability to discover such negligence. *Carr v. Inter-Urban R. Co.*, 185—872.

CONTRIBUTORY NEGLIGENCE.

Injuries to Tenant—Sufficiency of Evidence. Evidence reviewed, and held a question for the jury as to whether the em-

NEGLIGENCE CONTINUED

ployee of a tenant, injured by being struck with a piece of plaster falling from the ceiling, was guilty of contributory negligence. *Mortrude v. Martin*, 185—1319.

Falling into Hole Near Sidewalk. Evidence reviewed, and held
11 insufficient to show contributory negligence *per se* in stepping into a hole near the edge of a sidewalk. *Hearn v. City of Waterloo*, 185—995.

Acts Constituting—Sufficiency of Evidence. Evidence reviewed,
12 and held that whether the passenger in an automobile, where the driver was negligent, was guilty of contributory negligence in not requiring the driver to exercise proper care, was a question for the jury, and that the same did not constitute negligence as a matter of law. *Cram v. City of Des Moines*, 185—1292.

IMPUTED NEGLIGENCE.

Sufficiency of Evidence—Non-Joint Venture. Evidence reviewed,
13 and held sufficient to go to the jury upon the question as to whether the passenger and the driver of an automobile were engaged in such a joint enterprise that the negligence of the driver could be imputed to the passenger. *Cram v. City of Des Moines*, 185—1292.

Directions by Passenger as to Place to Be Driven. The negligence of the driver of a vehicle is not imputable to the passenger merely because the passenger suggested a ride, and directed as to the place where the car was to be driven. *Cram v. City of Des Moines*, 185—1292.

Driver's Negligence Not Imputable to Guest. The negligence
15 of the driver of an automobile cannot be imputed to a guest having no authority or control over the driver. *Nels v. Rider*, 185—781.

TRIAL.

Undisputed Facts. Undisputed facts bearing on negligence
16 present questions of law for the court. *Peterson v. Chicago, M. & St. P. R. Co.*, 185—378.

NEGLECT CONTINUED

Instructions—Recklessness and Willfulness as Elements of Con-
 17 **tributory Negligence.** Recklessness or willfulness is not a *necessary* element of contributory negligence, and an instruction which so states or infers is prejudicially erroneous. *Wells v. Chamberlain*, 185—264.

Instructions—Undue Emphasis—Unequal Degree of Care. Whether
 18 instructions are prejudicially erroneous which place the duty of ordinary care on plaintiff, and possibly, in effect, on defendant, yet, in addition, call the jury's attention to the dangerous instrumentality which *defendant* was handling and the "high" degree of care which he should exercise, etc., *quære*. (The court suggests modification on retrial.) *Wells v. Chamberlain*, 185—264.

Instructions—Duty to Define Statutory Terms—"Proper Insula-
 19 **tion."** Statutory terms which carry a technical meaning must, without request, be defined by the court in its charge to the jury, in actions based on injury by reason of the violation of such technical terms. So held as to the term "*properly insulated*," in the statute governing maintenance of electric transmission lines. (Sec. 1527-c, Code Supp., 1913.) *Wells v. Chamberlain*, 185—264.

Last Clear Chance Doctrine—Erroneous Instruction Only Applies
 20 **upon Discovered Peril.** An instruction applying the last chance doctrine, and stating that the plaintiff would be entitled to recover, not only if the employees of the company saw plaintiff upon the track in danger of being injured, but also "if it *ought* to have been known to defendant's employees, in the exercise of reasonable and ordinary care on their part, that they might, by the exercise of reasonable diligence," have avoided a collision, is erroneous, as the last chance rule does not apply unless the person injured was actually *seen*. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

Last Clear Chance Doctrine—Erroneous Instruction—Harmless
 21 **Error.** An instruction erroneously stating that the plaintiff could recover under the last chance doctrine if defendant *ought* to have known of plaintiff's peril, held harmless error, in view of the fact that the employees of the railway operating the train testified that they saw the em-

NEGLIGENCE CONTINUED

TO

NEW TRIAL

ployee's outfit when the train was half a mile away, and that they continued looking through the cab windows up to the time of the collision. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

NEW TRIAL.**DISCRETION OF COURT.**

Newly Discovered Evidence. Ordinarily, the granting of a new
1 trial for newly discovered evidence is largely a matter of discretion with the trial court. *De Witt v. Larson*, 185—1138.

Newly Discovered Evidence—Insufficient Showing. The trial
2 court is within its discretion in refusing a new trial for newly discovered evidence when the movant fails to negative negligence in sooner securing such evidence. *De Witt v. Larson*, 185—1138.

Ground Justified by Record. An order for new trial on a ground
3 clearly justified by the record is quite conclusive on the appellate court. *Benefiel v. Semper*, 185—410.

When Court Has No Discretion. Courts have no discretion to
4 grant a new trial on the ground of newly discovered evidence when there is no evidence whatever to support the same. *Pyle v. Herring*, 185—646.

MISCONDUCT OF COURT.

Re-reading Instructions. It is not misconduct for the court,
5 after long deliberation of the jury, to re-read his instructions, and that, too, with such emphasis and intonations of voice as he may think necessary in order to convey understanding. *In re Estate of Osborn*, 185—1307.

PROCEEDINGS TO PROCURE.

Motion (?) or Petition (?) An application for a new trial, in
6 the form of a *motion* made after the expiration of three

NEW TRIAL CONTINUED TO PARTIES

days after the return of verdict (Sec. 3756, Code, 1897), may be treated as a *petition* for a new trial, under Sec. 4091, Code, 1897, *when said so-called motion contains all the matters required in a petition.* Pyle v. Herring, 185—646.

Hearing on Petition—Production of Evidence—Waiver. Evidence
7 in support of a *petition* for a new trial, filed subsequent to the expiration of three days after the return of the verdict, *must be produced precisely as required in any ordinary proceeding*, and the one opposing such petition does not waive such requirement by simply failing to demand that the petitioner make such production. Pyle v. Herring, 185—646.

PARENT AND CHILD. See PRINCIPAL AND AGENT, 9.

PARTIES.

Municipal Corporations. A municipal corporation which is a
1 customer of a public utility corporation may maintain injunction to prevent an unauthorized or unjustified increase in rates. Town of Williams v. Iowa Falls Elec. Co., 185—493.

Intervention—Right to Intervene. An owner of land along a spur
2 track, who has sold part of the same, with an agreement to defend his grantees in the use of switch tracks, has such an interest as to be allowed to intervene in a suit brought by another shipper, seeking to restrain the railway company from allowing the use of the track by other shippers. Northern Grav. Co. v. Muscatine N. & S. R. Co., 185—1259.

Defendants—Bank Deposits—Action Against Bank and Claimant
3 of Deposit. One having the bank passbook and claiming to be the owner of a deposit is a proper party defendant, under Sections 3462, 3466, Code, 1897, in an action brought against the bank for said deposit. Stevens v. Peoples Sav. Bank, 185—619.

PARTNERSHIP

TO

PENITENTIARIES

PARTNERSHIP. See EXEMPTIONS; FRAUDS, STATUTE OF, 1.

Creation and Requisites—Supplying Building and Funds to Run a
1 **Store.** Where the owner of a store building supplied the building and funds for the operation of a grocery store, under an arrangement whereby he was to receive rent and interest and the storekeeper was to have all the profits, the owner retaining title to the stock, a partnership was not created. *Brenard Mfg. Co. v. Sketchley Store*, 185—694.

Estoppel by Holding Out. He who holds himself out as a part-
2 ner is thereby estopped to deny liability as a partner to any creditor who relies thereon. *Cutbill v. Harrington*, 185—537.

PAYMENT.

Retention on Uncommunicated Condition. One who receives a
1 payment with knowledge that it has been made on a particular condition will be presumed to irrevocably assent to such condition, unless he affirmatively shows that, upon receipt of such payment, he *promptly* and *actually* brought home to the one making the payment the intention to hold it on some other and different condition. *McDonald v. Equitable L. Assur. Soc.*, 185—1008.

Payments under Agreed Interpreter. Bona-fide payments under
2 a contract, in accordance with the interpretation of one mutually and specially chosen for that purpose, are final and non-recoverable. *Nishnabotna Drain. Dist. v. Lana Cons. Co.*, 185—368.

PENITENTIARIES.

Defined. "The Reformatory," at Anamosa, is a penitentiary, within the meaning of Section 4897-a, Code Supp., 1907,—now appearing, in an amended form, as Section 4897-a, Code Supp., 1913. *State v. Smitch*, 185—80.

PHYSICIANS AND SURGEONS TO PLEADING

PHYSICIANS AND SURGEONS. See **CONTRACTS**, 7;
DAMAGES, 2; **LIBEL AND SLANDER**, 1.

Effect of Improper Filing of Certificate. Failure of a duly certified physician to file his certificate of authority in the office of the county recorder, as provided by law, does not render unenforceable his contract with another physician by which the latter agreed to refrain from practicing his profession in a certain locality, and for a stated time. (See Sec. 2580, Code, 1897.) *Rowe v. Toon*, 185—848.

PLEADING. See **FRAUD**, 2.

IN GENERAL.

Conclusion of Law—"Faulty and Illegal Acknowledgment." Allegation in an answer that a contract was improperly recorded because of its faulty and illegal acknowledgment, but without any statement of *facts* constituting the fault or illegality complained of, stated a legal conclusion, and raised no issue of fact upon any other allegation of the petition. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

Necessity for Prayer, Etc. Plea, prayer, and proof are essential conditions precedent to the entry of judgment. So held where the court erroneously entered judgment in the absence of either plea or prayer. *Schuster Bros. v. Davis Bros.*, 185—143.

Waiver of Insufficiency. A pleading which has been treated in the trial court as sufficient will be regarded as sufficient on appeal. *Beck v. Scott*, 185—401.

ADMISSIONS.

Insufficiency of Reply—Waiver by Failure to Object. By failure to interpose any objection to reply of plaintiff that award of arbitrators was so grossly inadequate as to make said award null and void, defendant conceded in the trial court that, if it were duly proved that the award was inade-

PLEADING CONTINUED

quate, plaintiff would thereby avoid the award. *Turner v. Hartford F. Ins. Co.*, 185—1363.

Admissions—"Duly Recorded." Where the petition alleged facts
5 showing that a conditional sale contract was "*duly filed for record*," an admission in the answer formally admitting this allegation was a concession that it was *properly recorded*, and so executed as to make it eligible for record, and eliminated the question of constructive notice. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

MATTERS SPECIALLY PLEADABLE.

Statute of Limitations. The statute of limitations must be
6 specially pleaded. *Holdorf v. Holdorf*, 185—838.

ANSWER.

Sufficiency of Denial. An allegation by plaintiff that defendant
7 was a principal on a promissory note need not necessarily be met by a general denial,—is properly met by an allegation by defendant that he was a surety only. *Mockler v. Lohman*, 185—448.

AMENDMENTS.

Conforming Pleading to Proof. Where the parties treated the
8 pleading as presenting a jury question, and an allegation of malice, made in an amendment, did not call for any evidence in addition to what had been offered, a request to be allowed to file such amendment should have been granted, and its refusal was prejudicial error. *Zeck v. Bowers*, 185—1267.

ISSUES, PROOF, AND VARIANCE.

Conversion Plus Unnecessary Allegation. A plaintiff who pleads
9 that his discount notes were sold by his agent to defendant, and that defendant converted said notes, in part, to his own use, by paying said agent in property other than money, without authority from plaintiff so to do, and that

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PRINCIPAL AND AGENT

defendant now refuses to pay plaintiff the amount of such unauthorized payment, need *not* prove a further allegation *that said sale was made under a prior general agreement therefor with defendant.* Garland Corp. v. Waterloo L. & T. Co., 185—190.

Unassailed Plea—Point Raised Sua Sponte. Proof of the plea
10 that there had been a full settlement of all matters involved in a cross-petition which was in no way challenged in the trial court, made a defense, even though, on challenge, such plea would have been held insufficient; and the Supreme Court will, on its own motion, raise the point that the fact that the plea is insufficient presents no reversible error. City of Oskaloosa v. Boyd, 185—1051.

Conspiracy to Slander—Individual Slander. An averment of a
11 conspiracy to slander will not, on failure of proof of conspiracy, authorize a judgment for an individual slander. (Secs. 3599, 3639, Code, 1897.) Yocum v. Husted, 185—119.

Sufficiency of Allegations—Injunction against Trustee. While
12 one may, under a prayer for general relief, have any relief in equity to which the allegations of his petition entitle him, the Supreme Court will not reverse an order dissolving a temporary writ restraining a trustee from delivery of property to one entitled thereto under stipulation, simply because the allegations of a cross-petition praying for the modification of a decree in a divorce case respecting alimony happen to contain the necessary averments for the appointment of a guardian, where the same was neither suggested nor asked therein, and the specific relief asked is inconsistent with the application for the appointment of a guardian. Carr v. Carr, 185—1205.

PRINCIPAL AND AGENT. See BROKERS; PLEADING, 9;
PROCESS, 2; SALES, 6, 12; WITNESSES, 2.

LIABILITY OF PRINCIPAL.

Negligence of Architect and Engineer. The owner of a building
1 is liable for the negligence of his architect and engineer while the latter is acting within the scope of his em-

PRINCIPAL AND AGENT CONTINUED

ployment in constructing the building. *Mortrude v. Martin*, 185—1319.

AUTHORITY OF AGENT.

Burden of Proof. The burden of proof is on one seeking to
2 charge a principal on a contract, to show that the agent
had authority from the principal to sign the contract.
Brenard Mfg. Co. v. Sketchley Store, 185—694.

Contracts—Ratification—Evidence. Evidence reviewed, and held
3 that, where the owner of a store building had supplied
funds for the operation of a grocery store, he was not
liable on a contract made by the storekeeper for the pur-
chase of pianos and jewelry for use in a trade extension
scheme, he never having authorized, approved, or ratified
the contract. *Brenard Mfg. Co. v. Sketchley Store*, 185—
694.

Authority to Sell or Find Purchaser. Naked authority to sell
4 land at a specified price, or simply to find a purchaser, em-
braces no implied authority to the agent to make repre-
sentations as to the character or condition of the land.
Ellison v. Stockton, 185—979.

Dual Agency. Statements by a borrower of money that he
5 would sign the note only in a representative capacity, made
to his own agent to *procure the loan*, do not bind the payee
in the note, even though such agent was payee's agent
to *make the loan*. *Schuling v. Ervin*, 185—1.

Conduct as Showing Authority. Prima-facie authority of an
6 agent is shown by evidence that his name appeared upon
the principal's letterhead as assistant treasurer; that he
acted in the contract matter in question ostensibly on be-
half of the principal; that he had the subject-matter in
question in his possession, just prior to the bringing
of suit therein; and that he was present and active at the
trial, ostensibly on behalf of the principal. *Goodman Mfg.
Co. v. Mammoth V. C. Co.*, 185—253.

Powers of Agent—No Ratification Without Knowledge. To bind
7 the owner of property by acts of agent in letting pur-

PRINCIPAL AND AGENT CONTINUED TO

PRINCIPAL AND SURETY

chaser into possession, after an initial payment, but before delivery of deed, it must appear that the agent had authority from the owner; and, in the absence of knowledge on the part of the owner that the agent had so assumed to act in his behalf, there could be no ratification. *Waterman v. Wood*, 185—897.

LIABILITY OF AGENT.

Agent's Liability to Third Persons—Contracts. There is no liability on the part of an agent to a third person, where the contract is in the name of the principal, and there is no claim of wrongful representation or lack of authority to act. *Brenard Mfg. Co. v. Sketchley Store*, 185—694.

UNAUTHORIZED ACTS—RATIFICATION.

Adopting Unauthorized Act. The authority of a parent to enter into a contract for and on behalf of his children becomes quite immaterial when the said children unreservedly adopt the acts of the parent. *Stutsman v. Crain*, 185—514.

PRINCIPAL AND SURETY. See GUARANTY.

Pleading Counterclaim. A surety may, with the consent of the principal, interpose any counterclaim which would be available in favor of the principal as against such indebtedness. *Cohn, Baer & Berman v. Bromberg*, 185—298.

Non-Receipt of Consideration. The fact that the signer of a promissory note received no part of the consideration may have persuasive bearing on the issue of principalship or surety. *Mockler v. Lohman*, 185—448.

Estoppel by Proceeding Against Undisclosed Principal. Procuring an uncollectible judgment against an undisclosed principal in a note works no estoppel on the payee to proceed against the agents, who have, in legal effect, assumed the position of sureties on the note. *Schuling v. Ervin*, 185—1.

PRINCIPAL AND SURETY CONTINUED TO

PROCESS

Judgment Against Principal Binding on Surety. An unappealed
4 judgment against a principal, on his defensive plea of
want of consideration and unauthorized material alteration,
is conclusive on the codefendant surety. *Sherman v. Smith,*
185—654.

Concealment of Material Facts. Principle recognized that sure-
5 ties are released by the fraudulent concealment, on the part
of the one taking the guaranty, of facts which *increase the*
risk of the surety, and induce him to enter into the con-
tract under a false understanding of the facts. *Sherman*
v. Smith, 185—654.

Non-Material Concealment. The *fraudulent* concealment of the
6 fact that an incorporated drug company,—the sale of the
corporate stock of which was the subject-matter of the
suretyship,—was, at the time of the sale, defendant in an
undetermined action for injunction against the *unlawful*
sale of intoxicating liquors, is not such *material* conceal-
ment as will release the surety. *Sherman v. Smith,* 185—
654.

Surety Becoming Principal by Operation of Law. A surety, as
7 between himself and his principal, becomes a principal by
voluntarily causing himself to be subrogated to all the
rights of the principal. *Davis v. Davis,* 185—179.

PROCESS.

Service—Presumption. The presumption is in favor of the re-
1 turn of the officer serving an original notice, and this pre-
sumption can only be rebutted upon clear and satisfactory
evidence, and the burden is upon the party attacking the
return to show, by direct and satisfactory evidence, that the
presumption is not well founded. Evidence chiefly by wit-
nesses interested held insufficient to overcome this pre-
sumption, which was also supplemented by positive testi-
mony of the officer that service was made, and by other
corroborative testimony. *Pyle v. Stone,* 185—785.

Discharged Agent. Service is ineffectual when made on one
2 who has been defendant's agent, but whose employment has

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RAILROADS

been terminated prior to the service in question. *State v. Bitter Root Val. Ir. Co.*, 185—60.

RAILROADS. See CARRIERS; EVIDENCE, 8, 10, 27; MUNICIPAL CORPORATIONS, 8; NEGLIGENCE, 7-9, 20, 21; PARTIES, 2.

Crossing Accidents—Reliance on Precautions—Contributory Negligence. Where a person injured at a railway crossing knew of the automatic signaling device at the crossing, and was induced by its failure to work to believe the crossing safe, the jury had a right to consider that fact in determining whether he exercised ordinary care in attempting to go upon the crossing. *Brose v. Chicago G. W. R. Co.*, 185—867.

Crossing Accidents—Signals—Negligence—Negative Testimony. Where plaintiff and his companion testified that they listened intently for signals, before going upon a railway crossing, and heard none, and the train crew were not examined as witnesses upon that subject, evidence held sufficient to go to the jury upon negligence in not giving signals. *Brose v. Chicago G. W. R. Co.*, 185—867.

Self-Preservation and Reliance on Signals. The presumption that a person will act in harmony with the recognized instinct of self-preservation, aided by the legal right of deceased to rely on the giving of warning signals by an engine crew in approaching a public crossing, at great speed, on a dark night, may create a jury question on the issue of deceased's negligence in entering upon such crossing, even though, under other conditions of light at the same place, the deceased might have had an unobstructed and safe view of an approaching train for a distance varying from 260 feet to one-half mile. *Wensel v. Chicago, M. & St. P. R. Co.*, 185—680.

Estoppel to Dispute Public Nature of Crossing. A railway may not be estopped from insisting that, at the time of an accident, a crossing was not public, when it had removed said crossing and ceased the maintenance of the same long prior to the accident in question. *Wensel v. Chicago, M. & St. P. R. Co.*, 185—680.

RAILROADS CONTINUED TO REFORMATION OF INSTRUMENTS

Reasonable Crossings Per Se. A railway crossing with planks

- 5 extending three inches above the dirt approach of the public highway is *per se* a reasonably safe crossing. *Peterson v. Chicago, M. & St. P. R. Co.*, 185—378.

Neglect in Crossing Maintenance. Railway crossings which are

- 6 reasonably safe for travel in the usual and ordinary way are all-sufficient, and on a fact issue as to negligence in maintaining such crossing, it is error for the court to fail to explain to the jury the nature and extent of the company's duty. *Peterson v. Chicago, M. & St. P. R. Co.*, 185—378.

Negligence—Sufficiency of Evidence. Record reviewed, and held

- 7 insufficient to establish any of the grounds of negligence alleged against a railway company by one engaged with his team in cutting weeds upon the right of way. *Bowery v. Wabash R. Co.*, 185—288.

Negligence—Trespassers—Only Duty Not to Injure Willfully or

- 8 **Wantonly.** No duty toward a trespasser arises until he is actually seen in a position of peril, and the extent of the duty then is, not to injure him wantonly or willfully, and to do everything that can reasonably be done to avoid injuring him. *Trotter v. Chicago, R. I. & P. R. Co.*, 185—1045.

Negligence—Trespassers—Duty to Warn after Discovering Peril.

- 9 Where a trespasser was seen in such a place that there was no reason to anticipate his going on the railway track, there was no negligence in not slowing up the train or giving him warning. *Trotter v. Chicago, R. I. & P. R. Co.*, 185—1045.

REFORMATION OF INSTRUMENTS.**Mutual Mistake.** A mutual mistake in the execution of a deed,

- 1 by which less land is conveyed than is called for by the contract, demands reformation, as between the parties to the deed. *Townsend v. Woodworth*, 185—99.

Voluntary Deed. A voluntary deed,—one supported by no con-

- 2 sideration other than the affection which the grantor held

REFORMATION OF INSTRUMENTS CONT'D. TO

RELEASE

for his brother, grantee,—may not be reformed or enforced.
Dolph v. Wortman, 185—630.

RELEASE.

Unintentional Misstatement of Present Fact. A statement by a
1 physician that an injured party "was all right to go to
work," "was all healed up," "was just as good as ever,"
based on the injured party's apparent condition, and on the
history of his injury, is a statement of *present fact*, and, if
untrue, even unintentionally so, is sufficient to avoid a re-
lease entered into in full reliance that such statement was
true. Malloy v. Chicago G. W. R. Co., 185—346.

Release at Law. The avoidance of a release on the ground of
2 mutual mistake may be had in an action at law. Malloy
v. Chicago G. W. R. Co., 185—346.

Return of Consideration. A release may be avoided for mutual
3 mistake *without returning the consideration received* for
the release, when it appears that the consideration was
given to the injured party for known and acknowledged
injuries, and for nothing else,—i. e., loss of time. And
evidence is admissible to show for what the consideration
was given. Malloy v. Chicago G. W. R. Co., 185—346.

Fraud—Jury Question. *Semble*, that a positive statement by the
4 physician of a railway company, untrue in fact, that an
employee "was as good as ever," made with full knowledge
that the statement would be used as a basis for settlement
with the company, is sufficient to carry to the jury the issue
of fraud in the subsequently executed release. Malloy v.
Chicago G. W. R. Co., 185—346.

Degree of Proof to Overthrow. A fair preponderance of evi-
5 dence is sufficient to overthrow a release on the plea of
mental incompetency at the time of signing. Wangen v.
Upper Iowa Power Co., 185—110.

Tender in Case of Avoidance. Where it is sought to set aside
6 a release or settlement on the ground of fraud, a tender
of the consideration paid need not be made *before* action
is commenced. Wangen v. Upper Iowa Power Co., 185—110.

SALES CONTINUED

TO

SALES

REMAINDERS.

Nature and Incidents. Contingent remainders may be mortgaged. *Bisby v. Walker*, 185—743.

REPLEVIN.

Converting Action of Replevin into Action for Conversion. Plaintiff in an action of replevin or detinue may dismiss as to the only defendant who is charged with the possession or detention of the property, and, by proper amendment, proceed against a sole remaining defendant *for conversion only*. So held where such amendment was inaptly denominated a "reply." (See Sec. 4164, Code, 1897.) *Head v. Hale*, 185—199.

SALES.**REQUISITES AND VALIDITY.**

Postponing Delivery and Payment. A contract of sale may be
1 complete, and therefore pass title, even though *delivery*
and *payment* are postponed. Whether the title does so pass
is, in its last analysis, a question of intent; and in determining this intent, the conduct of the parties may afford
illuminating light. *Moats v. Strange Bros. Hide Co.*,
185—356.

ACTIONS AND REMEDIES OF BUYER.

Retention of Defective Goods. Retention of palpably defective
2 goods for an unreasonable time, and without complaint,
bars rescission. *Bastian Bros. Co. v. Loomis*, 185—1379.

Non-Divisibility. One who enters into a non-divisible con-
3 tract for the purchase of two articles may not demand one
and decline the other. *Mitchell v. Caviness*, 185—446.

Breach of Seller—Damages. Where the seller of a cereal bev-
4 erage, manufactured under a secret process, knew that the
buyer could not obtain it elsewhere, and was purchasing

SPECIFIC PERFORMANCE

it as a wholesaler, and for the purpose of filling orders from retailers, on a breach of the contract for same the purchaser was not only entitled to damages by reason of the difference between the market value and the contract price, but also to loss of profits which he would have realized if the cereal beverage had been delivered as agreed; and testimony as to the buyer's having orders for the entire carload of the beverage at a certain price was admissible as tending to prove the profits lost. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Reduction of Damages—Profit on Other Goods Used for Filling Or-

- 5 ders. Testimony as to whether there was any profit on soft drinks furnished to the buyer's customers in place of a cereal beverage purchased, was admissible as bearing on the question of reduction of damages on a breach of the sale by the seller. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Damages—Evidence—Seller's Knowledge of Purpose of Purchase.

- 6 Testimony that the agent of the seller knew the nature of the business in which the purchaser was engaged, and the purpose for which he was purchasing a carload of cereal beverage, and statements by an agent that prompt shipment would be made, were admissible as bearing on the measure of damages, and as showing the knowledge of the seller of the purpose for which the goods were being purchased. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Breach of Seller—Delay in Inspection by Buyer. There was no

- 7 unreasonable delay in inspecting goods delivered, where the buyer was required to pay for the goods before delivery, and, having several customers from whom orders had been taken, he delivered to them the goods so ordered, and made an inspection when the goods were opened for sale at retail. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Failure of Buyer to Use Care after Delivery. The buyer's right

- 8 to recover for a breach of sale, where a cereal beverage was not of the quality of the sample, or was spoiled in transit by the seller's negligence, would not be defeated by the buyer's negligence to properly care for the same after its arrival. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

TAXATION

Sales by Sample—Acceptance of Part of Goods. The acceptance
9 by the buyer, under a contract of sale of a certain amount of the corn, of part of the corn, which was delivered, after knowing it was of inferior quality, precluded him from objecting, when the remainder was tendered, that it was of such inferior quality; and it was immaterial that, before accepting the part delivered, the buyer objected to its quality, or that the seller had sought to adjust the dispute by making a new contract, which, however, was not made. *Halloran v. Quaker Oats Co.*, 185—823.

WARRANTIES.

Secondhand Article Sold as New. The statement, duly relied on,
10 that a secondhand machine, purchased without opportunity for inspection, (a) is in first-class condition, (b) has not been used more than six months, and (c) will carry the same guaranty as a new machine, which latter guaranty calls for full capacity and efficiency, constitutes a warranty, not only as to its first-class condition and length of prior use, but that it was equal in capacity and efficiency to a new machine. This is true even though the seller did not know the precise use to which the machine would be put. *Merkle-Hines Mach. Co. v. Gaynor*, 185—210.

Reliance on Warranty. The presumption will be indulged that
11 a warranty was relied on, when it was an interwoven part of the contract of purchase and the consideration paid. *Merkle-Hines Mach. Co. v. Gaynor*, 185—210.

CONDITIONAL SALES.

Recording Acts—Acknowledgment. Where plaintiff's salesman
12 was authorized to make a conditional sale contract in his own name, and signed it in his own name, and was, so far as the purchaser was concerned, a principal in the contract, and his acknowledgment to the contract, as shown by the certificate, was as "his own act and deed," the certificate of acknowledgment was sufficient, under Section 2959, Code, 1897, although, in addition to his signature, the contract had the stamped signature of the plaintiff. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

TAXATION CONTINUED TO SET-OFF AND COUNTERCLAIM

Validity. A conditional sale of personal property is valid between the vendor and purchaser; but, to be valid against execution and attaching creditors and purchaser without notice, it must, under Section 2906, Code, 1897, be evidenced by a written instrument, acknowledged like conveyances of real estate, and filed for record. *American Laund. Mach. Co. v. Everybody's Laundry*, 185—760.

SCHOOLS AND SCHOOL DISTRICTS. See TAXATION, 6, 7.

Consolidated District—Size of Remaining Corporation. In determining the amount of land to be left in a school district, from which land has been taken to form a consolidated district, under the provisions of Section 2794-a, Code Supplement, 1913, that no school corporation from which said territory is taken shall, after the change, contain less than "four government sections," and so situated as to form a suitable school corporation, the unsurveyed portion of certain sections covered by a lake cannot be used in making up the necessary remaining "four sections," where the school district from which the land was taken did not extend beyond the shore line of the lake. *Rural Ind. School Dist. v. Ventura Cons. Ind. School Dist.*, 185—968.

SEDUCTION.

Non-Sufficient Seductive Acts. Seduction may not be predicated on an indefinite and questionable promise of marriage and hasty protestations of love, evidently made for the purpose of obtaining sexual gratification from a woman who is by no means unfamiliar with the "way of a man." *State v. Carson*, 185—568.

SET-OFF AND COUNTERCLAIM.

Right of Surety. A surety may not, in an action on the contract of suretyship, plead, as a counterclaim, claims assigned to him by the principal *after* the commencement of the action. (Sec. 3570, Code, 1897.) *Cohn, Baer & Berman v. Bromberg*, 185—298.

REMAINDERS

TC

STREET RAILWAYS

SPECIFIC PERFORMANCE.**Exchange of Lands—Conditions—Waiver of Performance.** In an

- 1 action for specific performance of a contract for exchange of lands, the burden is on the plaintiff to show that, before the action was commenced, he had performed or attempted to perform all conditions to be performed by him; and if he has failed, then the burden is upon him to plead and prove that the defendant waived performance of such conditions. *Goettsch v. Weseman*, 185—1213.

Exchange of Lands—Conditions—Maturity of Mortgage. Plaintiff,

- 2 having agreed to exchange land on which a mortgage was not to mature until the spring of 1920, could not offer to perform with a mortgage maturing a year earlier on said lands, and enforce specific performance against defendant. *Goettsch v. Weseman*, 185—1213.

STATUTES.**Revival of Unconstitutional Act.** An unconstitutional, but un-

- 1 repealed, statute becomes operative, without re-enactment, whenever the constitutional objections are removed. So held as to Sec. 2419, Code, 1897, which was originally violative of the Federal interstate commerce clause, but was subsequently revived by the passage of the Webb-Kenyon Act. *Stajcar v. Dickinson*, 185—49.

Judicial Insertion of Words. Construction may not be carried

- 2 to the extent of so inserting a word in an affirmative statute as to render it a negative statute, even though the court may, *aside the statute*, believe that the latter meaning was the one intended by the legislature. So held where the statute provided that an automobile light, at a point 75 feet in advance of the machine, *should* rise above 42 inches from the level surface upon which the vehicle was standing. *State v. Claiborne*, 185—170.

STREET RAILWAYS. See TAXATION, 2.

SALES CONTINUED

TAXATION. See MUNICIPAL CORPORATIONS, 19-21.

NATURE AND EXTENT OF POWER.

Constitutionality of Statute—Purpose and Need of Revenue. Un-

- 1 der Article 7, Section 7, Constitution of Iowa, the purpose for which revenue is needed must be set out in the act which authorizes the tax out of which the revenue comes; and the legislature is required to declare the need of revenue and the purposes for which it is needed; and the tax must be levied and exacted to meet the needs so found to exist. Taft Co. v. Alber, 185—1069.

CORPORATE PROPERTY AND STOCKS.

Capital Stock of Street Railways. Formula for determining the

- 2 value of the capital stock of a street railway company "over and above" the value of the tangible property of the corporation: Determine the *total* value of such *stock* by giving due consideration, *inter alia*, to the value and earning power of the business, its debts, dividends, etc., and subtract therefrom the value of the tangible property as fixed by the assessor in an *unquestioned* assessment on such tangible property. (Secs. 1323, 1343, Code, 1897.) Marshalltown L., P. & R. Co. v. Welker, 185—165.

LEVY AND ASSESSMENT.

Option Contract. An instrument where one party agrees to sell

- 3 another an *option* to purchase real estate, and a cash payment, is made, and possession of premises, with use and benefit thereof, is given to the party having right to purchase during entire period of contract, with right to elect not to purchase during the time, and to forfeit all payments, and with right to warranty deed when entire price has been paid, construed to be an *option*, and not a contract of sale, and as such, *held* not assessable for taxes. Lunde v. Town of Slater, 185—605.

Sufficiency of Objection. The objection that a contract was not

- 4 assessable as *money and credits*, made before the board of

SALES CONTINUED

review, raises sufficiently, under Section 1373, Code Supplement, 1913, the question that the contract was an *option* contract, and not taxable. *Lunde v. Town of Slater*, 185—605.

EQUALIZATION OF ASSESSMENT.

Undervalued but Inequitable Assessment. Assessing property at 5 less than its actual value still leaves the taxpayer with a grievance, when it is made to appear that such property is assessed higher, proportionately, than other property in the same taxing district. Evidence reviewed, and held insufficient to show such inequality as to justify a disturbance of the assessment. *Benson v. Town of LeClaire*, 185—506.

EXEMPTIONS.

Endowment Lands. Real estate which is owned by an educational institution of this state as a part of its endowment fund is exempt from taxation to the extent of 160 acres in any civil township, even though such township is coterminous with a city, and even though such real estate consists of ordinary city lots. In re Appeal of Trustees, 185—434.

Endowment Lands. On a plea by an educational institution of 7 this state that certain endowment lands belonging to it are exempt from taxation, the burden is on the public authorities to show, if such be the case, that such institution has already been granted an exemption of 160 acres on like lands in the civil township in question. In re Appeal of Trustees, 185—434.

COLLATERAL INHERITANCE TAX.

Treaty Limitations. A treaty provision to the effect that the 8 alien, nonresident "representatives" of an intestate resident of this state shall succeed to the estate on the same terms as the inhabitants of this state may succeed thereto, includes "heirs," etc., and limits the collateral inheritance tax to 5 per centum. *Brown v. Peterson*, 185—314.

TENANCY IN COMMON

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TENANCY IN COMMON.

Contribution for Deficiency Judgment. A cotenant must make contribution to his cotenant, not only for the amount paid by the latter in redeeming from a mortgage foreclosure sale, but also for the amount paid in satisfying a *deficiency* in the foreclosure judgment. *Davis v. Davis*, 185—179.

TOWNSHIPS.

When Coterminous with City. A civil township continues to legally exist, even though its boundaries are coterminous with the boundaries of a city, and even though the ordinary duties of township officers are performed by the municipal authorities. *In re Appeal of Trustees*, 185—434.

TRIAL. See CRIMINAL LAW; EVIDENCE; INSANE PERSONS, 3; INTOXICATING LIQUORS, 2, 6; JUDGMENT; JURY; NEGLIGENCE, 16-21; NEW TRIAL; RETLEVIN; SALES, 4-6.

METHOD OF TRIAL.

Items of Debit and Credit—Equitable Jurisdiction. That the controversy involves a large number of items of debit and credit which could be more *conveniently tried* to the court is not a ground of equitable jurisdiction. *Fleener v. Nugent*, 185—701.

Proper Calendar—Law Issues—Transfer in Toto to Equity.
2 Where an action is properly brought at law, the defendant, as to the equitable issues tendered by his counterclaim, is entitled to have them transferred to equity, under Section 3435, Code, 1897, but it is error for the court to transfer the entire case. *Fleener v. Nugent*, 185—701.

Trial on Law Side—Waiver of Objection. Where, in an action
3 brought at law by an insured for damages from lightning, the insurer urged on the law side that there had been an accord and satisfaction by award of arbitrators, and, upon

TRIAL CONTINUED

the filing of insured's reply, the insurer knew that an attempt was being made to litigate the validity of award on the law side, and made no objection or challenge to the reply or its form, and made no motion to transfer to equity, he conceded that the said issue should be determined by a court not sitting as an equity court; and an objection made at the trial on insurer's part to testimony, that it could not be received because there had been a binding appraisal, was an admission that it was competent for the court to determine whether or not the appraisal and award were binding. *Turner v. Hartford F. Ins. Co.*, 185—1363.

Defense of Arbitration Award in Law Action. Where suit was
4 brought at law by insured for damages on an insurance policy, and as a bar to his recovery the insurance company urged on the law side that there had been an accord and satisfaction by an award, the law court could determine whether the award pleaded in the law action stood in the way of a recovery in that action. *Turner v. Hartford F. Ins. Co.*, 185—1363.

EVIDENCE.

Objectionable Document Admissible for One Purpose. The re-
5 ception in evidence of an instrument which is very largely irrelevant, and which, preferably, ought to have been kept out of the record, is not error, when such instrument did have some small bearing on one of the issues, and was specifically so limited by the court, and especially when complainant first prominently injected the document into the testimony, but without offer of its introduction. *In re Estate of Osborn*, 185—1307.

Objection after Answer—Necessity of Motion to Strike. An an-
6 swer given to a question before an objection was sustained thereto, where no motion was made to strike the same, remained in the record, and no reversible error was presented as to the ruling in sustaining the objection to the question. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Question Failing to Disclose Proposed Evidence. Prejudice will
7 not be presumed from the exclusion of questions when the

TRIAL CONTINUED

record does not disclose what counsel expects to prove thereby. *Wangen v. Upper Iowa Power Co.*, 185—110.

TAKING CASE FROM JURY.

Direction of Verdict—Favorable Inferences to Losing Party. In 8 determining whether a verdict was rightfully directed, it is the duty of the Supreme Court to give the party against whom the verdict has been directed, the most that can reasonably be claimed for the effect of his testimony and the inferences therefrom. *Trotter v. Chicago, R. I. & P. R. Co.*, 185—1045.

Jury Question. A fair conflict of testimony on an issue pre- 9 sents a jury question. *Brodd v. Crile*, 185—412.

Jury Question as Preventing Directed Verdict. Plaintiff may not 10 have a directed verdict if the record reveals a jury question on any one of numerous defenses pleaded. *Garland Corp. v. Waterloo L. & T. Co.*, 185—190.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Joint Defendants. There was no error in not submitting sep- 11 arate forms of verdict as to the defendants where, under the evidence, if there was any liability, both defendants joined in the action would be liable. *Mortrude v. Martin*, 185—1319.

Damages to Shipment of Horses—Province of Jury. An instruc- 12 tion, in action for damages to shipment of horses, as to damages, *based upon the fair market value*, held proper, and not as making the evidence introduced conclusive on the jury. *Heisel v. Minneapolis & St. L. R. Co.*, 185—885.

INSTRUCTIONS—ISSUES AND THEORIES IN GENERAL.

Determination of Issues—Logical Order. There is no prejudicial 13 error in telling the jury to first determine whether the driver of an automobile was negligent, even if it be the logical way to have the jury first determine whether the

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negligence of the driver was imputable to the passenger.
Cram v. City of Des Moines, 185—1292.

Material Facts. Instruction submitting to the jury the question
14 as to whether a person was "guilty of any of the *material*
false acts or representations charged" was improper,
where there was in the instructions no guide to the jury
as to *what* false acts should be deemed material. Mulroney
Mfg. Co. v. Weeks, 185—714.

Material Allegations—Failure to Define Issues. Where the alle-
15 gations of the petition contained, in addition to a material
allegation of a false representation, numerous unnecessary
allegations of false representations, an instruction submit-
ting all of such matters to the jury was improper. Mon-
ghan v. Bowers, 185—708.

Unsupported Theory. An instruction which presents a wholly
16 unsupported theory constitutes error. Shaffer v. Miller,
185—472.

INSTRUCTIONS—FORM AND LANGUAGE IN GENERAL.

Instructions Taken as a Whole. In an action for injuries
17 caused by the fall of plaster from the ceiling, instruction
as to the pouring of concrete and water held not objection-
able as to the use of the word "water" when only concrete
was poured, when taken in connection with the other in-
structions. Mortrude v. Martin, 185—1319.

Prejudicial Error. That the jury might have found that dece-
18 dent was guilty of contributory negligence did not cure
the error in having charged the jury that it could find
that decedent had joined in a joint enterprise, or in hav-
ing charged that, if he directed the driver where he wished
to travel, the driver's negligence was imputable to him.
Cram v. City of Des Moines, 185—1292.

Assumption of Fact. No assumption of want of due care re-
19 sults from a recital of the degree of care required by the
law, followed by the statement that "a failure to exercise
such degree of care constitutes negligence." Wells v. Cham-
berlain, 185—264.

TRIAL CONTINUED

Assumption of Fact. Instruction reviewed in its entirety, and 20 held that the reference to a hanging wire "which caused the death of Jesse Wells," did not assume that the death was brought about by a hanging wire. *Wells v. Chamberlain*, 185—264.

REQUESTED INSTRUCTIONS.

Waiver by Request of Instruction. A party cannot object to 21 an instruction that submits an issue not raised by the evidence, where he himself has requested an instruction upon that issue. *Cram v. City of Des Moines*, 185—1292.

Applicability to Pleadings—Evidence. It was not error to refuse 22 to instruct that there was no evidence that plaintiff's bad eye was in consequence of the accident, where no claim was made in the petition therefor, and none was submitted, and where the evidence showed that his right eye, at the time of the trial, was not the same as it was before the injury. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

Circumstantial Evidence Cases—Consistency with Other Hypoth-
23 **esis.** Circumstances, in order to be sufficient, *of themselves*, to establish liability, must be wholly inconsistent with any other hypothesis than that of liability, and, on request to so instruct, it is reversible error to refuse. *Wells v. Chamberlain*, 185—264.

Requests Otherwise Covered. There is no error in refusing re- 24 quested instructions when, so far as correct, they were included in the ones given by the court. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

Non-Applicability of Evidence. Where, under the evidence, the 25 time required for fermentation of a cereal beverage might exceed eight hours, an instruction was properly refused that, if the jury found that the cereal beverage had been in a condition of fermentation, there could be no presumption based thereon that it had been in such condition for more than eight hours. *Omaha Bev. Co. v. Temp Brew Co.*, 185—1189.

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INSTRUCTIONS—EXCEPTIONS.

Failure to Request Correct Instruction—Waiver. The right to
26 insist on a definite exception to an instruction is not
waived by failure to ask a correct instruction on the same
point. *Wells v. Chamberlain*, 185—264.

VERDICT.

Excessiveness—Personal Injury. Evidence reviewed, and held
27 that a verdict for \$7,500 was not excessive, where a frac-
ture of the skull had been received, causing intercranial
hemorrhages and intense suffering to a 36-year old man,
who had not recovered at the time of the trial, 8 months
after the injury, and whose memory was bad, and who
could not keep books as well as before the injury, and
when there was a possibility that the injuries might result
in epilepsy or insanity. *Mortrude v. Martin*, 185—1319.

Excessive Verdict—\$5,000. Verdict of \$5,000 for personal in-
28 juries sustained, as nonexcessive. *Garren v. Ottumwa Gas*
Co., 185—1142.

Impeachment. A verdict may not be impeached by the testi-
29 mony of a juror to the effect that he yielded to mere
weariness or weight of numbers. *In re Estate of Osborn*,
185—1307.

Impeachment of Verdict. Jurors may not impeach their ver-
30 dict by affidavits to the effect that they did not under-
stand the court's rulings with reference to the rejection of
certain testimony. *State v. Brennan*, 185—73.

Impeachment—Affidavit of Jurors. A verdict may not be im-
31 peached by affidavits of two of the jurors that, but for a
certain instruction, the jury would have returned a ver-
dict of not guilty, or would have disagreed. *State v. Sny-*
der, 185—728.

Special Interrogatories—Ultimate Facts. Where, if the driver
32 was not negligent, there would be no negligence to impute

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TO

TRUSTS

to the decedent, who was a passenger in the automobile, an interrogatory as to whether the driver was negligent in approaching the bridge was properly submitted. *Cram v. City of Des Moines*, 185—1292.

Special Interrogatories—Discretion of Court. Rule recognized
33 that the action of a trial court in submitting an interrogatory that is not ultimately determinative will not be interfered with on appeal, although the trial court would be sustained for refusing the same interrogatory on that ground. *Cram v. Des Moines*, 185—1292.

Special Interrogatories—Discretion in Submitting. The refusal to
34 submit an interrogatory not calling for an ultimate fact, or the answer to which would not necessarily be decisive, is not error. Section 3727, Code, 1897. *King v. Chicago, R. I. & P. R. Co.*, 185—1227.

Confirming Quotient Verdict Agreements. The invalidating effect
35 of a definite agreement by jurors to do that which would render their verdict a "quotient" verdict, is not avoided by the subsequent action of the jury, after arriving at such verdict, in taking another vote and unanimously agreeing on the amount thereof, or by the addition thereto of interest from a certain date. *Carter v. Marshall Oil Co.*, 185—416.

Verdicts Contrary to Instructions. The verdict in favor of the
36 buyer was not contrary to an instruction that the buyer was excused from taking corn only on grounds excepted in the contract, where the contract provided that corn need not be accepted when it was impossible to get cars, when there was evidence to sustain the claim that cars could not be secured. *Neola Elev. Co. v. Kruckman*, 185—1254.

TRUSTS. See EXECUTORS AND ADMINISTRATORS, 2.

Enforcement—Right of Donor to Enforce—Equity. The donor
1 of a trust has such interest therein as entitles him to maintain a suit in equity to compel the carrying out of the terms thereof. *Carr v. Carr*, 185—1205.

TRUSTS CONTINUED

TC

VENDOR AND PURCHASER

Spendthrift Trusts—Not Subject to Debts of Cestui Que Trust.

- 2 Where a testator created a trust fund in the hands of a third person, with full and *unlimited* power of control in the trustee, who was authorized to pay to testator's son, from time to time, such sums as, in his discretion and judgment, he deemed wise and prudent and just for the son's welfare, *held* that the testator had the right to confer upon the trustee such full power over the fund as he would have had, if living, and that such a fund *was not subject to the debts of the son until it passed into his hands*. Kiffner v. Kiffner, 185—1064.

Termination of Fiduciary Relation. Fiduciary relations are pre-

- 3 sumed to terminate with the execution of the trust. So held as to the turning over of stock by an executor to the *cestui que trust*. Birks v. McNeill, 185—1123.

VENDOR AND PURCHASER. See BANKRUPTCY, 2, 4;
BROKERS; CONTRACTS, 6.

CONSTRUCTION AND OPERATION OF CONTRACT.**Possession—Presumptions—Burden of Proof.** In the absence

- 1 of other showing, the right to possession is in the holder of the legal title, and the burden of showing a superior right thereto is upon the party asserting it. Waterman v. Wood, 185—897.

Possession—No Right until Purchaser Acquires Title. A mere

- 2 contract to sell and convey land at a future date confers no right of possession until the purchaser has acquired title in himself. Waterman v. Wood, 185—897.

Contract for Warranty. A contract to give a warranty deed con-

- 3 clusively implies a warranty *against all incumbrances*, even though vendor describes that which he sells as "all my right, title, and interest." Bull v. Weisbrod, 185—318.

MODIFICATION OR RESCISSION.**Abortive Tender of Performance.** A tender of performance by

- 4 a vendor, at a time when he is wholly unable to perform.

VENDOR AND PURCHASER Continued

is a nullity, and therefore calls for no tender of performance by the vendee. *Weiser v. Rowe*, 185—501.

Mutual Failure to Tender Performance. Mutual failure to tender performance within a stipulated time limit automatically continues life of contract. *Weiser v. Rowe*, 185—501.

Non-Necessity for Tender of Performance. A vendor is under no obligation to tender performance, when such performance is conditional on vendee's furnishing evidence of good title in the thing sold, and when vendee was wholly unable to do so. *Carroll v. Mundy & Scott*, 185—527.

REMEDIES OF PURCHASER.

Contracts with Promoter—Fraud. Where a promoter made a contract of sale of a packing plant by fraudulent misrepresentations, the company to whom it was sold could, upon discovery, either (a) sue the promoter for damages on an accounting, or (b) rescind the contract and recover the consideration paid, from the promoter or from a third person receiving the same with notice of the fraud. *Arney v. Brittain & Co.*, 185—1114.

Contracts with Promoter—Fraud. Fraud on the part of a promoter of a corporation in obtaining a contract from the company for the purchase of a packing plant by misrepresentations, would render the contract voidable, and not void, and it would not be an election to rescind for the company to bring suit against a third person for the consideration, without making the promoter a party. *Arney v. Brittain & Co.*, 185—1114.

Vendee Injured by Unauthorized Fraud. A vendee of land may not maintain an action against the vendor for damages for *deceit* because of the false and fraudulent representations of the vendor's agent, when such representations were *wholly* unauthorized by the vendor, and were unknown to the vendor until after the sale was consummated; but such vendee may, within a reasonable time after the closing of the sale, bring such fraud to the attention of the vendor and demand rescission, and, if rescission be refused,

VENDOR AND PURCHASER Continued TO WATERS AND WATERCOURSES

may maintain an action against the vendor to recover the difference between the actual value of the land and the amount he agreed to pay for it. Vendors may not repudiate the unauthorized fraud of their agents *and retain the fruit of the rascality*. *Ellison v. Stockton*, 185—979.

Possession—Consent of Vendor to Possession before Passing of Title. While, prior to the passing of title under contract not providing for possession, purchaser could not, without the consent of the vendor, acquire the right of possession, yet if, after making the initial payment, and before the delivery of deed, the vendor consents to the purchaser's entering into possession, the purchaser could rightfully hold such possession, pending the delivery of the deed or final adjudication of his rights. *Waterman v. Wood*, 185—897.

VENUE.

Change of Venue—Time to File—Waiver of Right. Defendant, by asking for and obtaining time to answer, does not, under Sec. 3504, Code, 1897, waive his right to move for change of place of trial, at any time before answer. Section 3514, Code, 1897, requiring the defendant to appear and defend before noon of the second day of the term, does not require him to make answer at that time or demand such a change at that time. *Burke v. Dunlap*, 185—949.

Change of Venue—Showing—Resistance. A motion for change of place of trial to the county of defendant's residence is properly overruled where, in resistance, plaintiff's affidavits showed that the transaction out of which the alleged damages arose was at an office maintained by the defendant in the county where the suit was brought, and there was no evidence to the contrary. *Burke v. Dunlap*, 185—949.

Change of Venue—Nonresidence of Codefendant. Defendant, who is a proper party to a suit, cannot have the venue changed to the county of her residence if her codefendant is a resident of the county where the action is brought. Section 3501, Code, 1897. *Stevens v. Peoples Sav. Bank*, 185—619.

WATERS AND WATERCOURSES. See **BOUNDARIES**, 1.

WILLS

WILLS. See BASTARDS; EXECUTORS AND ADMINISTRATORS, 7, 8; LIMITATION OF ACTIONS, 3.

TESTAMENTARY CAPACITY.

Unsound Mind—Sufficiency of Evidence. Evidence reviewed, 1 and held sufficient to submit to the jury the question of testator's capacity to make a will. *Haddock v. Jacobs*, 185—1057.

Effect of Permanent Guardianship. A person under guardianship 2 ship may be found competent to make a will, but the fact of the guardianship is presumptive proof of incompetency. *Reeves v. Hunter*, 185—958.

Evidence. A record without some substantial evidence of testamentary incapacity *at the time the will was executed* 3 will not support a verdict overthrowing the will. In re Estate of Osborn, 185—1307.

CONTRACTS TO DEVISE OR BEQUEATH.

Specific Enforcement of Contract in re Conflicting Wills. An oral 4 contract, under which a surviving wife agrees to waive her rights under a prior, unprobated will which is wholly in her favor, and to accept in lieu thereof assured support for life and the benefits of a later will which tenders lesser benefits to her, provided the latter will is not probated until after her death, is specifically enforceable after full execution by both parties to the contract. *Stutsman v. Crain*, 185—514.

PROBATE, ESTABLISHMENT, AND ANNULMENT.

Execution—Proof. Proof that a deceased subscribing witness to 5 a will actually signed the will as a witness, plus testimony by the surviving subscribing witness that, while he had no distinct and independent recollection of having signed the will as a witness, yet he knows he would not have signed if the testator had not signed, presents prima-facie evidence of the due execution of the will. In re Estate of Osborn, 185—1307.

WILLS CONTINUED

Mistake of Fact in Execution of Will. A will, executed by one
6 of sound and disposing mind, may not be overthrown on
a mere showing that testator, in the execution of the will,
was *mistaken* as to the amount of property which an heir
had received from other relatives, and by reason of such
mistake disinherited such heir. *Riley v. Casey*, 185—461.

CONSTRUCTION.

Conditional Devises. A will may make a devise conditional on
7 the surrender by the devisee of contract rights existing
between the deviser and devisee. Will reviewed, and held
not to show such condition. *Parnham v. Weeks*, 185—455.

Life Estate (?) or Naked Use (?) A devise which provides that
8 devisee

- (a) shall live upon the real estate,
- (b) shall have the right to make any use of it which he
may desire,
- (c) shall have all proceeds therefrom,
- (d) shall pay all taxes and insurance and make all repairs,
- (e) shall pay interest on a specified indebtedness,
- (f) shall support a sister so long as she does his house-
work,
- (g) may sell, on a price consented to by other heirs, and
- (h) shall, "*after the property is sold*," have \$1,000 out of
the proceeds, the balance to be divided among other
heirs,

does not grant a life estate,—grants nothing but a *use* for
a specified compensation,—but does grant the \$1,000 to
devisee after *any* authorized sale, howsoever made. *Fed-
dersen v. Matthiesen*, 185—183.

Unreasonableness. The claim of unreasonableness necessarily
9 falls, unless the will and the proper extraneous matters
reveal the facts from which unreasonableness may be de-
duced. *Feddersen v. Matthiesen*, 185—183.

Construction Leading to Intestacy. The law is abhorrent of
10 any construction of a will which will lead to even partial
intestacy. *Feddersen v. Matthiesen*, 185—183.

WILLS CONTINUED

TO

WITNESSES

Fee with Enjoyment Postponed. A will which "gives and be-
11 queaths" all of testator's property to named children,
"share and share alike," with direction to the executor
to take possession and manage the same for a named
number of years, conveys a fee, with possession and en-
joyment postponed. Alden v. Meling, 185—394.

Title Individually (?) or as Trustee (?) The contention that a
12 devisee took as trustee for others becomes immaterial when
it appears that, if he did so take, he has fully executed
the trust. Birks v. McNeill, 185—1123.

WITNESSES. See APPEAL AND ERROR, 4; COSTS, 1; CRIM-
INAL LAW, 2; EVIDENCE, 7, 18, 20, 21; LIBEL AND
SLANDER, 1; WILLS, 5.

COMPETENCY.

Husband and Wife. A wife is not a competent witness against
1 her husband, who is charged with an assault to commit a
crime the *consummation* of which would be a crime against
herself. So held on a charge of assault with intent to
commit rape. (Sec. 4606, Code Supp., 1913.) State v. Wil-
cox, 185—90.

Agent's Testimony in re Transaction with Deceased. An agent
2 is a competent witness to testify to personal transactions
and communications with a deceased relative in matters
in which his principal is interested. So held where par-
ents so testified in relation to matters growing out of the
settlement of a will contest wherein they acted for their
children, who were devisees under the will. Stutsman v.
Crain, 185—514.

Transaction with Deceased. In a hearing on the objection to
3 an allowance of a claim, the wife of the claimant can
testify as to a conversation overheard by her between claim-
ant and decedent, in which she took no part. In re Estate
of Newton, 185—1223.

EXAMINATION.

Scope of Examination. Prejudicial error does not result from
4 the curtailment of an examination relative to matters bear-

WITNESSES CONTINUED

ing on credibility, when the matters have been elsewhere fairly and substantially brought out. So held as to an inquiry as to the quantity of liquors possessed by a party, and as to the extent of intoxication. *State v. Nagel*, 185—1038.

Undue Limitation on Examination. Unduly limiting examination
5 on matters bearing on the interest of the witness in the pending action is not necessarily reversible error. So held as to whether the witness himself had an action pending which grew out of the accident in question. *Lang v. Marshalltown L. P. & R. Co.*, 185—940.

CROSS-EXAMINATION.

Conviction of Misdemeanor. A witness may not be cross-ex-
6 amined as to his former conviction of the crime of having unlawfully obstructed the course of public justice,—a misdemeanor,—because:

1. Such offense is not a felony, as provided by Code Section 4613, and.
2. Such examination would expose the witness to public ignominy, in violation of Section 4612, Code Supp., 1913. In re *Estate of Osborn*, 185—1207.

Antecedent Character of Witness. The permissible range of
7 cross-examination may embrace a showing of the depraved habits, antecedents, and character of the witness. *State v. Brennan*, 185—73.

CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

Contradictory Statements. A witness may, on proper foundation,
8 be impeached through the medium of a transcript of the witness's former testimony, which is inconsistent with his present testimony. *State v. Waterbury*, 185—87.

Contradictory Statements. A witness may be impeached, on
9 cross-examination, by a showing that he has, on another occasion, made statements which are not only contradictory of his present statements, but wholly at variance with the

WITNESSES CONTINUED TO WORDS AND PHRASES

obvious purpose of his present statements, even though such contradictory statements very seriously reflect on the moral character and credibility of the party to the action who has called the witness. *State v. Brennan*, 185—73.

Evidence. Where a witness testified that a bottle of liquor which
10 he purchased from defendant had been drunk by himself and another person, testimony of the other person that, on that day, he drank with the purchaser, who appeared to be intoxicated, whisky from a bottle, was admissible, as corroborating the purchaser in his statement that he had purchased the whisky, and also as showing that the contents of the bottle were intoxicating. *State v. Killgren*, 185—791.

Character Witness—Cross-Examination. A good-character wit-
11 ness may, on cross-examination, be asked if he has not heard certain disparaging reports concerning the one whose reputation he has testified was good. *State v. Moss*, 185—158.

Impeachment by Showing Indefinite and Remote Transaction. A
12 witness may not be impeached, as to certain facts testified to by him, by a showing of other facts which are indefinite and uncertain, both as to the nature thereof and as to the time when they occurred. So held where a party testified as to certain facts in defense of an action for the negligent intermingling of inflammable oils, and plaintiff sought to impeach by a showing of another indefinite and unidentified transaction. *Carter v. Marshall Oil Co.*, 185—416.

WORDS AND PHRASES.

"Sidewalks." A sidewalk is a part of the street expressly reserved for pedestrians, and constructed differently from other portions of the street. *Central L. A. Soc. v. City of Des Moines*, 185—573.

"Real Estate." The term "real estate" includes city lots. In re Appeal of Trustees, 185—434.

"Unless." "Unless" is often employed as equivalent to "except."
3 *Ward v. Interstate B. M. Acc. Assn.*, 185—674.

"Void" and "Voidable." The word "void," when used to se-

WORDS AND PHRASES CONTINUED TO WORKMEN'S COMPENSATION ACT

- 4 cure a right to, or to confer a benefit on, the *public*, will, as a general rule, be construed as implying a declaration of absolute nullity; when used with respect to the rights of *private individuals*, it will be construed, as a general rule, as implying voidability only. *Sherman v. Smith*, 185—654.

WORK AND LABOR. See LIMITATION OF ACTIONS, 4.

Value of Services. The value of services becomes wholly imma-

- 1 terial, when such services are rendered under an understanding in advance that they shall be gratuitous. *Bass v. Sherr*, 185—398.

Sufficiency of Evidence. Evidence reviewed, and held to sus-

- 2 tain finding of trial court that claimant furnished services to deceased with intention to demand pay, and that the decedent was indebted to him therefor. In re *Estate of Newton*, 185—1223.

WORKMEN'S COMPENSATION ACT. See APPEAL AND ERROR, 5; CERTIORARI; MASTER AND SERVANT, 4-12.

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